U.S. CHAMBER
Institute for Legal Reform

Fixing the False Claims Act

The Case For Compliance-Focused Reforms

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Executive Summary

The False Claims Act (FCA) is the government's most important tool to uncover and punish fraud against the United States. The FCA has been used to address alleged false claims in many economic sectors, including healthcare, pharmaceuticals, finance, and defense. The statute is intended not only to recover funds for the federal fisc, but also to deter fraud and encourage ethical corporate behavior. The FCA also provides a monetary reward to whistleblowers (known as "relators") who come forward with evidence of fraud and file lawsuits on behalf of the government.

Despite some successes, the FCA is simply ineffective at *preventing* fraud as it is currently structured and enforced. The Government Accountability Office has estimated that the United States Treasury loses approximately $72 billion to fraud, abuse, and improper payments each year.[1] The Department of Health and Human Services (HHS) has estimated that fraud costs the Medicare program $60 billion annually.[2] Looking at the Medicare program alone, simple math suggests that an astounding $600 billion may have been lost to fraud in the past decade. Using the FCA, the government has recovered only $35 billion since 1987—a tiny fraction of the moneys believed to be lost to fraud over that period.[3] Based on these figures alone, the FCA plainly is not getting the job done.

This paper proposes reforms to the FCA that build on the FCA's strengths—including the important role that whistleblowers play in detecting fraud—and improve its enforcement, while radically improving its role in *preventing* fraud. The proposed reforms are based on three basic premises:

- **First,** the FCA is a complex statute that in operation has proved flawed in ways that reduce its effectiveness in preventing fraud. The statute does not promote compliance with applicable laws as effectively as it could or provide the right incentives to ensure that fraud is reported to the government. As a result, the government recovers only a fraction of what it loses to fraud and spends too much time and money on investigations and enforcement after fraud has already been committed rather than on preventing it in the first place.

- **Second,** earlier detection and better prevention of fraud will generate greater savings for the government and the public than the existing after-the-fact, punishment-through-litigation approach. Businesses are best placed to detect and prevent wrongdoing as the first line of defense against fraud. They should be incentivized to maintain effective compliance programs that stop violations before they occur and to disclose and make restitution to the government swiftly and completely when violations do occur. Appropriately incentivizing whistleblowers is a crucial component of FCA enforcement, but the statute should incentivize companies to take the lead in curbing and reporting fraud.
- **Third,** certain aspects of the FCA as used by many relators and the government today, and as interpreted and applied by some courts, incentivize the filing of frivolous lawsuits and impose irrationally excessive penalties, sometimes for technical violations that occur despite businesses' good faith efforts to comply with contracts or regulations. These aspects of FCA practice generate unnecessary litigation costs for government and businesses and coerce businesses that may have done nothing wrong to pay enormous out-of-court settlements based on untested and questionable legal theories.

Proposed Amendments

First, the paper explains how rigorous compliance programs can reduce the incidence of fraud, describes a model for creating incentives for widespread adoption of such programs, and proposes that independent entities should determine whether a company's practices meet general and industry-specific state-of-the-art "gold standards" for compliance. Companies that obtain and maintain this "gold standard" certification would gain the benefit of four proposed FCA reforms:

1. Re-calibration of the damages multiplier, so that a defendant would be liable for treble damages only if it acted with specific intent to defraud; double damages if it acted with knowledge, reckless disregard, or deliberate ignorance; and 1.5 times damages if it made a qualifying self-disclosure to the government of the conduct.
2. With limited exceptions, a bar on *qui tam* actions against a company if the company had previously disclosed substantially the same allegations to an appropriate government Inspector General or other federal investigative office.
3. In order to create incentives for employees to report alleged misconduct internally, an employee who failed to report internally at least 180 days before filing a *qui tam* action would face dismissal of the action.
4. A change to the government's exclusion and debarment regulations to provide that a company and, absent personal involvement in fraud, its executives would not be subject to mandatory or permissive exclusion or debarment.

Second, the paper describes eight proposed reforms that would apply to all individuals and entities subject to the FCA. These reforms are designed to address current inefficiencies in the way the statute operates and is enforced. The proposed reforms are as follows:

1. A reduction to the relator's share of the government recovery to provide substantial but not excessive incentives for bringing fraud to light. In cases in which the government intervenes, relators would receive 15 to 25 percent of the first $50 million recovered; plus 5 to 15 percent of the next $50 million recovered; plus 1 to 3 percent of amounts recovered above $100 million. In non-intervened cases, relators would receive 25 to 30 percent of the first $50 million recovered; plus 20 to 25 percent of the next $50 million recovered; plus 10 to 20 percent of amounts recovered above $100 million.
2. A bar on *qui tam* actions brought by former or present government employees arising out of such person's employment by the government to prevent government employees from cashing in on their government service.
3. A definition of the phrase "false or fraudulent claim" to exclude the judicially-created concept of "implied false certification" liability, so that liability is imposed when a claim is "materially false or fraudulent on its face," or when a claim is presented or made "when the claimant has knowingly violated a requirement that is expressly stated by contract, regulation, or statute to be a condition of payment of the claim."
4. A requirement that all essential elements of liability under the FCA must be proven by "clear and convincing evidence" to bring the FCA in line with other federal and state anti-fraud statutes.
5. An amendment to the FCA damages provision to better measure the government's actual loss. The government would recover its "net actual damage" before application of any damage multiplier, which is defined to mean "out-of-pocket monetary losses, less the value of benefits received by the government, and does not include indirect or consequential damages."

6. A change to the current irrational penalty structure of the FCA, so that statutory penalties are assessed only where no damages are awarded and are capped at an "amount equal to the sum sought in the claim in addition to all costs to the government attributable to reviewing the claim."

7. An amendment to the Wartime Suspension of Limitations Act, which has been badly misconstrued in several recent court decisions, to clarify that it applies only to criminal actions, not to the civil FCA.

8. A requirement that once the Department of Justice (DOJ) has received a *qui tam* complaint, or initiates a false claims investigation, it must notify all relevant government agencies and employees of their obligation to preserve the documents. If it fails to provide this notification, the court would be instructed to "draw or instruct the jury to draw a negative inference from any failure of the government to produce documents requested in the course of litigation based on their loss or destruction."

Third, the paper proposes a policy reform to the use of Civil Investigative Demands (CIDs) by the DOJ, which are investigative tools that can impose extreme costs and burdens on companies and individuals. The paper proposes that the DOJ should adopt internal policy guidelines to ensure that CIDs are issued only when necessary to a fraud investigation and when less burdensome alternatives are unavailable.

False Claims Act Overview

Liability Under the FCA

The FCA imposes liability on any person who knowingly submits a false claim seeking government funds. A company is liable under the FCA when it "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[4] The most important elements of liability are summarized below.

CLAIM

The FCA applies to all "claims" for payment, defined to mean any request for money or property that is directly presented to the government, or that is made indirectly to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government's behalf or to advance a government program or interest and if the government provides or will provide any portion of the money or property requested.[5] The effect of this definition of "claim" is that any person receiving funds traceable to the federal government is potentially subject to liability under the Act.

FALSE OR FRAUDULENT

The FCA imposes liability only when a claim is "false or fraudulent." A claim may be "false" on its face—for example, if it seeks payment for more money than is due—or it may be "false" if the claimant has failed to comply with contract or grant requirements, regulations, statutes, or other requirements on which payment is conditioned.

KNOWING CONDUCT

The FCA imposes liability when a claimant has "knowingly" submitted a false claim. The term "knowingly" is defined to include not only actual knowledge of falsity, but also "reckless disregard" as to whether a claim is true or false and "deliberate ignorance" as to whether a claim is true or false.[6] Although the FCA does not impose liability for negligence or mistakes, a claimant cannot evade liability by contending that it did not intend to commit fraud or submit false claims; the law states that liability can be imposed even when there is no intent to defraud the government.

The "reverse false claim" provision of the FCA imposes liability for the "reverse" of the typical situation: when a company "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government."[7] This type of liability can be imposed when a company improperly retains a government overpayment or otherwise seeks to evade other kinds of established payment obligations that arise from contracts, grants, licenses, fee-based relationships, statutes, or regulations. Liability is not imposed when a company seeks to avoid paying a "contingent" future obligation, however, such as the potential imposition of a fine.

Violations of the FCA can have substantial monetary consequences. A company that has violated the FCA is liable for three times the amount of the United States' damages. In addition, the company must pay civil penalties of between $5,500 and $11,000 per individual false claim, which can add up to amounts far larger than the multiples of actual harm to the government in many cases where multiple invoices or prescriptions are issued for small dollar amounts.[8]

Enforcement of FCA by *Qui Tam* Plaintiffs

Both the DOJ and private citizens are authorized to bring actions asserting violations of the FCA. When an individual files a *qui tam* complaint, the DOJ investigates the allegations and decides whether to intervene. If the DOJ intervenes in the *qui tam* action, it has the primary responsibility for prosecuting the action, although the relator remains a party and can assist in the litigation. If the DOJ declines to intervene, the relator has the right to conduct the case on his or her own.[9]

The FCA provides financial incentives for current and former employees, and others, to file *qui tam* lawsuits. If the government intervenes, the relator is eligible for an award of between 15 and 25 percent of the government's recovery, whether the action is resolved by settlement, on summary judgment, or at trial.[10] If the DOJ declines to intervene, the relator is eligible for an award of between 25 and 30 percent.[11] The statute also provides that a relator in a successful action shall be awarded reasonable attorneys' fees and costs, to be paid by the defendant.[12]

In addition, *qui tam* plaintiffs may bring personal "retaliation" claims alleging that their employers have retaliated against them for actions to stop an ongoing FCA violation. Successful plaintiffs can be awarded back-pay and other damages, attorneys' fees, and reinstatement in their former position.[13] Relators are entitled to retain all of the damages they recover from defendants as a result of their retaliation claims, whether or not the government intervenes in the *qui tam* action.

> *DOJ intervention is almost always an accurate predictor of the ultimate success of the case. Approximately 95 percent of intervened cases result in a settlement or judgment for the government, while only 6 percent of non-intervened cases do.*

Snapshot of FCA Enforcement History

Litigation under the FCA has steadily increased in the quarter century since the Act was substantially revised in 1986, and the law has been highly successful in providing incentives for relators to file suit. The last two decades have seen roughly three times as many *qui tam* cases as non-*qui tam* cases each year.

Even more striking than the increase in FCA litigation is the growth of settlement and award amounts. The amount of total government recoveries under the statute has significantly increased over the past quarter century, and the majority of the government's recoveries now are attributable to *qui tam* cases. Since 1987, the government has recovered a total of more than $35 billion under the FCA, of which $24 billion has been attributable to *qui tam* matters. The government recovered roughly $3 billion in each of 2010 and 2011, and an all-time high of almost $5 billion in 2012.[14]

The most recent available DOJ statistics show that the DOJ has intervened in approximately 23 percent of all *qui tam* cases filed between 1987 and 2010.[15] DOJ intervention is almost always an accurate predictor of the ultimate success of the case. Approximately 95 percent of intervened cases result in a settlement or judgment for the government, while only 6 percent of non-intervened cases do.[16]

FCA Reforms to Incentivize Effective Compliance Programs

Under the FCA as it is currently constituted, the government emphasizes adversarial investigatory and enforcement efforts after fraud has occurred rather than directly encouraging companies to prevent fraud before it happens or to support the government's interests through early detection and prompt reporting when it does.

Of course, investigations and enforcement will always be needed in some cases, but the government's post hoc enforcement approach to fighting fraud in government contracting is imbalanced and ineffective. As top officials at DOJ have recognized, "[l]itigation to recover the costs of fraud is a far inferior option to preventing fraud in the first place."[17] DOJ is increasingly considering "forward-looking compliance measures" and has asked the business community "to join with the Department in establishing structures that help prevent fraud—and the need for lawsuits to combat it—in the first instance."[18]

The reforms we propose will preserve the FCA's beneficial effects and increase healthy incentives for prevention and corporate self-reporting while decreasing unhealthy incentives for frivolous litigation and coercive out-of-court settlements. At the heart of the proposed reforms are provisions that will incentivize businesses that contract with the government or participate in government programs to prevent, identify, and disclose wrongdoing, while also providing rational sanctions and restitution to the government in cases of genuine fraud. These reforms would create meaningful incentives for businesses to detect wrongdoing and

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> *"Rigorous corporate compliance programs can be effective at preventing fraud before it happens."*

disclose it to the government, generating significant savings to taxpayers through less expensive but more effective government investigations, and less litigation. At the same time, the proposed reforms will not reduce the effectiveness of *qui tam* relators as a crucial final line of defense when corporations do not prevent, detect, or disclose fraud.

The proposed reforms do not seek to undo the amendments to the FCA enacted through the Fraud Enforcement and Recovery Act of 2009 (FERA),[19] which were intended to clarify that the statute applies to indirect recipients of federal funds and to the retention of government overpayments.[20] To the contrary, these proposals would complement FERA's goal of holding organizations that receive government funds responsible for fraud by also ensuring that they undertake meaningful compliance programs to prevent fraud from occurring in the first place rather than relying only on post hoc enforcement and punishment.

Certified State-of-the-Art Compliance Programs Reduce Fraud

Rigorous corporate compliance programs can be effective at preventing fraud before it happens. Officials and former officials across administrations of both parties have increasingly acknowledged that "if you really want to deter white-collar crime, the best weapon is an effective compliance program."[21] A study by the Ethics Resource Center, a leading nonprofit specializing in corporate ethics, concluded that [w]hen well-implemented . . . ethics and compliance programs reduce misconduct and grow strong ethical cultures."[22]

There are of course many government regulations and guidelines recommending or mandating compliance practices and programs for different types of federal contractors and industries, but the world of government contracting and federal programs lacks a coherent and forward-looking approach to compliance. Moreover, assessments of the effectiveness of a given compliance program typically occur case-by-case and often after fraud has already occurred (e.g., when DOJ is considering whether to impose a lower penalty on a company because it has made a good-faith effort to comply with applicable laws). This is like closing the barn door after all the livestock have run out of the building.

We propose a system for voluntary accreditation of rigorous compliance programs tailored to specific industries. Companies that adopt independently certified, state-of-the-art compliance programs would get the benefit of the package of FCA reforms outlined below. The proposed certification program would have two components, each carried out by independent third parties—whether new single-purpose non-profits, or other industry-specific organizations.

STATE-OF-THE-ART STANDARDS FOR CORPORATE COMPLIANCE PROGRAMS

First, the legislation would authorize these independent entities to develop state-of-the-art standards for corporate compliance programs in a range of industries. The standard-setting process should be flexible and continually evaluated over time to ensure that it reflects the latest in compliance practices and responds to evolving sources of compliance risk. At the same time, effective compliance programs must be tailored to a company's specific business and to the risks associated with that business.

In addition to developing cross-sector "best practices," standard-setting organizations should design industry-specific practices that are continually updated in light of changing business conditions and practices. For example, standards in the healthcare industry could build on the regulatory guidance already provided by the HHS Inspector General's Office for several types of providers.[23] Standards in the defense industry could build on the Defense Industry Initiative's standards for responsible conduct.[24] Similar standards could be developed by industry organizations in the pharmaceutical, manufacturing, insurance, banking, transportation, energy, consumer services, and telecommunications sectors.[25]

This combination of cross-cutting general standards with standards targeted at particular industry sectors should help ensure consistency across industries while at the same time allowing compliance programs to take account of particular risks and challenges unique to individual industries. Importantly, both the cross-sector best practices and the industry-specific best practices must be more detailed and more rigorous than existing compliance and guidance regimes.

INDEPENDENT ACCREDITING BODY

Second, companies would be required to retain—at their own expense—an independent accrediting body (with legal, auditing, investigative, and loss prevention skills)[26] to regularly review and certify their individual compliance programs as meeting the new standards. Accreditation would require monitoring, auditing, and reporting activities designed to ensure that a company, once certified, maintains compliance with the rigorous standards applicable to its industry. This approach builds on a feature of many government settlements in which the government requires a company to retain an independent corporate monitor to assess a corporation's compliance with the terms of the agreement.[27]

While the independent certifier in this context will not continuously monitor the corporation's activities, periodic re-certification will ensure that the compliance program maintains and applies the relevant standards.

Features of a State-of-the-Art Compliance Program

Existing government regulations and guidance generally identify the following features of an effective compliance program.[28]

- **Compliance office and officer** to provide oversight, commit resources, and ensure that a compliance program is visible, active, and accountable.
- **Written standards** (such as a code of conduct and policies and procedures) to demonstrate organization-wide commitment to the detection and prevention of fraud.
- **Training and education** to engage the workforce in compliance efforts.
- **Internal reporting mechanisms** (such as an anonymous telephone hotline) to allow employees to voice concerns without fear of retaliation.
- **Risk assessment measures** to identify fraud and abuse risks specific to a company's activities.
- **Auditing and monitoring** to ensure that all aspects of operations adhere to the organization's compliance policies and procedures.
- **Investigation, response, and corrective action** to indentify non-compliant conduct, report violations to the relevant authorities, and take action

Readers of this report may well ask why the compliance reforms suggested above should not be mandatory instead of voluntary. If high-quality compliance programs prevent fraud and save the government money, and if independent certification ensures that such programs are truly effective, why shouldn't Congress require all government contractors and participants in federal programs to adopt such measures? There may be companies for whom the costs of obtaining certification will exceed the benefits—either because their volume of government contracting is low or for other reasons. To require them to expend the resources needed to achieve certification may be unfair and may unnecessarily constrict the government's options in obtaining goods or services or selecting those who will carry out federal programs. Many companies would elect to forego the benefits that companies with certified programs would obtain, and in a system that mandated certified compliance, those companies would simply opt out of government contracting or participation in federal programs—which would be a bad result.

> *Certified gold-standard compliance programs contemplated by this paper can be expected to save the government billions of dollars each year that would otherwise be lost to fraud.*

Under this proposal, however, such companies would be eligible for federal funding but would remain subject to the existing statutory framework of the FCA. On the other hand, under this proposal, companies that undertake the costs of obtaining and maintaining certification will accrue meaningful benefits as will the government, which will experience a significantly reduced risk of fraud. To put it simply, under this proposal certified businesses will face moderated—though still very substantial—consequences, because they pose less risk to the government. Accordingly, there should be less fraud. But a universal mandate would be counterproductive.

Certified gold-standard compliance programs contemplated by this paper can be expected to save the government billions of dollars each year that would otherwise be lost to fraud. As noted above, conservative estimates indicate that the United States Treasury loses $60 billion or more to fraud each year.[29] It is reasonable to believe that, as a result of the increased self-policing prompted by the proposed compliance programs, billions of dollars worth of fraud each year will be prevented before it occurs. It is also reasonable to believe that, as a result of the proposed robust self-reporting requirements, corporations will be much more likely to self-report (and repay) fraud or false claims when they do occur, making the government's enforcement efforts both more comprehensive and more efficient. If the proposals in this paper lead to even a 20 percent annual reduction in fraud, the government could save over $12 billion each year or $120 billion over a decade. It is possible the proposals will result in an even greater reduction in fraud.

Four Proposed FCA Reforms

Calibration of Multiplier to Culpability

For companies with certified compliance programs, the FCA damages multiplier would be calibrated to the defendant's culpability, so that a defendant would be liable for treble damages only if it acted with specific intent to defraud; double damages if it acted with knowledge, reckless disregard, or deliberate ignorance; and a maximum of 1.5 times damages if it made a qualifying disclosure to the government of the conduct. Section 3729(a)(2).

CURRENT LAW

Under the current FCA, a person who violates the law is generally liable for three times the amount of damages sustained by the government, regardless of the person's level of culpability.[30] Thus, a defendant who submits false claims with the express intent of defrauding the government is subject to the same damages multiplier as the defendant who lacked such intent but is later deemed to have been reckless about the truth or falsity of some aspect of a claim. The FCA at present also provides for a reduction to double damages if the defendant has made a disclosure to the government of the misconduct, has fully cooperated with the government, and had no knowledge of a government investigation at the time of the disclosure. Courts have only rarely relied on this provision, however, often finding that defendants failed to meet one or more of its requirements.[31] As a result, the provision has not provided companies with any material incentive for timely reporting.

PROPOSED REFORMS

We propose that for companies with certified compliance programs, the multiplier structure should differentiate between entities that have acted with intent to defraud (treble damages), entities that have made good-faith attempts to ensure compliance but whose employees have engaged in misconduct (double damages), and entities that promptly disclose any wrongdoing to the government (1.5 times damages).

As a general matter, the proposed graduated damages structure follows the structure of most penal regimes—including Internal Revenue Service penalties for fraudulent and negligent errors on tax returns; U.S. Customs and Border Protection enforcement of import controls under the Tariff Act of 1930; and the Model Penal Code—in imposing its harshest punishment for the most reprehensible conduct, namely actions undertaken with specific intent to defraud. But when a company has implemented a certified compliance program and despite that an employee acts wrongfully but without specific intent, a reduction from treble to double damages operates as an incentive to adopt a state-of-the-art compliance system and reflects the company's lesser culpability. Finally, companies that also voluntarily disclose potential FCA violations would get a further reduction, which will incentivize not only the adoption and maintenance of a certified program but prompt self-reporting as well.

Certified compliance programs reduce fraud and thus save the government money. Self-reports also save the government significant time and money, by reducing the cost of investigating and prosecuting fraud and ensuring that violations are detected and that restitution is made. Without concrete incentives—such as assurances that lower damages will be imposed—companies may be hesitant to come forward with reports of possible misconduct. Such incentives are already in place in several federal agencies and have resulted in significant recoveries for the government through settlements with disclosing entities. Agency officials routinely praise such programs for promoting effective corporate compliance programs and view them as a necessary tool in fighting fraud.

A maximum of 1.5 times damages is an appropriate multiplier whenever a defendant with a certified compliance system has made a good-faith disclosure to a relevant government investigative agency or the DOJ.[42] As with the current self-disclosure provision, the reduction in the multiplier will only be available if the defendant has made a disclosure of the misconduct, has fully cooperated with the government, and had no knowledge of a government investigation at the time of the disclosure. Since certified compliance programs would include rigorous mechanisms for monitoring compliance and identifying fraud, companies will be more likely to uncover information about potential wrongdoing. A reduction in damages would serve as strong incentive to fully investigate and disclose any fraud, instead of putting the matter on a back burner.

Examples of Effective Incentives for Self-Disclosure

The **HHS Office of Inspector General Provider Self-Disclosure Protocol** (SDP) (in place since 1998) received more than $280 million between 1998 and 2013.[32]

- Providers may utilize the SDP to make disclosures that "in the disclosing party's reasonable assessment, potentially violate Federal criminal, civil, or administrative laws for which Civil Monetary Penalties (CMPs) are authorized."[33]
- HHS typically imposes a multiplier of only 1.5 times single damages in settlements of matters in which an entity has self-disclosed under the SDP.[34]
- Commenting on the updated self-disclosure protocol, HHS Inspector General Daniel Levinson said that "self-policing is such a critical part of making compliance work" and that health care providers should "take on the role to a certain degree of the internal inspector general for their institutions."[35]

The **DOD Voluntary Disclosure Program** (in place from 1986 to 2008)[36] recovered $497 million for the government during its existence.[37]

- Defense contractors could "bring to light potential civil or criminal fraud matters."[38]
- The DOD and DOJ considered various factors—including the contractor's cooperation; truthfulness, completeness, and timeliness of the disclosure; and extent of the fraud—in determining whether to prosecute, suspend, or debar the contractor.[39]
- DOD officials noted that contractors "were far more cooperative" in "disclosing a wrongdoing, conducting an internal investigation, and providing an internal investigative report without resorting to subpoenas or grand juries" when participating in the Voluntary Disclosure Program than they would be "in any adversarial investigation."[40] The DOJ stated that the Program "has been remarkably effective in nurturing business honesty and integrity and in bringing good new cases to the government's attention."[41]

Jurisdictional Bar on *Qui Tam* Actions after a Defendant's Disclosure to the Government

With limited exceptions, qui tam *actions against a company with a certified compliance program will be barred if the company has disclosed "substantially the same allegations or transactions as alleged in the action or claim to a government Inspector General or other federal investigative office under a government voluntary disclosure program or pursuant to a mandatory disclosure obligation." Section 3730(e)(5).*

CURRENT LAW

Under the current FCA, a *qui tam* plaintiff who files suit after the defendant has already disclosed the same conduct to an agency Inspector General is entitled to proceed with the suit and receive a full bounty.[43] This possibility exists even though the disclosure has been made to the government authority responsible for investigating fraud and even though the party making the disclosure is typically required to cooperate fully in the investigation.

PROPOSED REFORM

When a corporation has made a disclosure of fraud to an agency Inspector General or other investigative office, *qui tam* actions based on the same allegations of fraud should be foreclosed. As one court aptly noted, the *qui tam* enforcement mechanism essentially allows the government to "purchase" from private citizens the information they may have about fraud on the U.S. Treasury.[44] Taxpayers should not be paying relators who file *qui tam* lawsuits based on information already in the government's possession.

> "*Taxpayers should not be paying relators who file* qui tam *lawsuits based on information already in the government's possession.*"

Existing Jurisdictional Bars on Parasitic Relators

Congress recognized that the prospect of a bounty might lure "freeloaders" without any valuable new information and has amended the FCA several times to ensure that the *qui tam* provisions pay whistleblowers only with fresh information:

- In 1986 Congress enacted a public disclosure provision to bar *qui tam* actions based upon information already publicly disclosed, and therefore already available to the government.[45] The purpose of the public disclosure bar is to safeguard against "parasitic exploitation of the public coffers [by] . . . opportunistic plaintiffs who have no significant information to contribute of their own," while rewarding "whistle-blowing insiders with genuinely valuable information."[46]
- Congress also enacted a "first-to-file" provision that ensured the rewards available under the FCA were given only to the first whistleblower to come forward, not subsequent would-be whistleblowers.[47] This is because "[t]he first-filed claim provides the government notice of the essential facts of an alleged fraud, while the first-to-file bar stops repetitive claims."[48]

Just as the public disclosure and first-to-file bars guard against *qui tam* payments to relators that bring no new information about fraud to the table, we believe it equally important for Congress to enact a bar against *qui tam* payments to relators who provide substantially the same information already disclosed to the government by the alleged wrongdoer itself.

The proposed self-disclosure bar would leave open critical avenues for whistleblowers to file *qui tam* lawsuits.

- **First,** the self-disclosure provision advocated here would not foreclose actions filed by whistleblowers who provide the government with information about fraud before a corporation makes a self-disclosure.
- **Second,** the proposed self-disclosure bar would not foreclose *qui tam* actions when the corporation had made a disclosure to any government employee other than an Inspector General or other investigative office. This addresses the concern that corporations could make sham disclosures of information to a non-investigative government official or office that is unlikely to act on the information or vindicate the government's interests.

- **Third,** the proposed self-disclosure bar would not interfere with an employee-relator's ability to file a *qui tam* action even after a company's self-reporting to the government, so long as the employee reported internally first and waited at least 180 days before going to court (see next reform).

In certain circumstances, a relator may come forward with valuable new information related to a company's activities after the company has disclosed its violation to the government. Our provision would not bar actions based on such new information, as long as the relator's action did not merely disclose "substantially the same allegations or transactions" found in the corporation's prior disclosure. A relator who provides additional, non-duplicative information would be permitted to proceed with a *qui tam* action based on that information and recover an award under the FCA's bounty provisions.

Importantly, the self-disclosure *qui tam* bar should be available only if a corporation has implemented a certified compliance program. As noted above, a certified compliance program would include rigorous mechanisms for identifying fraud and disclosing any information uncovered about fraud. A statutory bar on subsequent *qui tam* actions raising substantially the same allegations or transactions already self-disclosed would serve as a concrete incentive for the corporation to fully investigate and disclose any fraud.

Incentives for Potential Relators to Report Internally to their Employers

When a potential relator who is an employee or who has a contractual or legal duty to report alleged misconduct internally fails to do so under a company's certified compliance program at least 180 days before filing a qui tam *action, the court shall dismiss such a* qui tam *action.*

If the company fails to disclose the violation within 180 days, the individual may proceed with the qui tam *lawsuit. Relators who report internally shall be deemed to have filed an action at that time for purposes of the "first-to-file" prohibition in the FCA and the proposed "self-disclosure" bar (see previous reform).*

If the company discloses the violation within 180 days of the employee's internal report and there is a resulting government recovery from the company, the individual who reported misconduct internally shall be eligible for up to ten percent of the government recovery, if the individual notifies the DOJ of his or her role pursuant to administrative provisions to be established by the DOJ.

CURRENT LAW

The FCA currently provides no incentive for employees to report concerns about potential fraud to their employers. To the contrary, the statute contains a structural disincentive to internal reporting in the form of the "first-to-file" provision, which specifies that only the first relator who files suit is eligible for a bounty.[49] This provision creates a "race to the courthouse," with the problematic effect that a potential relator has no incentive to take the extra step of reporting internally first since

Incentives for Internal Reporting

A number of statutory and regulatory regimes recognize that incentivizing internal reporting is more effective at reducing fraud than incentivizing a race to the courthouse. For example:

- The Sentencing Guidelines offer a strong incentive for companies to encourage employees to use internal reporting and compliance programs and to develop systems that make such reporting effective. The Guidelines provide for a reduction in penalties when a company has taken reasonable steps to "have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation."[51]
- The SEC, in implementing the Dodd-Frank Act's whistleblower provisions, has established several regulatory incentives to encourage employees to report possible violations of federal securities laws to the company, including giving the employee a "place in line" that dates to the first internal report and treating as a plus-factor the whistleblower's "participation . . . in internal compliance systems." These incentives encourage companies to develop robust internal reporting mechanisms and in turn increase the likelihood that employees will report misconduct.[52]

doing so might reveal information to other employees, one of whom might beat the initial discoverer of the problem to court. The FCA thus encourages employees to "circumvent internal reporting channels altogether."[50] The FCA's disincentives for prompt internal reporting are out of sync with modern statutory and regulatory mechanisms that encourage internal reporting and more robust corporate compliance programs.

PROPOSED REFORM

The reforms proposed here would create incentives under the FCA similar to those found in other whistleblowing regimes. These reforms would apply to companies that have adopted the certified compliance program proposed in this paper. These amendments would provide that if an employee of a company with a certified compliance program (or any other individual with a contractual or legal obligation to make reports to such a company) fails to report the alleged misconduct internally at least 180 days before filing a *qui tam* suit, the court would be required to dismiss the action. The 180-day window would afford the employer sufficient time to investigate the allegations and make a determination whether to self-disclose a violation to the government and/or take corrective action.

In order to ensure that a person who uses the internal reporting mechanism is not disadvantaged, the reforms would also provide that a person who reports internally and triggers a prompt disclosure by the company to the government would still be eligible for up to 10 percent of any government recovery that results from the

> *This reform would ensure that an employee's internal reporting would not handicap the employee in the 'race to the courthouse'.*

company's disclosure, by following administrative procedure to be established by the DOJ. If the whistleblower reports internally, but the company does not promptly self-disclose and the whistleblower proceeds with a *qui tam* action, then the whistleblower will be deemed to have filed an action for purposes of the FCA's "first-to-file" bar dating back to the time of the internal report. This reform would ensure that an employee's internal reporting would not handicap the employee in the "race to the courthouse."

We propose to limit these changes to companies with certified compliance programs for two reasons. First, certification will assure employees that the company in question is conforming to the highest standards with respect to fraud prevention, protection of whistleblowers, and self-reporting of violations. An employee who bypasses such a system is unlikely to have a good reason for doing so. Second, this change will provide a meaningful incentive for companies to adopt certified compliance programs. Companies that provide clear reporting channels and appropriate protections for whistleblowers and develop effective protocols for reporting misconduct to the government will benefit from more consistent internal reporting of potential fraud by their employees.

The current "first-to-file" rule serves two purposes, both of which will be furthered by the proposed amendment. The rule is designed "to encourage whistleblowers to come forward with allegations of fraud and to prevent copycat actions that do not provide additional material information to the government."[53] The proposed change would advance both of those purposes, without the negative incentives the current rule imposes.

First, the amendment would encourage desirable whistle-blowing. Indeed, available evidence suggests that "[w]histleblowers prefer to report internally to their employers," especially if the company has robust reporting mechanisms.[54] One study, for example, found that almost 90 percent of employees who filed a *qui tam* case had initially reported their concerns internally.[55] Thus, amending the FCA to provide a concrete monetary incentive for whistleblowers to report concerns internally should not have any deleterious effect on whistleblowing. The proposed amendment would have the additional positive effect of inducing the minority of whistleblowers who would not otherwise report internally to do so if their employers have strong compliance programs.[56]

Second, because the program proposed here contemplates disclosure to the government of discovered wrongdoing, the government would obtain all of the information that it now obtains from the first whistleblower to file.

No Mandatory or Permissive Exclusion or Debarment

The government's exclusion and debarment regulations should be revised to provide that a corporation with a certified compliance program (and—unless they were personally engaged in fraud—its executives) would not be subject to mandatory or permissive exclusion or debarment.

CURRENT LAW

As explained in detail in the U.S. Chamber Institute for Legal Reform ("ILR") October 2012 study entitled *The Exclusion Illusion*, a principal reason for the huge sums that healthcare and pharmaceutical companies have paid to settle FCA matters is the threat of exclusion from federal healthcare programs, including Medicare and Medicaid.[57] Over the last decade, HHS has expanded dramatically the reach of the threat of exclusion by making entities that are indirectly reimbursed for products prescribed to program beneficiaries subject to exclusion.[58] In non-healthcare contracting matters, the similar threat of "debarment" has also led to huge settlements.[59] In 2011 alone, over 3,300 federal contractors were suspended or debarred as a result of increased contract monitoring by federal agencies.[60]

PROPOSED REFORM

Exclusion or debarment may be necessary to protect federal programs from entities or individuals who present a particularly high risk of recidivism. But for many companies and employees in many fields, exclusion or debarment threatens their very existence or the continuation of their careers. Consequently, the threat of exclusion or debarment gives agencies enormous leverage to compel companies to accept settlements on the government's terms, even when there is little proof that fraud actually occurred or that the government suffered any harm.[61] This, in turn, precludes the courts from playing their vital roles in

> "*Eliminating the threat of exclusion would create a powerful incentive for companies to adopt state-of-the-art compliance programs*"

articulating the law to provide guidance for future conduct and of guarding against government overreaching.[62] And when a company has implemented a certified compliance program, the rationale for exclusion or debarment no longer applies because the company should not present a significant risk of recidivism. Eliminating the threat of exclusion would create a powerful incentive for companies to adopt state-of-the-art compliance programs while also affording such companies the meaningful ability, where appropriate, to seek the guidance and protection of the courts.

The government itself has recognized the distorting and counterproductive effects of exclusion and debarment in other contexts. For example, the government has rejected the possibility of using mandatory debarment as a remedy for Foreign Corrupt Practices Act violations, finding that the remedy "would likely be outweighed by the accompanying decrease in incentives for companies to make voluntary disclosures, remediate problems, and improve their compliance systems."[63] Justice Department officials have acknowledged that debarment does not "deter or punish wrongdoing" and "impinge[s] negatively on prosecutorial discretion."[64] Those very same considerations apply to the FCA, yet the government continues to use the threat of exclusion or debarment to induce irrationally high FCA settlements.

The legislation proposed here aims to reduce the unfairness and inefficiencies caused by the use of exclusion and debarment as settlement leverage. At the same time, the proposed legislation is aimed directly at the heart of the problem that the FCA is designed address—reducing fraud in government programs. Some debarment regulations already take into account considerations such as "[w]hether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment."[65] This legislation would create a front-end incentive to adopt such controls, while eliminating the counterproductive and unjustified possibility that a company with such a program may be subject to the threat of exclusion or debarment.

FCA Reforms to Ensure Fair and Effective Enforcement

The following proposed amendments are intended to address discrete aspects of the FCA that are ineffective, irrational, or unfair. The amendments would be applicable to all companies and individuals, not just those companies that elect to maintain a certified compliance program.

Some of the problems these amendments address have arisen because relators sometimes receive rewards that are much larger than necessary to incentivize whistleblowing, or rewards that are based on information the relator gained from government service. Other problems have arisen because a number of courts have interpreted the FCA to permit lawsuits based on violations of regulations or contractual provisions unrelated to the goods or services defendants provide to the government. Still other problems have resulted from the statute's authorization of large per-claim penalties on top of treble damages, even when the government receives valuable services or goods for its money. Finally, problems have resulted from erroneous court interpretations of the FCA's statute of limitations. In the aggregate, the proposals below will provide clarity and a more fair and rational structure to the FCA.

Graduated Reduction in Relator's Share Percentages

In intervened cases, relators shall receive 15 to 25 percent of the first $50 million recovered; plus 5 to 15 percent of the next $50 million recovered; plus 1 to 3 percent of amounts recovered above $100 million. In non-intervened cases, relators shall receive 25 to 30 percent of the first $50 million recovered; plus 20 to 25 percent of the next $50 million recovered; plus 10 to 20 percent of amounts recovered above $100 million. Attorney's fees and costs would still be available to successful relators under Section 3730(d)(1)(D).

CURRENT LAW

The current structure of the FCA systematically overpays relators and their counsel. The law provides that in cases where the government intervenes, relators are generally paid 15 to 25 percent of the overall recovery, and where the government declines to intervene, relators are paid 25 to 30 percent of the recovery. These percentages remain fixed, no matter how high the government's recovery. The statute also provides for compensation to the relator's attorney by requiring the defendant to pay successful relators their attorneys' fees and costs. Attorneys also typically receive 40 percent of the relator's share, on top of fees and costs.

PROPOSED REFORM

In high-dollar cases, the government is paying dramatically more—often tens or hundreds of millions of dollars—than is necessary to incentivize whistleblowers and their counsel to uncover and assist in the prosecution of fraud under the FCA.[66]

In an October 2011 paper, ILR advocated for imposing a $15 million cap on relator awards, calculated to provide sufficient compensation to induce relators to come forward by guaranteeing that the typical relator with information concerning a high-dollar-value fraud scheme would be able to maintain his or her standard of living even if the relator were never again able to find work as a result of blowing the whistle.[67] ILR calculated that if the government had instituted this $15 million cap in 1986, it would have saved at least $674 million in the 10 largest cases alone over the past 25 years.

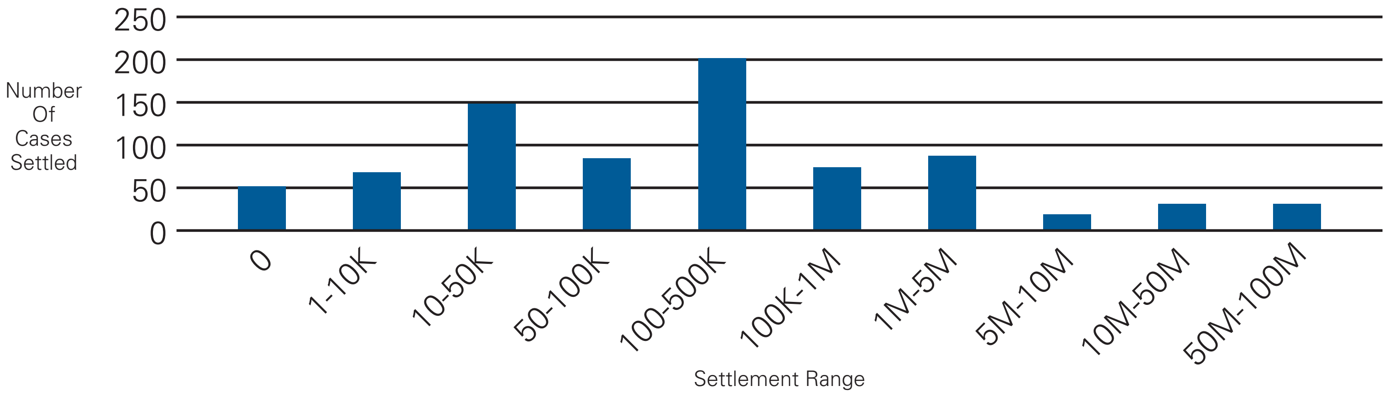
Qui tam advocates criticized the proposed $15 million cap on several grounds. First, they noted that an absolute cap would provide a disincentive for relators and their counsel to continue to help the government achieve recoveries of greater than approximately $100 million, because they would not have any incremental financial incentive to do so.[68] Second, they contended that the $15 million amount was too low because it failed to account for the various risks relators and their counsel face.[69] Significantly, *qui tam* advocates did not seriously contest the major premise underlying the ILR proposal—namely, that awards of hundreds of millions of dollars are not necessary to induce whistleblowers to come forward, and that appropriate restructuring of the bounty provisions would save the government hundreds of millions of dollars while continuing to provide an adequate incentive for whistle-blowing.

To address concerns relating to the $15 million award cap, this paper proposes a revised approach to save the government money while adequately rewarding relators and their counsel: a graduated structure of award percentages. Under this alternative, the reward percentages would remain unchanged for all cases in which the amount of the government's recovery is $50 million or less—as reflected in Table 1, the great majority of *qui tam* cases.[70]

> *"The government is paying dramatically more—often tens or hundreds of millions of dollars—than is necessary to incentivize whistleblowers and their counsel to uncover and assist in the prosecution of fraud under the FCA."*

Table 1

Settlements and Amounts



As reflected in Table 2, relators would receive a reduced percentage for amounts the government recovers between $50 million and $100 million, and a still further reduced percentage for all amounts recovered in excess of $100 million.

This structure continues to afford relators the prospect of generous recoveries in high-dollar cases, and provides the prospect of increasing bounties indefinitely, although at maximum rates of 10 to 20 percent in non-intervened cases and one to three percent in intervened cases rather than the current percentages. The proposal also recognizes that in non-intervened cases, relators and their counsel take on a larger role in bring the case to settlement or verdict. The proposal recognizes the higher burden on relators and their counsel in non-intervened cases while still generating savings for the government as compared with the current system.

Table 3 illustrates the amounts that relators would be paid at various levels of overall government recovery in intervened cases (*i.e.*, the vast majority of cases).

As Table 3 indicates, in large cases yielding billion-dollar recoveries, relators would be eligible to receive up to $53.75 million in cases in which the government intervenes (and up to $117 million in non-intervened cases). These potential award amounts are unquestionably sufficient to incentivize desirable whistle blowing while at the same time, this graduated structure will yield substantial savings to the U.S. Treasury.

Table 2

Proposed Relator Award Structure

Incremental Government Recovery	Intervened Case Award Ranges	Non-intervened Case Award Ranges
$0-50 million	15%-25%	25%-30%
$50-100 million	5-15%	20%-25%
$100 million and above	1%-3%	10%-20%

As Table 3 reflects, in a large intervened case involving a billion dollar recovery, the government could save up to $196 million under the revised bounty structure.

If the FCA had included this structure, the government would have saved at least $880 million in the top eight cases alone over the past 25 years.

Table 3

Relator Award and Government Savings in Intervened Cases

Government Recovery	Proposed Minimum Award	Proposed Maximum Award	Current Minimum Award	Current Maximum Award	Government Savings
$25,000,000	$3,750,000	$6,250,000	$3,750,000	$6,250,000	$0
$75,000,000	$8,750,000	$16,250,000	$11,250,000	$18,750,000	$2,500,000
$150,000,000	$12,500,000	$27,500,000	$22,500,000	$37,500,000	$10,000,000
$300,000,000	$14,000,000	$32,000,000	$45,000,000	$75,000,000	$31,000,000 - $43,000,000
$500,000,000	$16,000,000	$38,000,000	$75,000,000	$125,000,000	$59,000,000 - $87,000,000
$1,000,000,000	$21,250,000	$53,750,000	$150,000,000	$250,000,000	$128,750,000 - $196,250,000

Table 4

Government Savings in Top 8 Cases

Alleged Wrongdoing	Date	Total Government Recovery	Total Relator Share	Maximum under Proposed Reform[71]	Savings to Government
Off-label promotion, kickbacks, price reporting, and misleading representation of safety profile	2012	$2,000,000,000	$500,000,000	$77,000,000	$423,000,000
Kickbacks and overcharging	2003	$631,000,000	$151,591,500	$35,930,000	$115,661,500
Medicare billing violations	2000	$731,400,000	$150,000,000	$38,942,000	$111,058,000
Off-label marketing, kickbacks, and pricing	2009	$1,000,000,000	$102,365,512	49,999,997	$52,365,515
Manufacturing	2010	$600,000,000	$96,000,000	$35,000,000	$61,000,000
Medicare billing violations	2005	$900,000,000	$90,000,000	$46,999,997	$43,000,003
Off-label marketing, kickbacks	2012	$800,000,000	$84,000,000	$41,000,000	$43,000,000
Kickbacks and overcharging	2008	$650,000,000	$68,752,000	$36,500,000	$32,252,000
Total Savings					**$881,337,018**

Government Employees Barred From Serving as Relators

No court shall have jurisdiction over an action brought by a former or present government employee under subsection (b) of this section arising out of such person's employment by the government. Section 3730(e)(1).

CURRENT LAW

The current FCA does not expressly prohibit government employees from taking information they learn as a result of their government employment, using that information to file a *qui tam* lawsuit, and then recovering a bounty. Several courts have held that the FCA's "public disclosure" bar precludes government investigators and auditors—the government employees most likely to learn of potential false claims—from filing *qui tam* actions.[72] But other courts have reluctantly permitted non-auditor government employees to serve as *qui tam* plaintiffs, despite recognizing the serious policy arguments against permitting such actions.[73] The DOJ has consistently voiced its strong opposition to government employees being permitted to cash in on government service by filing *qui tam* lawsuits.[74]

PROPOSED REFORM

The FCA should be amended to prohibit any government employee from using information gained during the scope of government employment to serve as the basis for a *qui tam* suit. As DOJ has argued, one of the principal objections to permitting government employees to serve as relators is the concern that they will inherently face conflicts of interest when doing so.[75] All federal employees are subject to the federal conflict-of-interest statute, which prohibits participating "personally and substantially as a government officer or employee" in a judicial or other proceeding in which the person "has a financial interest."[76] This statute would appear to apply to government employees who file *qui tam* actions, as the lawsuit is a judicial proceeding in which the relator has a financial interest.

This criminal law is designed to ensure impartial judgment on the part of federal employees, which may be compromised if a government employee, faced with information that might be viewed as a violation of the FCA, has the prospect of personal financial gain. Numerous other federal regulations prohibit the use of information obtained through government employment for personal use. Yet courts have been reluctant to exclude government employees altogether from serving as FCA relators because of the FCA's unqualified language in this regard.

> *"[O]ne of the principal objections to permitting government employees to serve as relators is the concern that they will inherently face conflicts of interest when doing so."*

Federal Ethics Regulations

Allowing government employees to use information gained as a result of their employment for private financial gain violates a broad range of federal ethics regulations that prohibit:

- The use of public office for private gain.[77]
- The use of government property or time for personal purposes.[78]
- The trafficking in "inside information."[79]
- The participation in any government matter in which the employee has a financial interest.[80]
- The holding of financial interests that may conflict with the impartial performance of government duties.[81]

Higher Standards for Government Auditors

The Government Accountability Office's auditing standards state that:

- Auditors are to exhibit both "[i]ndependence of [m]ind" and "[i]dependence of [a]ppearance."[82]
- Auditors are to avoid situations that may lead reasonable third parties to conclude that they are unable to maintain independence or exercise impartial judgment on all issues associated with their work.[83]

If permitted to file, every government auditor, investigator, and other employee will have a perverse incentive to seek to profit from their government employment by filing a *qui tam* suit. Investigators within DOD, DHS, HHS, and elsewhere would have an incentive to retain for themselves any information about fraud so that they could later capitalize on this information for personal gain, making at best minimal disclosures to the Inspector General, Attorney General, and supervisors, and hoping that the DOJ would not file any action in response. Government investigators and auditors would also have an incentive to race to the courthouse before a case is fully developed, undermining the potential effectiveness of the case. Fraud recoveries that the government would have recouped in full under the current FCA would be reduced by up to 30 percent—the amount that a government employee could receive as a relator.[84]

> "*If permitted to file, every government auditor, investigator, and other employee will have a perverse incentive to seek to profit from their government employment by filing a* qui tam *suit.*"

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

The concerns expressed above are not abstract hypotheticals—there are many real-life examples of government employees and former government employees who have used information learned on the job to file *qui tam* suits, hoping to get rich based on their government employment, and failed to live up to their obligations to the government.

- After retiring from his job of ten years, an auditor in the Department of Energy Office of the Inspector General filed *seven qui tam* lawsuits based on information obtained through conducting and supervising audits.[85]
- An auditor for the Minerals Management Service (MMS) within the Department of the Interior filed *four qui tam* actions against oil and gas companies for alleged underpayment of royalties and interest owed.[86] In 2007, the OIG investigated the legitimacy of claims made in these lawsuits (as well as other *qui tam* lawsuits filed by MMS auditors) and found that "the auditors did not properly report their suspicions of wrongdoing to the appropriate authorities, including the [OIG]."[87] The OIG "determined that the auditors removed and used proprietary, sensitive or confidential business information without authorization."[88]
- After retiring from his job of 15 years investigating Medicare fraud, a special agent at HHS filed *two qui tam* lawsuits against companies that he previously investigated.[89] The special agent learned about the alleged fraud while still at HHS, when an informant provided "inside information" about his employer's alleged Medicare fraud. As part of his job, the special agent developed an audit program and obtained search warrants to investigate the allegations.[90] The court dismissed the two lawsuits because the special agent failed to allege fraud with sufficient particularity.
- A postmaster reported her suspicions of fraud to her managers, the Inspector General's office, and a postal systems coordinator. The Postal Inspection Service began to investigate her allegations, but before it could complete its investigation, the postmaster filed a *qui tam* lawsuit against the subject of the investigation "to recover her lawful share of the proceeds."[91] Although her lawsuit did not prod the government to pursue fraud allegations it otherwise would not have pursued, the government had to pay the postmaster $408,000 from the settlement proceeds, reducing its recovery by 17 percent.[92]
- An Air Force attorney discovered and reported to his superiors evidence of a corporation's alleged bid-rigging on a government contract, and then filed a *qui tam* lawsuit while the government was actively investigating his allegations.[93]

• Two former federal auditors who worked for the Office of Personnel Management (OPM) filed a lawsuit against the subjects of an OPM audit before OPM could complete its audit report.[94]

Definition of "False or Fraudulent Claim" to Exclude Implied Certification Liability

"False or fraudulent claim" shall be defined to impose liability only when a claim is "materially false or fraudulent on its face," or when a claim is presented or made "when the claimant has knowingly violated a requirement that is expressly stated by contract, regulation, or statute to be a condition of payment of the claim." Section 3729(b)(5).

CURRENT LAW

One of the most controversial expansions of FCA liability in the past two decades has been the court-created "implied false certification" theory of liability. Under this theory, a violation of any fine-print regulatory requirement, even though not mentioned in a government contract or invoice, can provide a basis for treble damages and penalties. Many circuit courts of appeals have embraced this expansive theory of FCA liability.[95]

PROPOSED REFORM

While violations of legal or regulatory requirements are not acceptable, they should be handled and penalized under the procedures and remedies provided under the governing statute or regulation, not through the FCA. As the Seventh Circuit has explained, "the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations. The FCA is a fraud prevention statute."[96]

Examples of Implied Certification Liability

- In *United States v. Science Applications International Corporation,* 653 F. Supp. 2d 87 (D.D.C. 2009), [*aff'd in part, vacated in part*], 626 F.3d 1257 (D.C. Cir. 2010), a jury awarded $5.9 million in damages and $577,500 in civil penalties under the FCA where it found the defendant "impliedly" falsely certified that it had no conflict of interest in performing a government contract. In that same case, and on the same underlying facts, the jury awarded just $78 for a breach of contract claim. The award was vacated on appeal.

- In *United States ex rel. Hendow v. University of Phoenix,* 461 F.3d 1166 (9th Cir. 2006), a relator was allowed to pursue an implied certification FCA claim based on a university's alleged noncompliance with a condition of participation in a student loan program, even though the Department of Education stated that it considered noncompliance with the condition an administrative enforcement matter, not fraud.

- In *United States ex rel. Tyson v. Amerigroup Illinois, Inc.*, 488 F. Supp. 2d 719 (N.D. Ill. 2007), the court imposed over $300 million in FCA liability on a Medicaid HMO under an implied certification theory for submitting claims while engaging in marketing practices that discriminated on the basis of health status. This was despite the fact that the relevant contract did not condition payment on compliance with the non-discrimination provisions, and there were no other problems with the medical services provided under the Medicaid program.

“We propose a new definition of ‘false or fraudulent claim’ that would impose false certification liability only in instances of genuine, material falsehood or fraud.”

Liability for false certifications should be permissible only if the requirement that has been violated is clearly and expressly stated, and if compliance with the requirement is explicitly identified as a condition of the government's payment of the claim. Thus, we propose a new definition of "false or fraudulent claim"[97] that would impose false certification liability only in instances of genuine, material falsehood or fraud. Specifically, a "false or fraudulent claim" should be defined as:

- A claim that is materially false or fraudulent on its face; or
- A claim submitted by a claimant who has knowingly violated a requirement that is expressly stated by contract, regulation, or statute to be a condition of payment of the claim.

The proposed reform would ensure that the contracting party knows the promises for which it may be held accountable. The reform also goes to the basic purpose of the FCA. If the requirement at issue would have made no difference in the government's decision to pay the defendant, then any violation of the requirement caused no economic harm to the government. Moreover, all parties will benefit if the government clearly considers and states which regulatory requirements are material to payment.

Although most circuit courts have recognized some theory of implied certification liability, they disagree over how the theory should be applied. The Second, Third, and Eighth Circuits have held that implied certification liability can attach only when the underlying statute, regulation, or contract expressly states the claimant must comply in order to be paid.[98] The D.C. and First Circuits, however, have found implied certification liability even though no applicable statute, regulation, or contract specified that compliance was a condition of payment.[99]

Division in the Courts

Federal courts have put forward different approaches to the implied certification theory.

- The Second Circuit has explained that the "[FCA] was not designed for use as a blunt instrument to enforce compliance with all… regulations—but rather only those regulations that are a precondition to payment—and to construe the impliedly false certification theory in an expansive fashion would improperly broaden the Act's reach."[100]

- The Eighth Circuit has noted that "[t]he FCA is not concerned with regulatory noncompliance."[101]

- The Third Circuit has expressed concern that allowing FCA suits based on nearly any regulatory violation "would short-circuit the very remedial process the government has established to address non-compliance with those regulations."[102]

- The D.C. Circuit suggested that express language linking compliance with a statute, regulation, or contract to eligibility for payment was not necessary because other evidence such as testimony from government officials could establish that a false implied certification was material. Although the court noted that "the implied certification theory is prone to abuse by the government and *qui tam* relators who, seeking to take advantage of the FCA's generous remedial scheme, may attempt to turn the violation of minor contractual provisions into an FCA action," it believed that this problem could be addressed through aggressive enforcement of other FCA requirements, such as materiality.[103]

- The First Circuit has adopted the D.C. Circuit's rule, although it did so in a case involving an agreement expressly conditioning payment upon compliance with Medicare regulations.[104]

The approach of the D.C. and First Circuits presents numerous problems for businesses that provide services to the federal government. First, it is very difficult to know beforehand exactly what will be material to the government's decision to make a payment; it is a largely subjective, case-by-case judgment—and one on which many millions dollars may depend.[105] Under this uncertain approach, any breach of contract or violation of one of dozens or perhaps hundreds of applicable regulations could engender enormous financial liability for a contractor. Even the most vigilant courts are unlikely to prevent abuses of the FCA merely by assessing materiality.[106] Courts determining whether a failure to comply is "material" do so in hindsight. Noncompliance with relatively minor requirements may appear material in retrospect. The government would always prefer total compliance, and government officials may be inclined to characterize any noncompliance as material to maximize the chances of recovering money. Thus FCA liability—and the massive damages awards that often accompany it—will continue to grow to encompass noncompliance with regulations and contractual provisions that would otherwise be enforced through far less harsh measures.

In addition, the D.C. Circuit and First Circuit approach broadly expands the potential scope of FCA liability. A claimant could be subject to damages equal to three times the value of any payments it receives from the government based on its violation of any one of perhaps hundreds of statutory, regulatory, or contractual requirements that apply under a federal program. For programs like Medicare, these laws and requirements are often so complicated that some minor noncompliance may be very difficult to avoid, as courts themselves have recognized.[107] And enforcing these laws through the FCA often undermines the (drastically less punitive) administrative remedies that Congress and federal agencies have put in place.[108] As the Tenth Circuit has noted, expanding the FCA to cover violations of any regulation would mean that "[a]n individual private litigant … could prevent the government from proceeding deliberately through the carefully crafted remedial process and could demand damages far in excess of the entire value of … services performed."[109]

The change proposed here will not mean that noncompliance with contractual, regulatory, or statutory requirements will go unpunished. To the contrary, such noncompliance will be addressed through existing contractual provisions (including the broad range of remedies available to the government), or existing administrative or judicial regimes to penalize noncompliance with regulatory or statutory requirements.

Change in Standard of Proof for FCA Liability

All essential elements of liability under the FCA must be proven by "clear and convincing evidence." The standard of proof for recovery of damages would remain the existing "preponderance of the evidence" standard. Section 3731(d).

CURRENT LAW

To sue successfully for fraud, a party must generally prove the elements of his or her claim by "clear and convincing evidence." That is true for fraud under federal tax law, federal trademark law, and federal patent law,[110] and for a wide array of state common law and statutory fraud claims.[111] Yet, the FCA, the most basic federal statute prohibiting fraud in government contracting and federal programs, sets a substantially lower standard. It requires proof by only a preponderance of the evidence.[112]

PROPOSED REFORM

Each of the considerations that lead courts and legislatures to require the more demanding "clear and convincing" standard apply fully to the FCA. Its standard of proof should accordingly be raised to that more appropriate level. Courts and legislatures typically insist on clear and convincing proof of fraud claims for two reasons.

- **First,** an accusation of fraud typically carries with it "harm … to [the] reputations [and] goodwill" of the defendant.[113] Being adjudicated liable for fraud may carry with it a stigma of "quasi-criminal wrongdoing."[114] Thus,

> *Raising the standard of proof would allow innocent companies to challenge the government's allegations in court.*

"the very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party."[115]

- **Second,** fraud liability often subjects defendants to heightened sanctions. That is certainly true of the FCA, which provides for both treble damages and potentially massive penalties. Given the enormity of potential liability, a heightened evidentiary standard is warranted.[116] Preponderance of the evidence requires only "evidence which as a whole shows that the fact sought to be proved is more probable than not."[117] Under this standard, a 51 percent likelihood of culpability is sufficient, and a 49 percent chance of non-culpability is acceptable.[118] Such a high potential error rate (49 percent) is unfair to FCA defendants, which face both treble damages and civil penalties.

These rationales for a heightened standard of proof in typical fraud cases apply to claims under the FCA. If anything, a "clear and convincing evidence" standard of proof is even more necessary for FCA claims. The scope of liability under the FCA is extremely broad under current law. As explained above, a plaintiff in an FCA suit need not show an actual false representation; an "implied" falsehood will suffice. Those implied falsehoods can (in some circuits) be implied certifications of compliance with regulations or contract provisions, even when those regulations or provisions have not been identified by the government as conditions of payment. And the plaintiff need not prove intent to deceive or knowing falsehood; mere reckless disregard of a claim's falsity is enough.[119] Given these plaintiff-friendly elements of the FCA and its potentially vast scope, the preponderance of the evidence standard's high error rate (49 percent) threatens to penalize an enormous variety of non-fraudulent conduct.

Because companies often cannot afford to risk the potentially enormous sanctions imposed under the FCA, and because the standard of proof is low, defendants typically settle FCA suits once the government intervenes. Raising the standard of proof would allow innocent companies to challenge the government's allegations in court, because litigating cases under a clear-and-convincing-evidence standard would place innocent companies at less risk of an erroneous (and financially devastating) verdict. Given companies' practical inability to risk going to court against the government in many cases under the current standard, the principal constraint on excessive *qui tam* suits is governmental discretion. A more rigorous burden of proof would make it more likely that companies will litigate FCA claims. This should improve the system of false claims recoveries, prevent abuses, promote fairer resolutions of FCA disputes, and encourage development of clearer legal rules under the FCA.

Even when the government does not intervene, companies face a substantial risk of erroneous liability when relators file questionable complaints. These companies may feel pressure to settle even frivolous FCA suits, given the enormous damages they might be forced to pay and the significant potential for error at trial. A higher burden of proof would greatly decrease the chances of an erroneous judgment at trial. This, in turn, would substantially reduce the pressure to settle and would tend to chill relators from bringing frivolous *qui tam* suits in the first place.

For all of these reasons, the FCA should be amended to require clear and convincing evidence to establish liability. The standard of proof for damages should remain "preponderance of the evidence" in accordance with the general rule that once liability is established, the injured party should be able to recover damages based on that lower standard of proof.[120]

Clarification of the Measure of Damages

The FCA damages provision should be amended to allow recovery of the "net actual damage" to the government before application of any damage multiplier. Section 3729(a)(2). We propose a new definition that "net actual damage" means "out-of-pocket monetary losses, less the value of benefits received by the government, and does not include indirect or consequential damages." Section 3729(b)(6).

CURRENT LAW

The current FCA provides for recovery of "3 times the amount of damages which the government sustains." Most courts have construed this language to limit the government's recovery to the actual damages sustained by the government, following the lead of a seminal 1976 Supreme Court decision which stated that "the government's actual damages" are measured as "the difference between the market value of the [product or service] it received and retained and the market value that [the product or service] would have had if they had been of the specified quality."[121] While there are different formulations for how damages should be calculated, courts generally agree that any reasonable method for calculating damages is acceptable so long as it "fairly reimburse[s] the government for its losses and expenses, without creating a windfall for the government."[122]

However, courts have increasingly been willing to award the United States all amounts paid on a claim, without considering the actual out-of-pocket loss to the government, and ignoring the benefits of goods and services that were received by the government. The net effect of these cases is that the government in many cases has received windfall recoveries far in excess of any actual financial harm it has suffered. Moreover, the government consistently takes the position in negotiation, and often in litigation, that single damages encompass the entirety of the government's spending without regard to benefits actually conferred on the government.[123] Because companies are seldom in a position to litigate FCA cases given the potential for astronomical damages, exclusion, or debarment, and other extreme consequences, they typically are not in a position to obtain a judicial ruling on the point and, as a result, settlements typically reflect the government's unreasonably inflated number.

PROPOSED REFORM

The statute should be clarified to ensure that negotiations with the government are based on a clear and rational damages rule. The amendment proposed here would allow recovery of the "net actual damage" to the government, defined as "out-of-pocket monetary losses, less the value of benefits received by the government, and does not include indirect or consequential damages." This language is intended to return the statutory damages provision to its intended reach, by clarifying that the government can only recover its actual out-of-pocket losses, which must take into account the value of benefits received by the government, and avoid the possibility of windfall recoveries. This new definition is consistent with the line of cases explaining that the FCA's damages provision is designed to put the government in the same financial position as it would have been had the defendant's claims not been false.[124] As one court aptly noted in refusing to permit an award of damages when the government received what it paid for, "a server's failure to bring a receipt after dinner causes no harm when you know you've been properly charged."[125]

Some courts, at the urging of the DOJ and relators' counsel, have stretched the concept of "damages" under the FCA in a way that is inconsistent with both Supreme Court precedent and common sense. Moreover, the FCA's damages provision is not the only remedy for contractor fraud. Where the government has suffered non-financial losses, the FCA provides for penalties to be awarded for each false claim submitted. In addition, the government has available a broad range of criminal sanctions for submission of false claims and presentation of false statements, which can be used in appropriate cases to punish and deter not only corporations but also individuals.

> *"Courts have increasingly been willing to award the United States all amounts paid on a claim, without considering the actual out-of pocket loss to the government, and ignoring the benefits of goods and services that were received by the government."*

Irrational Windfalls to the Government

Courts have allowed the government to recover the entire amount it paid on a claim, even if the government received substantial benefit from the goods or services that the defendant provided.

- In *United States ex rel. Wall v. Circle Construction, LLC,*[126] a district court held that where a construction contractor failed to pay wages in accordance with the requirements of the Davis Bacon Act, the government's damages consisted of all payments made under the contract—even though there was no problem with the work the contractor performed. The government received a windfall because it got the value of the services contracted for, plus treble the amounts it paid under the contract.

- In *United States ex rel. Feldman v. van Gorp,*[127] the Second Circuit held that where a recipient of a grant failed to provide all the services it promised in its grant application, the government's damages consisted of the full amount of the grant payments—even though the grantee had provided many services in accordance with the grant requirements.

- In *United States ex rel. Longhi v. Lithium Power Technologies, Inc.,*[128] the Fifth Circuit upheld an award of $4.9 million in trebled damages against the recipient of a research grant that made false statements to receive the grant. The court held that damages in such cases always consist of all amounts the government paid, without consideration of the value of the research work performed by the grant recipient.

- In *United States ex rel. Leotine v. CDW-Government, Inc.,*[129] a district court held that where a contractor provided fully compliant products to federal agencies, but violated the Trade Agreements Act by misrepresenting the country of origin of the products, the measure of damages is the full amount paid for the products—even though the government received the full value of goods for which it paid.

The proposed language does not change the rule articulated by the Supreme Court that damages are to be measured and then multiplied before monetary "credits" from the defendant or other sources are taken into consideration.[130] Thus, when a defendant has returned money to the government to reimburse it for alleged losses, damages are measured as the full amount of the government's out-of-pocket losses, to be subjected to the multiplier, and then credits are to be deducted after application of the multiplier. Otherwise (as the Supreme Court pointed out) a defendant could evade liability for FCA damages by making a payment to the government before judgment.

Otherwise Duplicative Civil Penalties Should be Assessed Only in the Absence of Damages

Statutory civil penalties should not be duplicative of the treble damages provisions of the FCA, and therefore shall be assessed only when no damages are awarded, and shall be capped at an "amount equal to the sum sought in the claim in addition to all costs to the government attributable to reviewing the claim. Section 3729(a)(3).

CURRENT LAW

In addition to treble damages, the FCA currently awards a civil penalty of $5,500 to $11,000 per "claim." Courts have almost uniformly concluded that a penalty should be awarded for each false claim submitted, which can result in an award of tens or hundreds of millions of dollars for a large number of low-dollar claims—in addition to the treble damages remedy, which should return three times the government's actual out-of-pocket loss. Such irrationally large penalties typically arise when a defendant has submitted many individual claims for payment, each of which involves a relatively small sum. For example, hospitals, doctors, and other healthcare entities routinely submit large numbers of relatively small-dollar claims for payment by Medicare or Medicaid, which can subject them to enormous penalties that far exceed the value of the underlying claims, even when there has been little or no harm to the government. The very potential for damages awards reflecting three times single damages plus $11,000 times literally thousands of invoices often permits the government to paint a picture, in negotiations, of a potential damages judgment in the hundreds of millions or multiple billions based upon government payments many times smaller.

PROPOSED REFORM

The current penalty provision in the FCA routinely results in penalties that are far in excess of any losses to the government or amounts that would be necessary to deter fraudulent conduct. Treble damages alone are thought to be enough to deter, for example, price-fixing and other conduct in violation of the antitrust laws. Furthermore, the threat of astronomically large penalties, which often bear little relation to the actual harm to the government or the defendant's culpability, have led many defendants to settle rather than attempt to fight even meritless FCA allegations. Indeed, because the FCA provides for penalties that are unrelated to the harm suffered by the government, many penalty calculations must be scrutinized as potentially violating the Eighth Amendment's Excessive Fines Clause.

We propose a straightforward change to the penalty provision that will logically dovetail with the FCA's damages provisions and provide an appropriate overall cap on penalties to avoid the possibility of penalty awards that violate the U.S. Constitution.

- **First,** we propose that no penalties may be assessed if any damages are awarded to the government.
- **Second,** if no damages are awarded, the total amount of penalties assessed may not exceed the amount that the defendant received from the government plus the ancillary costs to the government of reviewing the false claim.

Excessive Penalties May Violate the Eighth Amendment

There are many examples of reported cases in which a relator or the government has sought penalties far in excess of any harm to the government, and courts have had to consider whether the award is unconstitutionally excessive. For example:

- In *United States ex rel. Bunk v. Birkart,*[131] the relator alleged that defendants violated the FCA by filing a single false certificate in connection with a contract bid submitted to the DOD. However, the relator could not elicit sufficient evidence to prove that the government suffered any damages and instead sought a civil penalty for each of the 9,136 invoices that the defendants submitted to the DOD. At trial, the jury found the defendants liable under the FCA, and the district judge determined that each of the invoices constituted a "false claim" for which the court was required to assess a civil penalty. Thus, although the relator could not prove that the government suffered any financial loss, the defendants were liable for total civil penalties of between $50 and $100 million. After a careful analysis, the district court determined that this penalty would violate the Eighth Amendment.
- In *United States ex rel. Smith v. Gilbert Realty,*[132] the defendant violated the FCA by charging higher rents for low-income rental units than permitted by law. The total overcharge was $1,630, but the total penalty exposure was at least $290,000 (calculated as $5,000 for each of 51 rent checks and 7 false certifications). The court reduced the penalty award, concluding that penalties 178 times the amount of the government's actual damages would be "extremely harsh and unjust."

There is no reason to impose penalties when the defendant has already been assessed damages times a multiplier. The application of the multiplier already serves the purposes of the penalty: to compensate the government for the ancillary costs of the defendant's fraud. Such costs include the administrative burden and expense of investigation and litigation, as well as the societal cost of a defendant's abuse of the public fisc. As the Supreme Court explained in *Cook County v. United States ex rel. Chandler,* the use of a multiplier ensures that the government is reimbursed for its costs of investigation and litigation and any required payment to a relator.[133] The Court also noted that the FCA's legislative history indicates that the treble damages provision was adopted as a substitute for allowing consequential damages under the statute.[134]

> *"There is no reason to impose penalties when the defendant has already been assessed damages times a multiplier."*

Additionally, the cap on penalties is designed to permit compensation for any harm suffered by the government, but to avoid the possibility of penalty awards that are so excessive as to violate the Eighth Amendment. The proposed cap is loosely derived from the anti-fraud provision of the Contract Disputes Act, which provides that the penalty for submission of a false claim is an "amount equal to the unsupported part of the claim plus the federal government's costs attributable to reviewing the unsupported part of the claim."[135] The Court of Appeals for the Federal Circuit has found that the award of a penalty under this provision, even when the government did not suffer out of pocket loss, does not violate the Eighth Amendment.[136]

These two changes to the FCA penalty provision will result in an overall financial penalty and damage structure that is aligned with the purposes of the FCA:

- When the government has sustained damage as the result of a false claim, it will be made whole for its losses through the award of its net actual damages. The application of the multiplier will compensate the government for any consequential or non-financial losses and will also provide an appropriate deterrent to fraudulent conduct.
- When the government has not sustained damage as the result of a false claim, it will be made whole for any investigative or non-financial losses through the imposition of penalties, up to the total value of the amount of the false claim plus the government's investigative costs. The award of a penalty in cases where the government has suffered no financial damages will provide an appropriate deterrent to the submission of false claims.

Amendment of the Wartime Suspension of Limitations Act to Clarify That It Does Not Indefinitely Toll the FCA Statute of Limitations

Amend the Wartime Suspension of Limitations Act to clarify that it applies only to criminal actions involving war-related fraud, not to the civil FCA.

CURRENT LAW

The FCA statute of limitations bars actions that are brought either (1) more than six years after the date on which the FCA violation was committed, or (2) more than three years after the date when facts material to the right of action were known (or reasonably should have been known) by the relevant government official, but in no event more than ten years after the date on which the violation was committed.[137] The three-year "tolling" provision sensibly allows the government time to uncover fraud and bring an FCA action, while the 10-year limit just as sensibly prevents defendants from being subjected to stale lawsuits. When enacting this 10-year statute of limitations in 1986, Congress noted specifically that it "did not intend to allow the government to bring fraud actions *ad infinitum.*"[138]

This careful limitations regime, which is designed to protect the legitimate interest of the government in remedying concealed fraud while ensuring that defendants are not subject to fraud actions "ad infinitum," has been upset by a series of decisions wrongly interpreting a little-known World War II-era statute known as the Wartime Suspension of Limitations Act (WSLA).[139] Most recently, the Fourth Circuit issued a decision holding that the WSLA suspends the running of the FCA statute of limitations.[140] The Court held that the law applies to civil fraud statutes including the civil FCA, and that it applies to actions filed by *qui tam* plaintiffs in addition to actions filed by the United States. The Court held that the law suspends the running of the FCA's six-year statute of limitations beginning on October 11, 2002 (*i.e.*, the beginning of the War in Iraq), and that the suspension remains in effect because neither the President nor Congress has officially declared an end to the war. In effect, the decision holds that the FCA statute of limitations is indefinitely suspended. Moreover, the suspension apparently applies to all cases asserted under the FCA, not only those that involve war-related fraud.

> *"The Fourth Circuit's interpretation of the WSLA is contrary to the purpose of the statute."*

PROPOSED REFORM

We propose that Congress should amend the WSLA to preclude application of the WSLA to the civil FCA. We believe that the law should be modified to apply only to "criminal offenses involving war-related fraud," to be consistent with congressional intent.

The Fourth Circuit's interpretation of the WSLA is contrary to the purpose of the statute, which is to suspend the operation of statutes of limitations for criminal fraud offenses relating to wartime efforts until after the cessation of hostilities. When enacted during World War II, the statute was clearly made applicable only to criminal offenses that were "indictable." When the law was amended in 1944, the term "indictable" was removed. However, the provision remained a part of the criminal title of the U.S. Code (Title 18), and when Congress again revised the law in 2008, there is every indication that legislators believed the statute should apply only to criminal offenses involving fraud related to wartime efforts. In 2008, Congress amended the law to clarify that it would be triggered whenever the nation was "at war," whether the war was declared formally or not. The Senate Report addressing the 2008 amendments made clear that the law should be made "consistent with the current statute of limitations for criminal fraud," and that the tolling provided by the WSLA was essential because the "statute of limitations has started to bar criminal actions in investigations of contracting fraud early in these conflicts."[141] The intent of Congress was therefore clear: the purpose of the WSLA is to extend the statute of limitations in actions involving criminal fraud against the government related to ongoing wartime efforts.

Interpreting the WSLA to apply to civil FCA actions means that government contractors in all industries—not just defense contractors—could be subjected to an increase in stale and often meritless litigation that imposes significant costs and creates business uncertainty. Businesses will never know when they can archive or destroy decade-old records lest they be targeted with a *qui tam* suit of "business past." Relators will have incentives to sit on false claims, allowing possible monetary damages to build up and increase their share of any recovery. Faced with the prospect of costly litigation—exacerbated by the absence of witnesses and documents that could have been used for the defense but were lost to the passage of time—businesses may decide to settle despite a *qui tam* lawsuit's lack of merit.

Requirement for Government Document Retention after *Qui Tam* Suit or False Claims Investigation

Once the DOJ has received a qui tam *complaint, or initiates a false claims investigation, it must notify all government agencies and employees with relevant documents of their obligation to preserve the documents. If it fails to provide this notification, the court would be instructed to "draw or instruct the jury to draw a negative inference from any failure of the government to produce documents requested in the course of litigation based on their loss or destruction." Section 3731(f).*

CURRENT LAW

Documents created by federal agencies are often critically important in FCA suits. Government documents may contain exculpatory information, such as information establishing the government's knowledge of allegedly fraudulent conduct. In addition, documents in the government's possession are often the best evidence of the government's actual damages. Thus, defendants in FCA cases can be severely prejudiced in their ability to present a defense when the government fails to take steps to retain relevant documents. Yet the government often fails to preserve its documents when it receives a *qui tam* action or initiates a false claims investigation. This neglect frequently takes the form of a failure to notify agencies and employees possessing relevant documents to retain the documents pending likely litigation. Indeed, federal judges have regularly admonished the government for its failures to preserve documents or to notify agencies possessing relevant documents in FCA and similar cases.[142]

PROPOSED REFORM

The FCA should be amended to ensure that the government meets its document preservation obligations and to protect defendants when the government fails to do so. As soon as the DOJ receives a *qui tam* complaint or initiates a false claims investigation, it should be required to notify all government agencies and employees with potentially relevant documents of their obligation to preserve the documents.[143] If the DOJ fails to provide this notification, the court would be instructed to draw or to instruct the jury to draw a negative inference from the government's failure to produce requested documents in the course of litigation. This sanction would be consistent with the principle that the drawing of an

> *"The FCA should be amended to ensure that the government meets its document preservation obligations and to protect defendants when the government fails to do so."*

adverse inference against parties who destroy evidence will "deter[] parties from destroying relevant evidence before it can be introduced at trial… [and] plac[e] the risk of an erroneous judgment [about document retention] on the party that wrongfully created the risk."[144]

It also comports with the principle that "an adverse inference should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party."[145]

Proposed Amendment

The proposed amendment to 31 U.S.C. §3731, which governs FCA procedure, would read as follows:

Upon receiving a complaint described in 31 U.S.C. § 3730(b)(2) or initiating an investigation concerning a false claim as defined in 31 U.S.C. § 3729, the Attorney General or his designee shall notify all government agencies and employees likely to possess documents relevant to the complaint or investigation concerning a false claim as defined in 31 U.S.C. §3729 of their obligation to preserve and retain the documents. If the Attorney General or his designee fails to make the required notification, then the court shall draw or instruct the jury to draw a negative inference from any failure of the government to produce documents requested in the course of litigation based on their loss or destruction after the notification was required to be given.

Proposed Policy Changes to DOJ Use of Civil Investigative Demands

The DOJ should adopt internal policy guidelines that would govern the issuance of Civil Investigative Demands (CIDs) and use of information provided pursuant to CIDs, to ensure that they are issued only when necessary to a fraud investigation and when less burdensome alternatives are unavailable.

CURRENT LAW

The FCA authorizes the DOJ to issue CIDs to seek documents, responses to interrogatories, and sworn deposition testimony from "any person [who] may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation," prior to the start of any legal proceedings.[146] Before 2009, only the Attorney General had the authority to issue CIDs. Congress then amended the FCA to allow the Attorney General to authorize lower officials to issue CIDs. While some delegation of this authority may have been necessary to relieve the Attorney General of personal responsibility for approving each and every CID, Attorney General Holder gave all 93 U.S. Attorneys the authority to issue CIDs free of central DOJ control, which has led to an explosion in their use. In the last three months of 2010, DOJ attorneys requested permission to issue more than 500 CIDs, more than six times the number of CIDs requested during the two preceding years combined.[147]

These administrative subpoenas, which require no judicial approval before issuance, can impose very heavy costs on companies that must respond to their often wide-ranging demands. The sensitive business

> *"These administrative subpoenas, which require no judicial approval before issuance, can impose very heavy costs on companies that must respond to their often wide-ranging demands."*

> *The CID guidelines should establish clearly defined limits on the DOJ's sharing of information obtained by a CID with relators.*

information frequently disclosed in response, if not handled with caution, may improperly reveal internal company operations and may allow *qui tam* relators to rely on the government's investigative authority—just the opposite of the mechanism intended by the *qui tam* provisions.

PROPOSED REFORMS

We propose that the DOJ adopt internal policy guidelines to govern the issuance of FCA CIDs in order to ensure that CIDs are issued only when necessary and only when less burdensome alternatives are unavailable. They should ensure that the DOJ exercises some degree of central control over their issuance in order to ensure consistency in their use and in the protection of the confidentiality of the resulting disclosures.

- **Authority to issue CIDs.** To ensure that the costs of CIDs as well as their benefits are considered before issuance, authority to issue CIDs in FCA investigations should be limited to the Deputy Attorney General, the Associate Attorney General, and the Assistant Attorney General for the Civil Division. This approach would still allow the DOJ the flexibility to make decisions about issuing CIDs below the level of the Attorney General, but it would also ensure that CID decisions are made consistently and with care.

- **Criteria for issuing CIDs.** Given the significant burdens responding to a CID can impose on a recipient, the DOJ should adopt general criteria governing the issuance of CIDs in FCA cases. The DOJ's Antitrust Division already has guidelines of this sort that can serve as model criteria for FCA investigations. The Antitrust Division Manual specifies, for example, that:

  > CIDs should be mindful of the theory of the violation being investigated and should request the information needed to develop and establish the violation in accordance with that theory. Additional breadth of scope is generally to be avoided as unnecessary, inasmuch as additional CIDs can subsequently be served on the same person or others if the need for additional material later develops. Unnecessarily broad CIDs can delay an investigation by consuming additional time for respondents' production and staff's review of material that is not likely to contribute to the investigation's outcome.[148]

  The Manual cautions that "[s]pecial care should be taken to keep CIDs served upon third parties as narrow as possible, consistent with the investigation's goals."[149] Similar guideposts should ensure more consistent and considered use of CIDs in FCA cases.

- **Sharing of information with relators.** The CID guidelines should establish clearly defined limits on the DOJ's sharing of information obtained by a CID with relators. Since 2009, the FCA has authorized such information-sharing if the DOJ finds it "necessary" to an FCA investigation.[150] This general authorization may allow relators and their counsel an advance look at evidence they would otherwise be unable to review. If the government then decides not to join the sealed *qui tam* action, the relator would nevertheless be able to amend his or her complaint based on information uncovered by the government rather than by the relator. This stands the intended functioning of the *qui tam* provision on its head. "[T]he purpose of [the FCA's *qui tam*] provision is 'to encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward'"[151] and not to allow individuals to benefit from the government's special investigative capabilities. The DOJ should therefore adopt internal policies providing that it will share CID information with relators in: (a) the pre-intervention stage only when necessary to the government's investigation; and (b) the post-intervention stage only when the defendant has answered the complaint or the court has denied a motion to dismiss. The proposed policy would minimize the likelihood that relators will be able to freeload on the government's CID power, but still give relators access to CID information in matters that proceed past the initial pleading stage into discovery.

- **Sharing of information with third parties.** Guidelines for the sharing of CID information with other third parties—including state and local government agencies; witnesses; courts and other tribunals; government investigators, auditors, consultants, and experts; counsel for other parties; and arbitrators and mediators—are also needed. While the FCA requires the DOJ to safeguard CID information and provides that CID information is exempt from disclosure under FOIA,[152] such obligations and restrictions do not apply to third-party recipients of CID information. This raises serious concerns that CID information might be released broadly once it is shared with third parties. The DOJ should therefore promulgate guidelines to specify the circumstances in which CID information may be shared with third parties. The guidelines should also ensure that any relators, relators' counsel, or other third-party recipients of CID information are held to strict confidentiality rules. These confidentiality safeguards should help encourage greater cooperation from non-parties.

- **Confidentiality protections.** Regardless of whether a CID is directed towards an investigative target or a third party, the DOJ should protect the confidentiality of proprietary and competition-sensitive information provided in response, especially when such information is shared with relators or other parties. In this regard, the Antitrust Division Manual notes that "the disclosure of third-party confidential business information obtained through CIDs may cause third-party CID recipients to be less cooperative with the Division in the future."[153] This concern applies as well to FCA investigations and calls for restrictions similar to those established by the Antitrust Division.

- **Criminal investigations.** Because the FCA gives rise to both civil and criminal liability, the DOJ should adopt guidelines to guard against misuse of the CID provisions to ensure that CID information is not improperly employed to aid a criminal investigation. For example, the Antitrust Division currently addresses this issue in the following manner: If a criminal prosecution has not yet begun but is appropriate, then the division must cease its investigation by CID and must instead open grand jury proceedings.[154] That separation of investigative tools and duties provides both the DOJ and potential witnesses and targets with a clear understanding of the investigation's nature. CIDs seeking depositions or interrogatory answers in the face of pending criminal proceedings pose particularly important problems because they can undermine Fifth Amendment rights and prejudice a defendant's ability to defend. "[T]he danger of prejudice flowing from testimony out of a defendant's mouth at a civil proceeding is even more acute when he is unaware of the pending criminal charge."[155] The DOJ should establish a policy generally prohibiting depositions or interrogatories when criminal cases are pending, absent extraordinary circumstances.

Conclusion

In 1986, Congress amended the FCA "to enhance the government's ability to recover losses sustained as a result of fraud against the Government." A quarter century of experience with the FCA has revealed several structural flaws and enforcement inefficiencies in the statute's liability, damages, penalty, and *qui tam* provisions. The goal of the 1986 overhaul of the FCA was to "make the statute a more useful tool against fraud in modern times."[156] The same goal should now motivate Congress to consider enacting the reforms outlined above.

Endnotes

1 U.S. Gov't Accountability Office, GAO-09-628T, Improper Payments: Progress Made but Challenges Remain in Estimating and Reducing Improper Payment (Apr. 22, 2009).

2 AARP's Inside E Street: Medicare Fraud (Gerald Roy, HHS Deputy Inspector General) (Oct. 29, 2010), http://www.youtube.com/watch?v=SZZrAhSgI4k&playnext=1&list=PL2A25C41B2397E338.

3 U.S. Dep't of Justice, Fraud Statistics – Overview, Oct. 2012, *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. The amount of fraud going undetected and unpunished is all the greater, given that much of the money "recovered" under the FCA comes in the form of penalties many times the amounts lost by the government in each FCA case.

4 31 U.S.C. §§ 3729(a)(1)(A) & (B).

5 31 U.S.C. § 3729(b)(2).

6 31 U.S.C. § 3729(b)(1).

7 31 U.S.C. § 3729(a)(1)(G).

8 31 U.S.C. § 3729(a)(1), as adjusted by 28 C.F.R. § 85.3(a)(9) (2000). The statute provides for a reduction in the amount of the damages (to double damages) if the defendant made a disclosure to the government within thirty days of discovering the violation and cooperated with the government in any ensuing investigation. 31 U.S.C. § 3729(a)(2). Courts almost never rely on this provision and usually find that defendants failed to meet one or more of its requirements.

9 31 U.S.C. §§ 3730(b)-(c).

10 31 U.S.C. § 3730(d)(1).

11 31 U.S.C. § 3730(d)(2). The award percentage can be reduced if the relator "planned and initiated" the misconduct. 31 U.S.C. § 3730(d)(3). No recovery is permitted if the relator is convicted of criminal conduct in connection with the alleged fraud. *Id.*

12 31 U.S.C. §§ 3730(d)(1)-(2).

13 31 U.S.C. § 3730(h).

14 U.S. Dep't of Justice, Fraud Statistics – Overview, Sept. 20, 2010 at 9, available from Taxpayers against Fraud, http://www.taf.org/FCA-stats-2010.pdf.

15 *Id. See also* U.S. Gov't Accountability Office, GAO-06-320R, Information on False Claims Act Litigation, Briefing for Congressional Requestors 31 (Dec 15, 2005), *available at* http://www.gao.gov/new.items/d06320r.pdf (information drawn from DOJ statistics from 1986-2005.)

16 *Id.*

17 Acting Assistant Attorney General Stuart F. Delery, Remarks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and *Qui tam* Enforcement (June 7, 2012), http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html; *see id.* ("The Department is well aware of the fact that litigation can only plausibly reach a fraction of the fraud committed against U.S. Government programs – which likewise makes the prevention of fraud a more potent tool for protecting the interests of the United States than efforts to undo the damage of completed schemes."); *see also* Assistant Attorney General Tony West, Remarks at the 12th Annual Pharmaceutical Regulatory and Compliance Congress (Nov. 2, 2011), http://www.justice.gov/iso/opa/civil/speeches/2011/civ-speech-111102.html ("I've often said we can't enforce our way out of the health care fraud challenge. That's why we also seek to promote a culture of compliance by emphasizing deterrence. A comprehensive approach to health care fraud requires preventative efforts

and strong compliance programs like those many of you currently promote; it requires guidance and dialogue between government and the private sector.").

18 *See* Delery Remarks, *supra* note 17.

19 Pub. L. No. 111-21, 123 Stat. 1617 (2009).

20 S. Rep. No. 111-10, at 3 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 432.

21 Larry Thompson, *The Blameless Corporation* 4 (Apr. 21, 2009), *available at* http://www.law.yale.edu/documents/pdf/cbl/Thompson_Blameless_Corporation.pdf.

22 Ethics Resource Center, Ethics and Compliance Officer Association, & Society of Corporate Compliance and Ethics, *The Release of Statistics on Ethics and Compliance Programs in Enforcement Decisions: A Joint Report to the U.S. Department of Justice* 3 (2011), available at http://www.ethics.org/files/u5/FinalDOJ.pdf. *See also* Ethics Resource Center, *2011 National Business Ethics Survey* 27 (2012), available at http://www.ethics.org/nbes/files/FinalNBES-web.pdf (finding that in companies whose executives focused on ethics, 93% of employees who observed misconduct were likely to report it, compared with 54% in companies whose executives did not focus on ethics).

23 *See* Compliance Guidance, http://www.oig.hhs.gov/compliance/compliance-guidance/index.asp (last visited Sept. 10, 2013).

24 *See* Defense Industry Initiative on Business Ethics and Conduct, DII Principles (Jul. 24, 2013), http://www.dii.org/resources/dii-principles (updated March 2010).

25 *See* CEB Compliance & Ethics Leadership Council, *State of the Compliance and Ethics Function: Key Findings from the 2012 Membership Survey* x (2012) (listing surveyed industries); *id.* at 14 (noting that industry regulations primarily dictate compliance and ethics budget size).

26 *See, e.g.,* U.S. Sentencing Commission, *Guidelines Manual* § 8B2.1 (2012); Fed. Acquisition Rule § 3.10, Contractor Code of Business Ethics and Conduct, 48 C.F.R. § 3.1000-1004; Notice, U.S. Dep't of Health & Human Servs., OIG Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8987 (Feb. 23, 1998); OIG Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4858 (Jan. 31, 2005).

27 For an example of this type of entity, *see* New York State Bar Association Commercial and Federal Litigation Section, *The Independent Private Sector Inspector General* at 8 (2005), available at http://www.nysba.org/Content/ContentFolders4/CommercialandFederalLitigationSection/ComFedReports/IndependentPrivateSectorInspectorGeneral.pdf ("The IPSIG's tasks are to monitor, investigate and analyze the business and operations of the host organization, to determine where fraud and other illegalities (including violations of relevant law and regulations), waste and abuse are occurring or likely to occur, to report violations of law and regulations in conformity with appropriate standards … , to devise internal controls to counteract problems thus identified and to monitor the implementation of those solutions.").

28 *See* U.S. Dep't of Justice, U.S. Attorneys' Manual, Title 9, Criminal Resource Manual § 163, Acting Deputy Attorney Gen. Craig S. Morford, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-prosecution Agreements with Corporations" at 1 ("As part of some negotiated corporate agreements, there have been provisions pertaining to an independent corporate monitor. The corporation benefits from expertise in the area of corporate compliance from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace."); *see id.* 5-6.

29 *Supra* notes 1-2.

30 31 U.S.C. § 3729(a)(2). That person is also liable

for an additional penalty of between $5,500 and $11,000 per violation. 31 U.S.C. § 3729(a)(1), *amended by* 28 C.F.R. § 85.3(a)(9) (2000).

31 *See, e.g., United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, Civ. Action No. 04-cv-01224-MSK-CBS, 2010 U.S. Dist. LEXIS 97018, at *5-9 (D. Colo. Sept. 16, 2010) (noting that "[t]here is relatively little published authority applying § 3729(a)(2), and no authority addressing the details of its interpretation or operation," and holding that disclosure must be made to the Attorney General or the DOJ, and not to the agency upon which the claim was made, in order to qualify for reduced damages.). Other courts have declined to apply the provision on grounds that the defendant did not furnish all information, did not meet the 30 day deadline or disclosed only after learning of a government investigation into its conduct, but did not reach the issue of to whom the defendant must disclose. *See, e.g., United States v. Anchor Mortg. Corp.*, 711 F.3d 745, 748 (7th Cir. 2013); *United States ex rel. Erwin & Assoc. v. Hamilton Sec. Grp., Inc*, 370 F. Supp. 2d 18, 49-50 (D.D.C. 2005); *United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 415 (3rd Cir. 1999).

32 U.S. Dep't Health & Human Servs., Office of the Inspector Gen., Updated OIG's Provider Self-Disclosure Protocol 1 (Apr. 17, 2013), available at http://oig.hhs.gov/compliance/self-disclosure-info/files/Provider-Self-Disclosure-Protocol.pdf.

33 *Id.* at 3.

34 *Id*. at 2.

35 Joe Carlson, *The Value of Preparation: Levinson Talks on Compliance Audits, EHRs, Fraud*, Modernhealthcare.com (Apr. 26, 2013), http://www.modernhealthcare.com/article/20130426/MAGAZINE/301049888.

36 The Department of Defense Voluntary Disclosure Program was phased out in 2008 following the implementation of the Federal Acquisition Regulation Mandatory Disclosure Rule Program. *See* Brian D. Miller, Inspector General of the U.S. General Services Administration, The Federal Acquisition Regulation Mandatory Disclosure Rule Program at the U.S. General Services Administration Office of Inspector General (June 2012), http://www.gsaig.gov/?LinkServID=DA671464-E1CB-543C-4E17C0DADEEE5485.

37 U.S. Dep't of Defense, Inspector General, The Department of Defense Voluntary Disclosure Program 1 (Apr. 23, 1990), *available at* http://www.dodig.mil/IGInformation/archives/vdguidelines.pdf.

38 *Id.* at Forward.

39 *Id.* at 3-4.

40 U.S. Gov't Accountability Office, GAO/NSIAD-96-21, Department of Defense: Use and Administration of DOD's Voluntary Disclosure Program 10 (1996), *available* at http://www.gao.gov/assets/230/222143.pdf.

41 *Id*. at 13.

42 A multiplier of 1.5 times damages is consistent with the approach recently articulated by the HHS OIG, which stated that a "typical" multiplier of 1.5 times single damages is appropriate when corporations have self-disclosed violations, because they "deserve to pay a lower multiplier on single damages" in such cases. Dep't Health & Human Servs., *supra* note 32 at 2.

43 *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) ("Section 3730(e)(4)(A) furnishes an exclusive list of the ways in which a public disclosure must occur for the jurisdictional bar to apply."); *United States ex rel. Beauchamp v. Academi Training Center, Inc.*, No. 1:11cv371, 2013 WL 1189707, at *10 (E.D.Va. Mar. 21, 2013) ("[Section] 3730(e)(4)(A), as amended in 2010, identifies three sources through which a qualifying public disclosure may occur: (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party, (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation, or (iii) from the news media. And the Fourth Circuit

has made clear that this list of disclosure sources is exclusive; a public disclosure of fraud operates as a jurisdictional bar against a *qui tam* plaintiff's action only if the public disclosure is through one of the specified sources.") (internal quotations omitted); *United States ex rel. Spay v. CVS Caremark Corp.*, 913 F. Supp. 2d 125, 182-183 (2012) (defendant's submission of data to government when such data were not made available to the public does not trigger the jurisdictional bar provisions of Section 3730(e)(4)(A)).

44 *United States ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 309 (5th Cir. 1999).

45 31 U.S.C. § 3730(e)(4).

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

47 31 U.S.C. § 3730(b)(5).

48 *United States ex. rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001).

49 31 U.S.C. § 3730(b)(5).

50 Michael D. Greenberg, RAND Corp., *For Whom the Whistle Blows: Advancing Corporate Compliance and Integrity Efforts in the Era of Dodd-Frank* 18 (2011) *available at* http://www.rand.org/pubs/conf_proceedings/CF290.html.

51 USSG *Guidelines Manual* § 8B2.1(b)(5)(C).

52 Final Rule: Implementation of the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, Exchange Act Release No. 36-64545 (May 25, 2011), 76 Fed. Reg. 34,300, 34,329, 34,360 (June 13, 2011); *but see* Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting,"* 45 Conn. L. Rev. 483, 486 (2012) (noting that SEC's provisions "do not go far enough because whistleblowers are not required to use a company's internal reporting system").

53 *United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011).

54 Ethics Resource Center, *2011 National Business Ethics Survey* 53 (2012), *available at* http://www.ethics.org/nbes/files/FinalNBES-web.pdf; *see also* Ethics Resource Center, *Inside the Mind of a Whistleblower* 13 (2012), *available at* http://www.ethics.org/nbes/files/reportingFinal.pdf ("In 2011 fewer than one in five reporters (18 percent) chose to tell someone outside their company, either initially or in a secondary report. Only three percent of reports were made externally at first, but of the secondary reports almost four times as many were made to someone outside (11 percent)."); *id.* at 14 ("In companies without ethics advice lines and/or anonymous reporting mechanisms, the likelihood an employee will not report internally and will *only* report to an external location is three times as great."); Aaron S. Kesselheim, David M. Studdert & Michelle M. Mello, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362:19 New Engl. J. Med. 1832, 1834 (May 13, 2010) ("Nearly all [eighteen of twenty-two] insiders first tried to fix matters internally by talking to their superiors, filing an internal complaints, or both.").

55 National Whistleblowers Center, *Impact of Qui tam Laws on Internal Compliance: A Report to the Securities Exchange Commission* 4 (Dec. 17, 2010), available at http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/nwcreporttosecfinal.pdf.

56 *See* Vega, 45 Conn. L. Rev. at 509-510 (discussing the difference between "bounty hunters" who seek only a financial reward and are more likely to report externally because of the financial incentive and "'real' whistleblowers" who are more willing to take proactive measures to prevent or remedy compliance problems).

57 U.S. Chamber Institute for Legal Reform, *The Exclusion Illusion: Fixing a Flawed Health Care Fraud Enforcement System* 20-26 (2012) ("*Exclusion Illusion*"). *See* Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 Ala. L. Rev. 239,

248 (1999) (discussing federal administrative sanctions, including exclusion and debarment, that the government may or must use to punish healthcare providers).

58 *See Exclusion Illusion* 4, 8-18.

59 *See, e.g.*, Federal Acquisition Regulation § 9.406, 48 C.F.R. § 9.406-2; Congressional Research Service, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* 5-6 (Jan. 6, 2012) (listing "violations of the civil False Claims Act" as one cause for permissive debarment); *id.* (under FAR "debarment may be imposed when government officials find, by a preponderance of the evidence, that the contractor committed certain offenses" including FCA violations); *id.* at 1 ("Debarred contractors are ineligible for government contracts for a fixed period of time, which can vary depending upon the authority under which the contractor is debarred and the seriousness of the conduct underlying the debarment; while suspended contractors are ineligible for the duration of any investigation into or litigation involving their conduct.").

60 *Suspensions, debarments jump 73 percent in federal contracting in 2011*, Wash. Post (Sept. 30, 2012), *available at* http://articles.washingtonpost.com/2012-09-30/business/35497386_1_professional-services-council-contractors-federal-agencies.

61 *See* Vicki W. Girard, *Punishing Pharmaceutical Companies for Unlawful Promotion of Approved Drugs: Why the False Claims Act Is the Wrong Rx,*, 12 J. Health Care L. & Pol'y 119 ("Companies settle these cases largely to avoid the potential loss of revenue associated with the exclusion regime administered by the U.S. Department of Health and Human Services, under which companies risk losing the right to have their products reimbursed under federal health care programs."); Leonard Post, *Heath Care Fraud Score: Big Fines, Little Jail; Recent Acquittals Spark Criticism That U.S. Fraud Unit Is Overzealous*, NAT'L L. J., July 26, 2004 (quoting attorney David Stetler, defense counsel who successfully represented a TAP vice president in the TAP criminal trial: "A company has no choice – they have to settle no matter how minor their exposure may be because the threat of debarment is so great, even for relatively minor conduct."); Neil Weinberg, *The Dark Side of Whistleblowing*, Forbes.com, (Mar. 14, 2005), http://www.forbes.com/forbes/2005/0314/090.html, (quoting TAP's president as stating that fear of debarment was primary reason for settlement).

62 *See* Girard, 12 J. Health Care L. & Pol'y at 153 (2009) ("Because to date the prosecution of unlawful promotion under the False Claims Act almost always resulted in negotiated settlements, pharmaceutical manufacturers lack the benefit of precedent and reliable information on which to base decisions about the legitimacy of the DOJ's use of the False Claims Act."); Nicole Huberfeld, *Pharma on the Hot Seat*, 40 J. Health L. 241, 245 (2007) ("From an industry perspective, one major disadvantage of settlements (as opposed to judgments) is that the precedential and informational function that case law serves in a common law system is largely absent. . . . [E]ach new investigation presents legal uncertainty for the company subject to inquiry because the bounds of the law remain unknown."). As one federal district judge observed, "[b]ecause the risk of loss in a False Claim Act case carries potentially devastating penalties, [ ] unlike most litigation or even an administrative recoupment action," companies are discouraged from even attempting to defend themselves in court. *Ohio Hosp. Ass'n v. Shalala*, 978 F. Supp. 735, 740 n.6 (N.D. Ohio 1997), *aff'd in part, rev'd in part*, 201 F.3d 418 (6th Cir. 1999); *see id.* (litigating in court "is a risk the hospitals feel they cannot take—even if they believe their chances of prevailing would be great").

63 *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime and Drugs of the S. Comm. On the Judiciary*, 111th Cong. 25 (2010) (Written Response of Assoc. Deputy Att'y Gen. Greg Andres, Criminal Div., U.S. Dep't of Justice, to

Sen. Coons' questions for the record).

64 *Id.* at 25-26.

65 48 C.F.R. § 9.406-1(a)(1) (Federal Acquisition Regulation).

66 The high-water mark is the $96 million relator's share paid from a $750 million settlement from a pharmaceutical company. *See* Lisa Flam, *Ex-Worker Wins $96M for Blowing Whistle on Drug Giant*, AOLNews.com (Oct. 27, 2010), http://www.aolnews.com/2010/10/27/ex-worker-wins-96m-for-blowing-whistle-on-drug-giant/. Notably, available evidence indicates that whistleblowers are not motivated to come forward for purely financial reasons. For example, a 2010 New England Journal of Medicine identified personal ethical standards, a desire to prevent risks to public health, a duty to bring criminals to justice, and a sense that filing suit would protect them from retaliation or other legal consequences, as the motivations for blowing the whistle – not the FCA's bounty provisions alone. *See* Kesselheim, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, *supra* note 54, at 1834-35.

67 U.S. Chamber Institute for Legal Reform, *Preventing Overpayments to Qui tam Plaintiffs: Proposed Amendments to the False Claims Act* (Oct. 2011).

68 Jack Meyer, Taxpayers Against Fraud, *The Importance of Whistleblowers to Reducing Fraud Against the Federal Government and Recovering Funds for Taxpayers: A Report Prepared for Taxpayers Against Fraud* 3, 12 (2012).

69 *Id.* at 3, 5-9.

70 U.S. Gov't Accountability Office, *supra* note 15 (reflecting FCA Settlements from 1985-2005).

71 Assuming government intervention.

72 31 U.S.C. § 3730(e)(4)(A). *See, e.g., United States ex rel. Biddle v. Bd. of Trustees of Leland Stanford Jr. Univ.,* 161 F.3d 533, 540 (9th Cir. 1998); *United States ex rel. Fine v. Chevron, U.S.A., Inc.,* 72 F.3d 740 (9th Cir. 1995) (en banc).

73 *See, e.g., Little v. Shell Expl. & Prod. Co.*, 690 F.3d 282, 287-89 (5th Cir. 2012); *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1212 (10th Cir. 2003).

74 As early as 1992, the Assistant Attorney General for the DOJ Civil Division testified before Congress to oppose a bill that would have expressly allowed government employees to pursue *qui tam* suits: "[t]he public's faith in government could only be diminished by a regime that allows government employees who are already paid by the taxpayer to discover and fight fraud, to divert the government's damages for their own private gain merely for doing what they were paid to do in the first place." *False Claims Act Technical Amendments of 1992: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong. 14-15 (Prepared Statement of Stuart M. Gerson, Ass't Attorney Gen., Civil Division, U.S. Dep't of Justice).

75 *See* Brief for Amicus Curiae the United States of America in Support of Appellees, *Little v. Shell Expl. & Prod. Co.*,, No. 11-20320, 2011 WL 5834291 (5th Cir. July 21, 2012). The courts have not yet significantly addressed the serious conflict of interest issues set forth in the DOJ brief.

76 18 U.S.C. § 208. *See also* 18 U.S.C. § 209 (limits supplementation of federal employee's government salary); 18 U.S.C. § 205 (prohibits federal employees from receiving a share in a claim against the United States).

77 5 C.F.R. §§ 2635.101(b)(7), 2635.702 (1993).

78 5 C.F.R. §§ 2635.704, 2635.705.

79 5 C.F.R. §§ 2635.101(b)(3), 2635.703(a).

80 5 C.F.R. §§ 2635.402, 2635.501, 2635.502.

81 5 C.F.R. § 2635.403.

82 U.S. Gov't Accountability Office, GAO-12-331G, Government Auditing Standards Ch. 3.03 (2011) ("The Yellow Book").

83 The Yellow Book, ch. 3.04.

84 *See Fine*, 72 F.3d at 745.

85 *See Fine*, 72 F.3d at 742.

86 *See United States ex rel. Little v. ENI Petroleum Co.*, Case No. CIV-05-1397-M (W.D. Okla. Nov. 30, 2005), *Little v. ENI Petroleum Co.*, Case No. CIV-06-120-M (W.D. Okla. Feb. 3, 2006); *Little v. Royal Dutch Shell plc*, Case No. CIV-06-00156 (W.D. Okla. Feb. 15, 2006); *Little v. Royal Dutch Shell plc*, Case No. CIV-06-00260 (W.D. Okla. Mar. 14, 2006). The outcomes of these lawsuits further highlight the need for a regime change that bars such lawsuits. The November 30, 2005, lawsuit, which was based on claims that the government investigated and determined lacked merit, did not survive the pleading stage. The February 3, 2006 lawsuit suffered a similar fate – the government investigated the claims and determined that they lacked merit because the defendants had acted pursuant to directions by MMS officials. Three years later, the district court granted summary judgment to the defendants because MMS had reviewed the issue and determined that the defendants' conduct was "appropriate and allowable." *Little v. ENI Petroleum Co.*, Case No. CIV-06-120-M, 2009 WL 2424215, at *4 (W.D. Okla. July 31, 2009). By contrast, the Fifth Circuit recently ruled that Little and another MMS auditor, Joel Arnold, may serve as relators in the remaining two lawsuits, which have been pending for seven years now and are based on claims that the government investigated and found lacked merit. *Little v. Shell Expl. & Prod. Co.*, 690 F.3d 282 (5th Cir. 2012).

87 U.S. Dep't of Interior, Office of the Inspector Gen., Investigative Report: Minerals Management Service False Claims Allegations 3 (Sept. 7, 2007).

88 *Id*.

89 *Unites States v. Enriquez*, No. 90-6105-civ, 1991 U.S. Dist. LEXIS 15972, at *4 (S.D. Fla. July 12, 1991).

90 *Enriquez*, 1991 U.S. Dist LEXIS 15972, at *12.

91 *Holmes*, 318 F.3d at 1223.

92 *See Government, bulk mailer settle for $2.4 million over alleged postal violations*, The Associated Press State & Local Wire, July 23, 2003; *Salida, Colo., Insurance Firm Facing $ 2.4 Million Bill from Post Office*, The Pueblo Chieftain, July 26, 2003.

93 *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496 (11th Cir. 1991).

94 *See United States ex. rel Foust v. Grp. Hospitalization and Med. Servs.*, 26 F. Supp. 2d 60, 71 (D.D.C. 1998).

95 *See, e.g., Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305-07 (3d Cir. 2011); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 996–98 (9th Cir. 2010); *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000); *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266, 1269 (D.C. Cir. 2010) ("*SAIC*"); *but see Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 786 n.8 (4th Cir. 1999) (stating without addressing validity of implied false certification theory under FCA, that its precedent makes the theory "questionable").

96 *United States ex rel. Lamers v. City of Green Bay,* 168 F.3d 1013, 1020 (7th Cir. 1999).

97 31 U.S.C. § 3729(a)(1)(A).

98 *Mikes,* 274 F.3d at 700 ("[I]mplied false certification is appropriately applied only when the underlying statute or regulation . . . *expressly* states the provider must comply in order to be paid."); *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 798-99 (8th Cir. 2011) (dismissing a complaint asserting FCA liability on an implied certification theory because the regulations the claimant allegedly violated did not require compliance as a condition of payment or "suggest that noncompliance with these regulatory requirements may result in the wholesale recovery of claims previously paid"); *Wilkins*, 659 F.3d at 309-10 (dismissing a claim because the plaintiff did "not cite to any regulation

demonstrating that a participant's compliance with [certain] marketing regulations is a condition for its receipt of payment from the Government.").

99 *SAIC*, 626 F.3d at 1269; *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 387-88 (1st Cir.), *cert. denied*, 132 S. Ct. 815 (2011).

100 *Mikes,* 274 F.3d at 699.

101 *Vigil*, 639 F.3d at 795.

102 *Wilkins*, 659 F.3d at 310.

103 *SAIC*, 626 F.3d at 1269-71.

104 *Hutcheson*, 647 F.3d at 387-88.

105 *See, e.g.*, *Vigil*, 636 F.3d at 795 (FCA relator sought treble damages based on *two billion* dollars of student loan subsidies); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d at 1168, 1174-78 (holding that relator stated a valid FCA claim for recovery of *hundreds of millions* of dollars in financial aid against a college that violated a marketing regulation unrelated to the financial aid itself).

106 *Cf. SAIC*, 626 F.3d at 1270.

107 *See Wilkins*, 659 F.3d at 310; *United States ex rel. Conner v. Salina Reg'l Health Ctr.*, 543 F.3d 1211, 1221 (10th Cir. 2008).

108 *See, e.g.*, *Wilkins*, 659 F.3d at 310; *Vigil*, 639 F.3d at 798-99; *Conner*, 543 F.3d at 1220-21.

109 *Conner*, 543 F.3d at 1221.

110 *See, e.g.*, Rule 142(b) of the United States Tax Court Rules of Practice & Procedures; *Smith v. Comm'r of Internal Revenue*, 926 F.2d 1470, 1475 (6th Cir. 1991) (tax fraud); *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009) (trademark fraud); *Scott Paper Co. v. Fort Howard Paper Co.*, 432 F.2d 1198, 1204 (7th Cir. 1970) (patent fraud).

111 *See, e.g.*, *Chopp v. Welbourne & Purdy Agency*, 522 N.Y.S.2d 367, 369 (N.Y. App. Div. 1987) (under common law, civil fraud must be proved by clear and convincing evidence); *U.S. Bancorp Equip. Fin., Inc. v. Rubashkin*, 950 N.Y.S.2d 767, 770 (N.Y. App. Div. 2012) (standard of proof to establish actual fraud under New York Debtor and Creditor Law § 276 is clear and convincing evidence); *Tran v. Metro. Life Ins. Co.*, 408 F.3d 130, 135 n.8 (3d Cir. 2005) (Pennsylvania common law); *Disner v. Westinghouse Elec. Corp.*, 726 F.2d 1106, 1109 (6th Cir. 1984) (Michigan common law); *Certain Underwriters at Lloyd's of London v. Alesi*, 843 F. Supp. 2d. 517, 530 (D.N.J. 2011) (New Jersey common law); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 534 (S.D.N.Y. 2011) (New York common law); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 856 (Ill. 2005) (Illinois common law).

112 *See* 31 U.S.C. § 3731.

113 *Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 (2d Cir. 1979).

114 *See, e.g., Addington v. Texas*, 441 U.S. 418, 424 (1979) (cases involving "allegations of fraud or some other quasi-criminal wrongdoing" are generally adjudicated under a heightened standard of proof).

115 *In re Bose Corp.*, 580 F.3d at 1243 (quoting *Smith Int'l, Inc.v. Olin Corp.,* 209 U.S.P.Q. (BNA) 1033, 1044 (T.T.A.B. 1981); *see Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (penalties involving "stigma" require "an intermediate standard of proof—'clear and convincing evidence'" as a matter of "fundamental fairness").

116 *See Addington v. Texas*, 441 U.S. at 424 (typically, "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" as well as cases involving extraordinary penalties are governed by a "clear, unequivocal and convincing" standard of proof).

117 *Greenwich Collieries v. Dir., Office of Workers' Comp. Programs*, 990 F.2d 730, 733 (3d Cir. 1993) (*quoting* Black's Law Dictionary 1182 (6th ed. 1990)), *aff'd*, 512 U.S. 267 (1994).

118 *See Turpin v. Merrell Dow Pharm., Inc.*, 959 F.2d 1349, 1357 & n.2 (6th Cir. 1992).

119 31 U.S.C. § 3729(b)(1)(A)(iii); *see, e.g.*, *United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997).

120 *See, e.g.*, *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946); *Sports Racing Servs., Inc. v. Sports Car Club of America, Inc.*, 131 F.3d 874, 889 (10th Cir. 1997).

121 *United States v. Bornstein*, 423 U.S. 303, 316 n.13 (1976). *See, e.g., Ab-Tech Constr. Inc. v. United States*, 31 Fed. Cl. 429, 433-34 (Fed. Cl. 1994) (no damages where government "got essentially what it paid for"), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

122 *United States ex rel. Roby v. Boeing Co.*, 79 F. Supp. 2d 877, 885 (S.D. Ohio 1999).

123 The following courts have accepted this government theory of damages in certain circumstances. *United States ex rel. Longhi v. Lithium Power Techs.*, 575 F.3d 458, 473 (5th Cir. 2009) (government's single damages were the entire amount of SBIR grant paid because there were no tangible benefit to the Government and it would be "impossible" to measure the intangible benefit of helping eligible small businesses.); *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 88 (2d Cir. 2012) (government did not get the "neuropsychology with a strong emphasis upon research training with HIV/AIDS" that it allegedly bargained for in a grant and therefore damages were the entire amount paid.); *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2011) (government's damages are the entire amount paid to a provider that was tainted by a kickback; no value allowed for services actually provided by the provider).

124 *See United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 906-07 (D.C. Cir. 2010); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943).

125 *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 840 (D. C. Cir. 2012).

126 700 F. Supp. 2d 926, 937-38 (M.D. Tenn. 2010), *aff'd in part, rev'd in part*, 697 F.3d 345 (6th Cir. 2012).

127 697 F.3d 78, 88 (2d Cir. 2012).

128 575 F.3d 458, 473 (5th Cir. 2009).

129 No. 05-33-DRH, 2012 U.S. Dist. LEXIS 94837, at *32 (S. D. Ill. July 10, 2012).

130 *United States v. Bornstein,* 423 U.S. at 316-17.

131 Nos. 1:02cv1168, 1:07cv1198 (AJT/TRJ), 2012 U.S. Dist. LEXIS 18445 (E.D. Va. Feb. 14, 2012).

132 840 F. Supp. 71 (E.D. Mich. 1993).

133 538 U.S. 119, 130-131 (2003).

134 *Id.* at 131 n.9 (citing S. Rep. No. 99-345, at 39 (1986); H. Rep. No. 99-660, at 20 (1986). Furthermore, standard deterrence theory – a cornerstone of legal theory regarding the imposition of punitive damages – argues that penalties above and beyond actual damages (subject to whatever multiplier is needed to offset ancillary costs of fraud) should be imposed only where the wrongdoer has a chance of escaping detection. With the adoption of the reforms proposed above, which are designed to increase self-disclosure (i.e., detection) of fraud, there is less need for penalties where there are no actual damages. The award of an additional per-claim multiplier on top of multiplied damages is unnecessary to accomplish these goals of compensation and deterrence, and unwisely dissociates the defendant's financial liability from the government's loss. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 887-896 (Feb. 2008).

135 41 U.S.C. 7103(c)(2).

136 *Daewoo Eng'g and Constr. Co. v. United States*, 557 F.3d 1332, 1340 (Fed. Cir. 2009).

137 31 U.S.C. § 3731(b).

138 H. Rep. No. 99-660, at 25 (1986).

139 18 U.S.C. § 3287.

140 *United States ex rel. Carter v. Halliburton*, 710 F.3d 171, 180-81 (4th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3010 (U.S. June 24, 2013) (No. 12-1497).

141 Wartime Enforcement of Fraud Act of 2008, S. Rep. No. 110-431, at 2, 4 (emphasis added).

142 *See, e.g., United States ex rel. Baker v. Cmty. Health Sys., Inc.*, No. Civ. 05-279 WJ/ACT, 2012 WL 5387069, at *6-9 (D.N.M. Oct. 3, 2012) (ordering sanctions against Government because its failures to preserve relevant documents were "woefully inadequate and go beyond mere negligence"); *Miller v. Holzmann*, No. CA 95-01231 RCL/JMF, 2007 WL 172327, at *5-6 (D.D.C. Jan. 17, 2007) (holding that "the government failed to comply" with its obligations to preserve documents in anticipation of false claims litigation and inform relevant custodians of their obligations to retain documents and concluding that "its failure was unreasonable"); *United States v. Fed. Res. Corp.*, No. 2:11-cv-00127 BLW, 2012 WL 1623408, at *3-4 (D. Idaho May 9, 2012) (admonishing Government for failure to place a litigation hold on documents possessed by the agencies most likely to possess relevant documents in CERCLA action); *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 61 (2003) (noting inadequacy of Government's policy on record preservation in breach of contract action).

143 *See Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (the Government, like any other entity, has an obligation to preserve evidence when it has notice that the evidence is relevant to likely future litigation); *Renda Marine*, 58 Fed. Cl. at 61 (same).

144 *Nation-Wide Check Corp. v. Forest Hills Distrib., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (opinion of Breyer).

145 *Kronisch*, 150 F.3d at 126.

146 31 U.S.C. § 3733(a)(1).

147 *Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 93 (2011) (Statement of Tony West, Assistant Attorney General for the Civil Division).

148 U.S. Dep't of Justice, Antitrust Division Manual ch. III, § E(1)(d) (5th ed. 2013).

149 *Id.*

150 31 U.S.C. § 3733(a)(1).

151 *United States v. Bradley*, 644 F.3d 1213, 1248 n.77 (11th Cir. 2011) (quoting *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1236 n.1 (11th Cir. 1999)), *cert. denied*, 132 S. Ct. 2375 (2012).

152 31 U.S.C. § 3733(k).

153 *See* Antitrust Division Manual ch. III, § E(6)(b)(v)(c).

154 Antitrust Division Manual ch. III, § E(1)(b).

155 *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1139 (N.D. Ala. 2005) (quoting *United States v. Parrot*, 248 F. Supp. 196, 200 (D.D.C. 1965)).

156 S. Rep. No. 345, 99th Cong., 2d Sess. (July 28, 1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266.

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