REPORT TO THE COMMISSION OF INQUIRY ON THE AWARDING AND MANAGEMENT OF PUBLIC CONTRACTS IN THE CONSTRUCTION INDUSTRY:

THE UNITED STATES FALSE CLAIMS ACT

February 15, 2013

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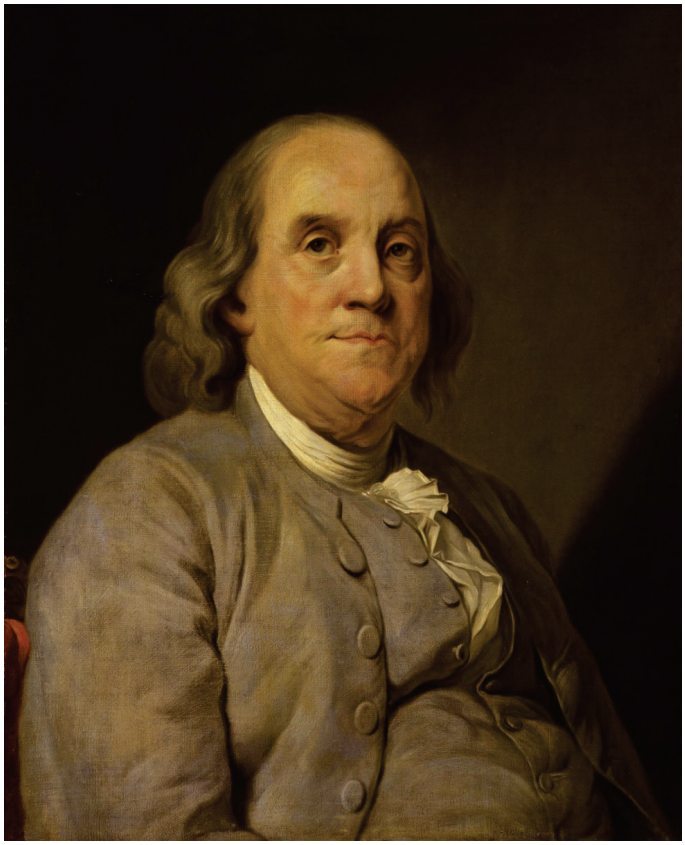

"...there is no kind of dishonesty, into which otherwise good people more easily and frequently fall, than that of defrauding Government..."

-Benjamin Franklin

Franklin, Benjamin. *The Complete Works of Benjamin Franklin*. New York: G.P. Putnam's Sons, 1887. Google Play. 28 Oct 2013.

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EXECUTIVE SUMMARY

This Report describes an effective tool, a False Claims Act (FCA) to combat corruption in Government construction and procurement contracts and to assist the existing Governmental entities in uncovering bid rigging, false billing, kickbacks and other dishonest behavior by Government contractors.

The Report begins with a description of why in principle this type of legislation would benefit Québec and why existing legal tools are inherently not as effective as the public-private FCA partnership.

There then follows eight parts. Each part concludes with a ➢Key Point for policy makers in Québec.

Part I describes the birth and evolution of the United States False Claims Act over the last 150 years. The debates over the shape and powers under the Act are important because they foretell the elements of a modern policy debate about the merits of such legislation for Québec.

> ➢ *The False Claims Act is 150 years old and, though fought by corrupt corporations and public bureaucracy, has endured and become the single most effective Governmental tool to fight fraud in public contracts.*

Part II describes in some detail the basic legal principles of the Modern False Claims Act that was passed into law in 1986. Part II begins with a section which delineates the basic legal constructs of liability, a claim, damages, penalties, protections for the Relator, attorney's fees, the statute of limitations, burden of proof and limitations on abuse by citizens. The second section describes in some detail the Qui Tam Procedure beginning with the disclosure and filing of the complaint, the investigation, the role of the Relator when the Government does or does not intervene and the awards of Relator Share.

> ➢ *The U.S. False Claims Act has been refined over its 150 year existence to carefully delineate liability, damages, penalties, protections, legal fees and costs, and the all important Relator's Share award incentive.*

Part III contains a discussion of the development of state false claims act legislation within a Federal system. It shows how the state and local systems can both complement the Federal FCA and in various circumstances develop new or more effective mechanisms.

> ➢ *The Federal, State (Provincial) and Local Government False Claims Act statutory schemes can act in unison to ferret out fraud, privately prosecute it and reward whistleblowers.*

Part IV describes new United States Whistleblower Programs established by legislation for the Internal Revenue Service, The Securities and Exchange Commission and the Commodity Futures Trading Commission. These new programs are definitely not based on the False Claims Act sine qua non which is a full share of the proceeds and the independent ability of the citizen to proceed when the Governmental entities decline to do so.

- *Merely having a financial reward system is not effective. A vibrant False Claims system is based on a reward and privately initiated prosecution.*

Part V gives an overview of the legal process and litigation of the various aspects of the False Claims Act. This overview shows that over time the appellate process often reshapes the impact of the Act in ways not contemplated by the legislature. This in turn requires the Act to be amended to continue to be effective to combat fraud.

- *The False Claims statutory language must be updated from time to time to take into account ongoing judicial interpretations.*

Part VI describes the success of the False Claims Act in uncovering and deterring fraud against the Government. The section describes how citizens can effectively fight fraud and how it is particularly effective in dealing with kickbacks and bid-rigging in the construction of Government projects.

- *The FCA is very effective at bringing construction kickbacks and poor quality issues into the open. Whistleblowers have unearthed fraudulent schemes that would be very hard or impossible for trained Government investigators to discover on their own.*

Part VII describes the success of the modern False Claims Act since the 1986 amendments. The section details the significant increase in the number of cases brought, the amount of damages collected and the limited negative impact of the act on the investigative resources of the Government.

- *The FCA has resulted in $35 billion of recoveries since 1986 and in recent years recovered more than $3 billion per year on average.*

Part VIII of the Report deals with the various policy and legal issues which might be raised against the creation of a False Claims Act for Québec. The section shows that while there would undoubtedly be a vigorous public debate, there are clearly benefits to such legislation and there are no significant valid policy or legal impediments to the enactment of such a law.

- *There do not appear to be substantial policy or legal impediments to the adoption of a False Claims Act for Québec.*

The Report reaches the following conclusion:

- *A False Claims Act for Québec would be a very effective tool for preventing collusion and corruption in the awarding of public contracts with a focus on the construction industry.*

POLICY CONCLUSIONS FOR QUÉBEC

A number of allegations have been made before this Commission concerning fraud and corruption in Government contracting and procurement in construction projects. It has then undertaken a number of studies concerning how to combat the problems of fraud and corruption in the future. This Report provides the legislative template for a significant tool to fight fraud and to insure that the investigative and prosecutorial institutions of Québec shall remain vigilant in uncovering, deterring and prosecuting fraud against the Government at all levels.

The Problem of Fraud and Corruption

Québec is not alone or unique among modern industrialized countries in facing major frauds from large well capitalized corporate entities, nor is it alone among those countries in having a wide spread belief that the institutions of Government are up to the task of combating such fraud and corruption. It is also not the only industrialized nation considering adoption of a False Claims Act. Please see *The FCA and Australia* by Lesley Skillen, Appendix A.

What is unique about Québec is that it is in the process of documenting the extent of the reach of fraud and corruption and of suggesting new tools to deal with the propensity of entities to attempt to defraud the Government.

The perennial problem of fraud against the Government is that the information about the fraud is not brought forward and there are rarely adequate Governmental resources in place to deal with fraud. The usual tools are not up to the task of uncovering large sophisticated frauds against the Government. Auditors reviewing contracts rarely uncover frauds for the very reason that they are reviewing the falsified fraudulent books and records. While tip or hotlines can be useful, by their very nature they keep the tipster anonymous and provide very little detail about the suspect activities. Protecting whistleblowers in their employment can be helpful but rarely would motivate an individual whistleblower to jeopardize his entire career. Similarly, having civil servants dispense cash rewards for information rarely is effective since the sums are small and the bureaucrats are loath to gift taxpayers' money to informers.

At a more fundamental level many of the strengths of the Governmental institutions involved, such as careful husbanding of investigative resources for "meritorious" cases or bringing cases that have a very high probability of success, will by definition not uncover carefully hidden secret frauds against the Government. Civil servants rarely use their broad powers of investigation to confront large well financed corporate entities which have both phalanxes of professional lawyers and accountants and deep ties to elected officials unless those civil servants have clear inside information about the frauds.

The False Claims Act Solution

This Report describes the single most effective tool used in the United States to ferret out, redress and stop fraud against the Government. Put in its simplest terms, the legislation empowers individual citizens with the actual secret information about fraud to bring cases in the name of the Government against individuals and corporations who defraud the

Government. It gives those individuals and their attorneys a strong financial incentive to risk income, career and their personal safety to stop the fraud and return some three times the amounts taken to the public purse. Most importantly the legislation forges a public-private partnership between the private citizens with the information and the institutions of Government to pursue the cases. This public-private partnership allows for the Government to maintain control of the prosecution of those cases and to make all the crucial decisions about both the investigation and case strategy including the decision not to intervene and devote Governmental resources to the case. Most importantly the citizen can use his own resources to pursue the case upon the behalf of the Government if they believe they have sufficient information about the fraud. Frivolous or vexatious private cases can be deterred by the provisions awarding the honest defendant with its attorney's fees.

PART I. THE BIRTH OF THE FALSE CLAIMS ACT

THE HISTORY, GENESIS AND PASSAGE OF THE UNITED STATES FALSE CLAIMS ACT

Abraham Lincoln and the Creation of the False Claims Act in 1863

At the beginning of the United States Civil War, the Union was doing very badly indeed. The defeats at Bull Run and Ball's Bluff were blamed on not only poor leadership and very bad generals, but a very corrupt War Department headed by Simon Cameron. Cameron was widely believed to be one of the most corrupt politicians of the war era whom Congressman Thaddeus Stevens said would steal a red hot stove. Cameron's most famous quote is, "An honest politician is one who, when he is bought, will stay bought."[1] After Cameron was removed in January 1862, a congressional committee censured the handling of War Department purchases which included "shoddy" material for soldiers' uniforms, sawdust instead of gunpowder and tainted meat.

Lincoln replaced Cameron with Edwin M. Stanton in late January 1862 and he quickly changed the public perception of the War Department. After a year of dealing with the extensive material supply problem it became clear that the Government did not have adequate tools to combat fraud and profiteering. Congressional hearings held in 1862 produced extensive testimony about poor quality goods and fraud in the War Department procurement process.

While there is no historical record of Lincoln's views on the legislation we do know that Lincoln, an able lawyer in his own right, knew that there was a tradition in England and the colonies of both double or treble damages for civil wrongdoing and a system of allowing informers to sue upon behalf of the king or colonial Government, as well as the informer, where harm had been done to public order and safety.[2]

The Latin words used in the English statutes for this right to bring suit upon behalf of the king and the individual were: "Qui tam pro domino rege quam pro se ipso in hac parte sequitur" or Qui Tam for short.[3] In the Americas, the First Continental Congress of the United States enacted Qui Tam legislation allowing private parties to bring actions in debt under penal statutes.[4]

[1] Johnson, Allen. *Chronicles of America Series*. New Haven: Yale University Press, 1918.
[2] This concept of citizen prosecutor can be seen in Ancient Greece. The rights of citizens who take the initiative (*Ho boulomenos*) to bring a public law suit (*graphe*) was described by Solon in the early 6th Century B.C. when he established the reforms which became the foundation of Athenian Democracy. See Johnson, 39.
[3] Blackstone, William. *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769*. Chicago: University of Chicago Press, 1979.
[4] *Journals of the Continental Congress: 1774-1789*. Washington: Government Printing Office, 1908. 732-33.

In 1863 in a still largely rural society, the expenditures on the Union Army by the War Department amounted to almost 12percent of the North's gross domestic product.[5] The largest and most sophisticated business entities of that era found that the military and civil servants were both unmotivated and ill equipped to uncover fraud. Some of the very same individuals who would transform the United States into an industrial powerhouse were only too willing to feed at the public trough. Cornelius Vanderbilt, Jr., supplied rotting hulls and unseaworthy ships.[6] Members of the cabinet and military command were also more than willing to participate. The Union Army got not sugar but "sand; for coffee, rye, for leather, something no better than brown paper, for sound horses and mules, spavined beasts and dying donkeys; and for serviceable musket and pistol, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories."[7]

The reward was based "upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."[8]

-Senator Howard, 37th Congress, 3rd Session, 1863

The original False Claims Act was designed specifically to staunch the ever-increasing amount of War Department procurement fraud by rewarding citizens acting as private attorney generals, or if one was a supplier of war material, bounty hunters, to prosecute the civil action and receive 50percent of all of the funds produced by the civil law suit brought in the name of the United States Government. The "Informer's Act"[9] was designed to give participants in the contracting process a financial incentive to bring forward the fraud in court. At the time the Act was drafted there was a well-founded belief that the Government employees themselves were involved in the fraud. A certain inaptly named Army Quartermaster Major Justus McKinstry was court marshaled for his corrupt procurement practices.[10] As originally drafted, this process was done completely independently from the Government prosecutors who it was feared might be subject to fraudulent coercion themselves.

Senate Bill 467, "to prevent and punish frauds upon the Government of the United States," after much debate in the Senate was enacted and signed by President Lincoln on March 2, 1863.[11] The 1863 False Claims Act contained the following important concepts:

- The Act merely required falsity in Government contracting. It did not require specific intent to commit a crime.
- The Act offered a reward to the informer who, in the words of Senator Howard, "comes into court and betrays his co-conspirator."[12] In the 1863 Act this reward was half of the sums collected, which were to be double damages for the harm against the Union Government.

[5] Daggett, Stephen. , Costs of Major U.S. Wars. CRS Report RS22926. Washington, DC: Library of Congress, Congressional Research Service, June 29, 2010.
[6] Andrews, Wayne, *The Vanderbilt Legend*. New York: Harcourt, Brace & Co., 1941. 77-84.
[7] Tomes, Robert. "The fortunes of war. How they are made and spent." 29 *Harper's Monthly Mag*. 228, 1864.
[8] *Cong. Globe*, 37th Cong. 3rd Sess. 955-56, (1863).
[9] *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 352, 1998.
[10] H. R. Rep. No. 37-49 (1863).
[11] Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, (1863).
[12] *Cong. Globe*, 37th Cong. 3rd Sess. 955-56, (1863).

- The original Act prohibited:[13]
  - "Making or causing to be made...any claim upon or against the Government of the United States, knowing such claim to be false, fictitious or fraudulent"
  - "Making, using or causing to be made or used, any false bill...knowing that it contains a false or fraudulent statement or entry..."
  - "Forging or counterfeiting...any signature of any person in the military, naval or civil service of the United States upon any bill...for the purpose of obtaining...from the Government any payment or allowance"
  - "Conspiring, agreeing or combining to cheat or defraud the Government by obtaining, or aiding and assisting to obtain, the payment or allowance of any false or fraudulent claim"
- The informer referred to in the Act as the "Relator" was originally given the role of private attorney general and was rewarded for prosecuting the action on behalf of themselves as well as the United States without any participation by the Government which had no right to participate or "intervene" in the litigation.
- The Act had a six year statute of limitations from the doing or committing of the act.

It is unclear in the mist of time whether "Lincoln's Law" contributed greatly to General Lee's surrender on April 9, 1865, at the Appomattox Courthouse in Virginia. What is clear is that the False Claims Act survived for 150 years and emerged anew at the end of the 20th century as the single most effective tool against fraud upon the Government.

The Ongoing Debate about the Validity of the False Claims Act and the Ensuing Changes to the Statute

The FCA, "was passed upon the theory, based on experience as old as modern civilization that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain."[14]

-Judge Deady, District Court of Oregon, U.S. v Griswold, 1885

The friends and adversaries to the concept of a citizen-initiated prosecutorial supervision of Government contracting in the United States have been debating and changing the statute on and off for the past 150 years. Not surprisingly, some of the most cogent criticism of the mechanism has come from the very prosecutors in the Department of Justice who one might naively think would welcome information and assistance.

The original FCA encompassed both criminal and civil violations and gave the Government no right to intervene in or otherwise control litigation brought by the private individual. The FCA gave such a person entitlement to receive one-half of the amounts of such damages and the other half was to be paid to the United States Government. Eventually, in 1878, the civil and criminal provisions were separated, and by 1909 the FCA was strictly dealing with the enforcement of the civil sanctions.

There were not a large number of reported cases under the original statute, but it is interesting to note that the lawyers for the " Relators" came to invoke the FCA in an ever

[13] Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, (1863).
[14] Pomeroy, Carter Pitkin, *West Coast Reporter*. San Francisco: A.L. Bancroft & Co., 1885. 704.

wider range of circumstances beyond frauds against the War Department, including overcharging for goods and supplying poor quality material.[15] There came to be cases concerning postal subsidies fraudulently obtained[16] and hog price support payments fraudulently obtained.[17] The courts weighed in on the efficacy of the statute.

The original False Claims Act lay largely untouched by the Congress for 80 years until another war, World War II, resulted in amendments which made the Act ineffective for the following 40 years. The reasons for the Act's fall from grace in 1943 were complex but centered on three basic arguments:

- The first was that, under the wording of the Civil War statute, it was possible for a private litigant to file a suit not based on his own knowledge of wrongdoing but based solely on public information, even information gained from the Government's own investigations. Such "parasitic" actions did nothing to uncover or deter fraud and clearly annoyed the Department of Justice.
- Second, the Attorney General clearly felt that his office's powers were being usurped. As the Government argued to the Supreme Court in the case of *U.S. ex rel. Marcus v. Hess*,[19] "Effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interests." The Supreme Court rejected these turf arguments and suggested that this was an issue for Congress.
- The third argument was that times had changed, which implicitly meant that the Government investigators were up to the job of stopping fraud against the Government. In Congress in 1943 there were some politicians (not unlike the English Politicians who made similar arguments and eliminated all Qui Tam procedures in England in the 1950s)[20] who thought that such suits imposed burdens on Government departments.

"What harm can there be if 10,000 lawyers in America are assisting the Attorney General of the United States in digging up war frauds?"[18]

-Senator William Langer, 1943

Luckily a complete gutting of the Act did not occur in 1943 because some senators, particularly Senator William Langer, rallied around the Act.

The amendments passed in 1943 gave the Department of Justice the right to intervene and take over privately initiated cases and deprived courts of jurisdiction over FCA cases based on information in the possession of the United States. This meant that the Government could, after a private complaint was filed, find information in their files to disprove the original nature of the complaint. Finally, the bounty for intervened cases was reduced to 10percent. The upshot of this was, of course, that the Act was rarely used for the next 40 years. The

[15] *Carter v. McClaughry,* 183 U.S. 365, 22 S. Ct. 181, 46 L. Ed. 236, (1902).
[16] *United States ex rel. Rodriguez v Weekly Publications*, 68 F. Supp. 767 (S. D. N. Y., 1946).
[17] *U.S. v. Kapp*, 302 U.S. 214, 58 S. Ct. 182, 82 L. .Ed. 205 (1937).
[18] 89 *Cong. Rec.* 7606 (1943).
[19] *Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943).
[20] Refer to The Common Informers Act of 1951, 14 & 15 Geo. 6, c. 39. The Government of Britain recently announced that it plans to examine the possibility of creating incentives for whistleblowing. ("Government Announces Plans to Review Whistleblowing Protections," GOV.UK. 12 July 2013. https://www.gov.uk/Government/news/Government-announces-plans-to-review-whistleblowing-protections)

good news was that the FCA remained on the books awaiting its resuscitation when the cold war spending boom arrived under President Ronald Reagan.

The Origins of the Modern United States False Claims Act

The False Claims Act was brought roaring back to life in 1986 by a unique set of political circumstances. The Presidency of Ronald Reagan, from 1981 to 1989, was marked by a significant peacetime increase in Defense Department spending and a major policy initiative by the President to stop waste, fraud and abuse in Government spending. The examples of such fraud were not only detailed in exhaustive Government reports such as the General Accounting Office, *Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?*[21], but also in lurid front page newspaper stories about $600 toilet seats and $7,000 coffee pots supplied to the Department of Defense under Government contracts. By 1986 it was no longer accepted fact, as it appeared to be in 1943, that the Attorney General and the Department of Justice were able and willing to do the job of ferreting out and prosecuting fraud in Government procurement.

Interestingly the primary sponsor of the legislation in the Senate was Senator Charles Grassley, a conservative Republican, and the sponsor in the House was Howard Berman, a liberal Democrat. Both of the sponsors had to deal with self-serving statements from the office of the Attorney General that no changes in the Qui Tam provisions were necessary. Inherent in the Congressional debate on this rebirth of the privatization of the prosecution of Government contractors was a clear mistrust of the Government to get the job done alone, both because of a lack of resources and information, and also the need for a check on any lack of Government ability and resolve.

The Ripe Opportunity for Fraud in Government Contracts

A 19TH CENTURY POLICY TOOL THAT IS EVEN MORE USEFUL IN THE 21ST CENTURY

Crimes against a person and his property are controlled through both the social contract in a given social setting and a policing function provided by the state. Since individuals' self-interest requires that they be safe in their person and that their resources be protected, there is a great deal of human effort devoted to the elimination of such crime.

Crimes against the amorphous entity known as the Government are however not so obviously in the self-interest of any given individual to eliminate. Corruption in the provision of Government goods and services may well hurt all of the body politic or even all of the taxpayers but each individual may not perceive the gravity of the harm in the same manner as a crime against their person, particularly if he/she might find some personal benefit in such corruption.

This tendency to overlook or participate in frauds against the Government, such as underpaying of income taxes or condoning generosity to Government officials or elected politicians in exchange for their public acts sets the stage for the much more serious

[21] Comptroller General of the United States. *Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?* Washington: U.S. General Accounting Office, 1981.

corruption of Government contracting. The Government expenditure on goods and services is inevitably the single largest allocation of resources in any given society.

The securing and contracting for goods and resources by a Government is inherently undertaken in an environment marked by the following:

- *GOVERNMENTS DO NOT PRODUCE GOODS*. With few exceptions (such as prisoner made license plates) Governments secure the goods and many of the services needed to conduct Government by contracting with multiple private entities. The process is inherently a public-private partnership which, through a political process, sets goals and polices and then, through an administrative process, designs and secures goods and many of the services needed. If this process is corrupted, then the policy may not succeed. In the 21st century, many of the Government goods and services which appear to be publicly created goods are in fact produced by private contractors. Public streets and curbs are created by private contractors, the mail is moved in private trucks and railroads, and America's space shuttle[22] was made by private corporations.

- *LACK OF INFORMATION*. Information concerning the quality and cost of the goods and services is invariably more obscure and hidden than it would be if there were multiple free market actors expending their own resources. Even the most well-meaning and honest contracting officer on a civil servant salary has little information compared to the private entity engaged in the process.

- *COLLUSION*. Since there is always only one buyer, there is always a tendency for the multiple suppliers to collude to maximize price and minimize quality. This can be as overt as pre-arranged bid rigging of Government contracts where the suppliers collude before the contracting process to select a winner and set higher than competitive prices or lower than competitive quality. Or it can be as simple as not informing the Government buyer about the bad actions of a competitor.

- *CO-OPTION*. There is always a tendency over time for the Government players, both the civil servants and the elected officials, to be co-opted by their suppliers. Again this can be overt such as the morally compromised civil servant who takes bribes and thus ensures that the cost is high and the quality low (such as Army Quartermaster Major Justus McKinstry, mentioned earlier). Or it can be a variant of the Stockholm Syndrome, where the civil servants or the elected officials begin to identify with the success of the contractors rather than the Government program or policy for which the goods and services are supplied. This is exacerbated in modern times by both the fluidity of employment between contracting officers and suppliers and by the need for political campaign financial contributions by the politicians who should be overseeing the civil servants.

[22] The four Government contractors for the NASA Challenger Space Shuttle, which was destroyed 73 seconds after liftoff due to poor design of the infamous "o" rings, were Morton Thiokol, Rockwell International, Lockheed and Martin Marietta (Committee on Science and Technology House of Representatives. *Investigation of the Challenger Accident*. Washington: U.S. Government Printing Office, 1986).

- *LACK OF INVESTIGATIVE RESOURCES*. There have never been enough resources in the right place with sufficient information and the correct prosecutorial motivation to stop fraud and abuse in Government contracting. This was true in ancient times in England when the Qui Tam empowerment of private individuals to prosecute the violation of public civil or criminal law arose because there was not an organized constabulary. It was also true at the time of the American Civil War when there was no FBI or Defense Contract Audit or Investigative Service. It was equally true in the United States in 1986 when the False Claims Act was given new teeth and power and when there was a full complement of those investigative agencies. In 1987 even with the 1986 amendments in place, out of a Federal expenditure of $909.2 billion[23] the Government only managed to collect damages of $86,479,949, or 0.0095 percent of the total spend, for waste, fraud and abuse.[24] Even the most committed Government civil service investigators will be searching for the last fraud instead of the new and clever one designed by the colluding private actors and often their co-opted public servants.

The underlying problems of fraud against the Government in the procurement of public goods and services were the same in 1863 as they are in 2014 The Government, whether at local or national level contracts, is always vulnerable to fraud. Since the risk of being caught defrauding the Government is often small, there are always dishonest actors willing to take such risks. The crucial missing ingredients are always (1) information, since the cheaters have a great incentive to keep their frauds secret and often to ensnare public officials in the fraudulent schemes themselves and; (2) privately initiated prosecutions.

A reward based system of privately initiated cases which are in-turn supervised by the Government is in fact a logical extension to the public-private mechanism for the delivery of Government goods and services. The eyes and ears of the citizens become, by extension, a policing function for the Government, and the use of the courts and the supervision of the cases become a means of joint supervision of Government contractors.

PART I KEY POINTS

The False Claims Act is 150 years old and, though fought by corrupt corporations and public bureaucracy, has endured to become the single most effective Governmental tool to fight fraud in public contracts.

[23] Executive Office of the President, Office of Management and Budget. *Budget of the United States Government, Fiscal Year 1989*. Washington: U.S. Government Printing Office, 1988.
[24] "Fraud Statistics - Overview." Civil Division, *Justice*. U.S. Department of Justice. 23 December, 2012. Web. 27 Jan 2014. http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf

"It would send a message from the top of the bureaucracy on down that whistleblowers should be heard and treated with rewards not reprisals."

-Sen. Charles Grassley

"Grassley holds President accountable for promises to make Government transparent." *Senator Chuck Grassley of Iowa*. March 13, 2009. Web. 27 Jan 2014.

PART II. THE BASIC LEGAL PRINCIPLES OF THE MODERN FALSE CLAIMS ACT

THE CREATION OF THE PRESENT DAY PROSECUTORIAL TOOL FOR FIGHTING FRAUD AGAINST THE GOVERNMENT

A False Claim: The Fraud against the Government

In common parlance, to defraud the Government would be to "cheat" the Government.

In legal terms this cheating is described as knowingly making a false representation (or omission) of a matter of fact that causes the Government to be deprived of money, property or a right.

The full text of the False Claims Act, as amended, Title 31 Sections 3729, 3730 and 3731 are attached as Appendix B.1.

LIABILITY

The drafters begin with an exhaustive list of the conduct which makes a person liable for such dishonesty:

- §3729 (a) (1)(A) and (B) starts with liability for any person who 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 paid by the Government.
  - this definition includes both the entity presenting the claim and any other entity such as a sub-contractor who may have caused the submission of the false claim
- § 3729 (a)(1)(C) extends liability to any person who conspires to violate any provision of the act, even if they did not make the presentation of the false claim.
- § 3729 (A)(1)(G) which is referred to as the reverse false claims section provides liability where a person acts to avoid or decrease amounts owed to the Government.

KNOWLEDGE

The mere submitting of a claim that is false to the Government does not cause a violation. Since this is a civil remedy not a criminal one, the person must have acted knowingly:

- § 3729 (b)(1)(A) states that knowing and knowingly means that the person has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information.

- §3729 (b)(1)(B) "requires no proof of specific intent to defraud."
- §3729 (b)(4) states that material (as in statement material to get the false claim paid) means having a natural tendency to influence or be capable of influencing, the payment or receipt of money or property.

Defendants often attempt to use Government knowledge as an affirmative defense, but the Government's knowledge is not generally relevant to whether the defendant acted knowingly. The defendant is liable if the claims are false or fraudulent even if the Government officials know of the falsity. Since there may be various individuals at the Government with some knowledge of the contractors' activities, defendants frequently attempt to use this as a defense in the proceedings. The contracts frequently state that no official can waive or amend the contract. Mere knowledge by some Government official of an aspect of the situation, as opposed to a full disclosure of all of the facts, does not eliminate the liability under the Act. In fact, even if the Government accepts equipment or waives its right to inspect goods, the contractor is still responsible if it furnishes equipment that did not meet the contract specifications. As one judge stated it, if "the Government inspector doesn't do his or her job [it] does not protect any contractor who in fact would file a false claim."[25]

While some courts have held that Government knowledge may in some cases be relevant to the Defendant's state of mind, the mere fact that the Government had knowledge of the false claim is not a defense to liability.

THE CLAIM

The FCA defines the term 'claim' broadly as a demand for money or property made either directly to the Federal Government or to a contractor, grantee, or other recipient if the money is to be spent on the Government's behalf.

- §3729 (b)(2)(ii) states that 'claim' includes any request or demand for payment if the money requested is spent or used on the Government's behalf or to advance a Government program or interest. If the Government provided any portion of the money or property requested or demanded or will in the future reimburse an entity for any portion of the money or property which is requested or demanded, then this constitutes a claim.

THE DAMAGES AND PENALTIES FOR VIOLATING THE FALSE CLAIMS ACT

The Statute provides that a person who is liable for violating the False Claims Act with the requisite knowledge must pay both a civil penalty and double or treble damages for the harm done to the Government.

- §3729 (a)(1) states that the liability includes a civil penalty of not less than $5,000 and not more than $10,000, (as adjusted by the Federal Civil Penalties

[25] *United States ex rel. Steven v. Ashland Petroleum* Co. No C-1-93-442 (S. D. Ohio, 1966).

Inflation Adjustment Act of 1990) plus three times the amount of damages which the Government sustains because of the act of the liable person.

- §3729 (a)(2) provides for damages to be reduced to two times the amount of damages if the liable person had come forward within 30 days of discovering the violation and cooperated with the Government investigation and no remedial action had been commenced against such person.

MEASURE OF DAMAGES FOR HARM TO THE GOVERNMENT

The general rule is that the measure of damages would be the amount that the Government paid out by reason of the false statements over and above what it would have paid if the claims had been truthful.[26] While consequential damages are not provided for in the Act, courts have allowed damages that are the direct result of the fraud. The application of these rules, however, varies by the type of fraud:

- Charging the Government the wrong amount
  - If the claim such as an invoice or bill is for goods or services that were not delivered or if the product was of a lower quality, then the damages are the amount that the Government paid above what they would have paid if there was not a fraud. Such cases often become problematic if the inferior goods are not of use to the Government and thus the damages could be the entire amount paid.
- Cheating the Government in the process of securing the contract
  - If the defendant secures the contract by bid rigging or giving Government employees or prime contractor employees kickbacks, or by making false pricing or cost statements to the Government the damages are again the amount the Government overpaid. This is often difficult to calculate since the Government received the goods and services and determining what it might have paid with adequate truthful information is somewhat conjectural. Some cases have taken the amount of the bribes or kickbacks as a part of the damages but have allowed additional damages for the harm to the Government's negotiating and contracting process.[27] An alternative damage amount could of course be the total amount of the contract payment based on the theory that the contract would not have been awarded if the Government knew of the fraudulent behavior.
- Making false statements or certifications about the goods and services delivered
  - The damages in such cases vary, depending upon the facts from small amounts based on the actual losses occasioned by the false statements to very large amounts based on the theory that "but for" the false statements the Government would have not dealt with the contractor at all.

[26] *United States v. Woodbury*, 359 F. 2d 370, (9th Cir. 1966).
[27] *United States v. Education Development Network, Inc.*, 884 F. 2d 737, (3rd Cir. 1993).

- Product substitution and poor quality goods and services
  - In these situations the Government received a good or service which was not what it bargained for but which may still be of value to the Government. The damages vary from the total amount of the contract, if the good or service was unsafe or dangerous or not useable,[28] to a lesser sum, measured by the difference in value between the quality and poor quality item, if the item had value and was in fact used by the Government.[29]
- Reverse False Claims under §3729 (a)(1)(G)
  - In situations where the defendant conceals, avoids or decreases an obligation to pay the Government the measure of damages is the difference between what they should have paid and what they did pay.

PROTECTIONS AGAINST RETALIATION AGAINST THE WHISTLEBLOWER

The Statute also provides for legal protections for individuals who suffered retaliation for efforts to stop violations of the False Claims Act.

- §3730 (h) states that any employee, contractor or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment shall be entitled to relief which shall include reinstatement and two times the amount of back pay and other compensation. It also provides for special damages.

  These anti-retaliation provisions to protect whistleblowers both include a double damages provision and are merely ancillary to the overall purpose of the FCA of allowing private actions.

It should be noted that protections for public or private employee whistleblowers to merely maintain their employment are not particularly robust in Canada or its various provinces such as Québec, but legislation has been proffered in various provinces including Québec.[30]

MEASURE OF DAMAGES IN RETALIATION

- Back Pay
  - The wrongfully terminated employee receives two times his pack pay and interest on the back pay. If the employee quickly finds new employment such mitigation may decrease or eliminate any such damages. Special damages have included emotional distress.

[28] Failure to test products made them valueless in *United States ex rel. Compton v. Midwest Specialties Inc.* 142 F. 3d 296, (6th Cir. 1998).
[29] *U.S. v. Bornstein*, 423 U. S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514, (1976).
[30] See Hutton, David. "Shooting the Messenger: The Need for Effective Whistleblower Protection in Alberta." Parkland Institute, May 21, 2013. Web. 7 Oct 2013.

ASSESSMENT OF PENALTIES

The False Claims Act provides for civil penalties in addition to the treble damages based on harm to the Government. The rationale for the penalty scheme is that it deters fraud and provides remediation to the Government for the cost of enforcement. Most importantly, it provides a remedy when there has been a fraud but not an actual or particularly large damage to the Government which nevertheless does significant damage to the integrity of the system of Government contracting.

- The penalties under the Act are mandatory.
  - The language of the Act makes it clear that the civil penalty is not discretionary to the judge. This automatic forfeiture has a deterrent effect against a person who may think that if there is no harm then there is no foul.
- Determining the level of penalties.
  - The authorized range of penalties is for between $5,000 to $10,000 (adjusted by statute, and is currently $5,500 to $11,000) per false claim. The Federal courts have assigned penalties across the spectrum based on a variety of rationales.
- Determining the number of penalties.
  - The Courts have determined that the section authorizes multiple penalties for a course of conduct involving multiple submissions of fraudulent claims.

ATTORNEY'S FEES AND COSTS AND EXPENSES

The Act provides that the Relator (not the Relator's Attorney), in both cases where the Government has intervened and cases where the Relator prosecutes the civil action, "shall also receive an amount for reasonable expenses plus reasonable attorney's fees and costs" and this sum is to be paid by the defendant directly to the Relator.

- Lodestar Approach
  - The amount of attorney's fees is either settled between the defendant and the Relator or is set by the judge who has overseen the False Claims Act case based on a "lodestar," which is defined as reasonable hours times a reasonable rate[31]. The hourly rate is based on prevailing market rates in that relevant legal community. This requires an analysis of the experience and skill of the Relator's attorney and a comparison to the rates of similar attorneys in that market. In certain circumstances of exceptional complexity and superior results some judges have increased the lodestar by some percentage.

[31] The etymology of the word lodestar is Middle English, meaning "a star that leads or guides" (Merriam-Webster Online). In U.S. courts the lodestar method was first used in *Lindy Bros. Builders, Inc. v. Am. Radiator & Stnd. Sanitary Corp.,* 487 F. 2d 161 (3d Cir. 1973) and now is so-called as this method has become jurisprudence to "guide" courts when deciding attorney's fees ("Cases: Lodestar," *California Attorney's Fees*. AlvaradoSmith APC. Web. 27 Jan 2014).

- Attorney's Fees for post judgment proceedings.
  - Under the case law, the Relator is also entitled to fees for most post judgment efforts such as appeals and fee petitions and collection proceedings.
  - Under the case law, there is an exception to this when the post judgment appeals involve only a dispute between the Relator and the Government concerning the payment of Relator share out of the Governments recovery.
- Expenses
  - The statute authorizes recovery of expenses from the defendant under the case law. Reasonable expenses include those out of pocket expenses that would be charged to a fee paying client such as expert fees, travel costs and copying costs or the costs of preparing trial exhibits.
- Costs
  - The statute provides that costs are recoverable from the defendant and under the case law this includes court filing fees and transcript costs.

STATUTE OF LIMITATIONS

The Qui Tam actions brought under § 3730 must be filed within six years of the date on which the violation is committed or if the fraud is hidden then within three years of its discovery, but in no event more than 10 years after the date on which the violation was committed. §3731 (b)

BURDEN OF PROOF

Since this is a civil remedy the essential element of the cause of action including damages must be proved by a preponderance of the evidence. §3731 (d)

LIMITING IMPROPER USE OF THE FCA

Over the 150 year life of the False Claims Act there have been a number of issues raised by opponents of the Act asserting that the Act could be abused or result in false denunciations. As the Act has been written and rewritten, many of these issues have been addressed and specifically addressed within the statute:

- Frivolous, vexatious or harassment
  - One concern expressed was that the Act could be used as a tool by unscrupulous Relators to harass defendants or to extort funds from them.
  - §3730 (d)(4) specifically grants the defendant the right to receive reasonable attorneys' fees and expenses if the defendant prevails and the court finds that the claim was clearly frivolous, clearly vexatious or brought primarily for purposes of harassment.

- Parasitic actions
  - Another concern has been that complaints would be based solely on Government investigations or freely available public information. Such actions would burden the Government departments and the Department of Justice and unearth no new frauds against the Government.
  - Unless the person filing the complaint is the original source of the information §3730 (e)(4) specifically instructs "the court to dismiss an action or claim unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publically disclosed (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit or investigation or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."
- When the Government is already pursuing a case
  - Another possible abuse would be for the person to bring an action based on an already filed civil suit or administrative civil money penalty proceeding.
  - §3730 (e)(3) prohibits such actions in which the Government is already a party.
- Collusion with the Defendant
  - A third concern was that the Relator and the Defendant could collude to settle the claim at some lower amount than justified with some behind the scene unknown payments.
  - Once the claim has been filed, under §3730 (b)(1) even if the Government does not intervene and take over the case, the action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
- Use of Act against members of the Government or members of the armed forces
  - A concern was that either fellow members of the military would file actions against each other or that action would be brought against members of Congress, the Judiciary or a senior executive branch official.
  - §3730 (e)(1) prohibits actions by a former or present member of the armed forces against any other member of the armed forces arising out of such persons service in the armed forces.
  - §3730 (e)(2) prohibits actions against members of Government if the action is based on evidence or information known to the Government when the action was brought.
- Use of the Act with regard to Internal Revenue Code violations

- The Internal Revenue Code is based on self-reporting by the tax payers and the corresponding protection of the taxpayers' confidentiality.
- The Act specifically excludes any complaint based on the Internal Revenue Code. As we will discuss below, the False Claims Act has created an interest in similar provisions under other statutory schemes and there is now a provision in the Internal Revenue Code for a whistleblower reward system, but not a Qui Tam system.

The Qui Tam Procedure

Attached as Appendix B.2 is *Best Practices: Practice Issues*, a checklist by Andrew M. Beato concerning Qui Tam procedure best practices.

THE FILING OF A CIVIL QUI TAM COMPLAINT

The False Claims Act in §3730 provides that the Attorney General may commence the Government civil action under the Statute against such a person who is liable for making such a false claim. Most importantly though it provides that private persons, called "Relators" in the statute may bring a civil action for a violation of § 3729 for that Relator and for the United States Government and in the name of the Government.

- §3730(B)(1) provides for such filing but in order to forestall any actions detrimental to the Government's interests the action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
- §3730 (B)(2) states that the complaint shall be served on the Government but not upon the defendant and the complaint shall be filed in camera and under seal for at least 60 days. The defendant does not have to respond until 20 days after the complaint is unsealed and served upon the defendant.

See Appendix B.3, by Randall M. Fox, a suggested list of procedures for filing a complaint.

THE GOVERNMENT INVESTIGATION

The Government for good cause can ask the court for extensions of time beyond the initial 60 days to keep the complaint under seal for months or years after the initial disclosure in order to investigate frauds which may involve thousands of claims, millions of documents and sometimes hundreds of millions of dollars of damages to the Government. The Government after it has completed its investigation can then either elect to intervene and proceed with the privately filed action or decline to take over the action. If the Government does decline then the private party has the right to conduct the action for the Government. The Government also may elect to pursue its claim through any alternate remedy available to the Government including any administrative proceeding to determine a civil money penalty.

THE ROLE OF THE RELATOR IN THE GOVERNMENT INTERVENED CASE

When the Government intervenes and prosecutes the action filed by the Relator the Government has the primary responsibility for prosecuting the action. The Government may file its own complaint or amend the complaint of the Relator to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. The Relator has the right to continue as a party to the action subject to a number of limitations specified in §3730 (c)(1) to (5). These limitations also apply if the Government chooses an alternative remedy such as an administrative proceeding or if after declining to intervene the Government changes its mind and with court approval intervenes at a later date upon a showing of good cause:

- The Government may dismiss the action even if the Relator objects as long as the Relator receives notice and has an opportunity for a hearing on the motion of dismissal.
- The Government may settle the action with the defendant notwithstanding the objections of the Relator if the court determines after a hearing that the proposed settlement is fair, adequate and reasonable under all the circumstances.
- The Government may ask the court to impose limitations on the person's participation if such person is interfering or unduly delaying in the Government's prosecution of the case or is causing harassment. Such limitations could include limiting the number of witness or their testimony or their cross examination.
- The Government may ask the court to limit certain actions of discovery by the Relator if it would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out the same facts.

THE ROLE OF THE RELATOR WHEN THE GOVERNMENT DECLINES

When the Government declines to intervene and prosecute the case, the Relator has the right to continue and to conduct the action. The Government can upon request be served with copies of all pleadings filed in the continuing action and be supplied with copies of all deposition transcripts.

The Relator however does have to bring meritorious claims because if the defendant prevails and the court finds that the claim of the Relator was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment then the court can award reasonable attorney fees and expenses to the defendant.

THE AWARD TO QUI TAM PLAINTIFF

The False Claims Act basic premise is to both give the Relator and his attorney a monetary incentive to bring such private actions upon behalf of the Government where that individual has original source information about the fraud and to protect the individual in his employment when he takes such action. The amount of such awards varies depending upon the role the Government plays, the contribution of the Relator to the prosecution of the action and his conduct.

- If the Government intervenes and proceeds with the action (or an alternative remedy including any administrative proceeding to determine a civil money

penalty) the Relator receives at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim payable from the proceeds the Government receives. The case law has made it clear that following the clear legislative history, the 15 percent is a reward for the mere act of bringing the case. This amount can be reduced to not more than 10 percent of the proceeds, where the action is based primarily on disclosures of specific information in a publicly disclosed document, investigation or news media report.

- If the Government does not intervene and the Relator proceeds with the action or settling the claim then the court sets an amount which is reasonable for collecting the civil penalty and damages which shall not be less than 25 percent and not more than 30 percent of the proceeds and shall be paid out of such proceeds.
- In either situation the person (the Relator) shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. These expenses, fees and costs are awarded against the defendant in the case brought by the Relator.
- While the determination of the Relator's share percentage may seem straightforward, in practice the Government often has developed legal theories at the very end of the case as to why the Relator may not be entitled to a share of the entire proceeds received by the Government. These have varied by case but have included arguments that the pleading was not made with sufficient clarity under Rule 9(b), the use of information to which there was public disclosure and arguments that the Government settled a different claim than that described in the Relator's Complaint.
- Even when the Government acknowledges that the Relator is entitled to a share, the Government and the Relator often cannot reach agreement on the proper percentage within the statutory range of 15-25 percent. The matter is then settled by the court. In these situations, the judges have analyzed a number of factors concerning the Relator's role. These include whether the Government intervenes, the contribution of the Relator to the prosecution of the case, the level of the cooperation and the Relator's personal, financial and professional expense to undertake the action.

LIMITATIONS ON AWARDS TO THE RELATOR

The FCA specifically limits awards to the Relator based on his own dishonest conduct:

- If the FCA action is brought by a person who planned and initiated the false claim upon which the action was brought then the court may reduce the share of the proceeds of the action taking into account the role of that person in advancing the case to litigation.
- If the person is convicted of criminal conduct arising from his or her role in the false claim that person shall be dismissed from the civil action and shall not receive any share of the proceeds.

The FCA specifically bars actions where the allegations or transaction are already the subject of a False Claims Action. Thus the first Relator to file a Qui Tam action based on a particular set of false claims will prevail over a second filer. (The first-to-file bar).

In addition the FCA bars actions where the Government has already filed a civil suit or an administrative civil money penalty proceeding. (The Government filing bar).

Finally the FCA specifically bars actions which are merely based on public information available to all. They must be actions brought on the basis of the Relator's original sources of the information on which allegations or transaction in a claim. (The public disclosure bar).

THE RELATOR-ATTORNEY RELATIONSHIP

The attorney for the Relator enters into an engagement with the Relator to represent him in the False Claims Act case. While such representation can be secured for an hourly rate, the typical Relator often does not have financial resources for what may be a lengthy representation. Accordingly, the attorney frequently enters into a contingent representation engagement contract with the Relator wherein the law firm absorbs any costs of the litigation and supplies its legal acumen and hours of service. In return the law firm contracts for the legal fees and costs awarded to the Relator and for a percentage of the Relator's Share in a successfully concluded case.

Contingent fee engagements are not prohibited by the Québec Code of Ethics of Advocates.[32] Furthermore, the Québec Court of Appeal, the highest court in the province, has stated that contingency fees are generally permissible.[33]

IMPLEMENTING THE PUBLIC-PRIVATE PARTNERSHIP

The False Claims Act in making the private citizen and the Government co-parties to the case establishes the mechanism for a public-private prosecutorial partnership. This partnership has, as we shall see below, led to a very successful tool to deal with and deter fraud. That said, in each individual case the shaping of the partnership is fraught with potential conflicts as well as opportunities.

Interviews with a variety of Relators and their counsel reveal that there are in practice a wide variety of experiences with such cooperation. In some situations the Department of Justice attorneys have welcomed the assistance and openly sought and used the assistance of Relators and their attorneys both for information about the mechanisms of the fraud and in terms of actual assistance with document discovery and depositions under the protection of joint prosecution agreements. However in other situations the Government attorneys, who ultimately and legally control the cases, have not sought substantial assistance of the Relators and their attorneys.

Some of these issues depend upon how the individual Attorney General's offices design their internal programs. If the office cooperates at the investigative stage with the Relator and

[32] Code of Ethics of Advocates, RRQ 1981, c. B-1, r. 1-8, ss. 3.08.01-3.08.08
[33] *M.D. c. G.D.*, 98 A.C.W.S. (3d) 868 (2000).

his counsel and establishes mechanisms for document sharing and deposition preparation these partnerships can go far more smoothly. Significantly when the State of New York amended its State False Claims Act in 2010 and 2013 a number of these Relator–friendly policies were incorporated into the State Program. See Appendix C.1 for David Koenigsberg's commentary on the New York False Claims Act.

PART II KEY POINTS

The U.S. False Claims Act has been refined over its 150 year existence to carefully delineate liability, damages, penalties, protections, legal fees and costs, and the all important Relator's Share award incentive.

PART III. STATE AND LOCAL GOVERNMENT FALSE CLAIMS ACTS

The Development of State False Claims Act Legislation

In a Federal Government Structure it is important that not only the Federal Government but also the State and Local Governments are enlisted in this public–private partnership to ferret out, uncover and prosecute fraud against the Government at all levels. In the United States as the False Claims Act came to be the most effective tool for fighting fraud against the Government, it came to be realized that the tool was needed at the State and Local levels. This is particularly true where there are extensive programs of joint Federal and State spending on medical or education programs.

The passage of state legislation has been accretive since 1986. The various acts have either been, like the pioneering California False Claims Act of 1987, virtual replicas of the Federal legislation, or they have been crafted to meet only certain types of fraud against the Government such as frauds on the delivery of medical services.

When the Federal False Claims Act was amended in 1986, the California legislature in 1987 passed the California False Claims Act (see Appendix C.2). Slowly, a number of other pioneering state legislatures began to enact comprehensive State False Claims Act modeled on the Federal Act. Now there are also a number of cities which have their own False Claims Acts.

Attached as Appendix C.3 is a list of all the States and Local Governments that have enacted False Claims Acts. And whether it is comprehensive or only with regard to Medicaid fraud.

THE NEW YORK FALSE CLAIMS ACT

As mentioned previously, the New York statutory scheme has been recently enacted and deals with a number of the procedural aspects of the programs that have been problematic in the past. See Appendix C.4 for the full text of the statute and D.5 for a list of standard clauses for New York State contracts.

One of the largest joint expenditures for the Federal and State Governments occurs in the medical area where medical and related benefits are provided to low income families and individuals. This program is called Medicaid. After 20 years of experience with the Amended Federal False Claims Act Congress came to realize that the States should be encouraged to pass State False Claims Acts which are based on the same type of private actions, rewards and protections of whistleblowers. The Deficit Reduction Act of 2005[34] created a financial incentive for States to enact legislation that established liability to the State for frauds under the State Medicaid program. The incentive was to give the State that has such a program a larger percentage of any recoveries under the State False Claims Act case payable out of the federal share of such recovery. To date 28 States have met the requirements to qualify for this incentive by enacting State False Claims Acts that

[34] The Deficit Reduction Act of 2005 appends s.1909 to 42 U.S.C. 1396 et seq., a portion of the Social Security Act describing the Medicaid program.

are certified by the Office of the Inspector General of the U.S. Department of Health and Human Services (OIG HHS).[35]

THE LOUISIANA EXPERIENCE: FALSE CLAIMS LEGISLATION IN A MIXED CIVIL LAW COMMON LAW JURISDICTION

Louisiana, like Québec, has a mixed Civil and Common Law system of Government which exists within a predominantly Common Law Federalist System. Louisiana passed the Medical Assistance Programs Integrity Law in 1997 and has had a successful program of citizen initiated lawsuits. See Appendix C.6 for the full text of the statute.

SAMPLE OF A STATE FCA

Finally Included as Appendix C.7 is a sample draft State False Claims Act prepared by The Taxpayers Against Fraud Education Fund (TAFEF).

Impact of Legislative Changes of the False Claims Act at the State and Local Level

Each State and Local Government statutory scheme has proved to be both additive in terms of stopping more fraud and more fraudulent practices, and inventive in terms of developing different or pioneering approaches to stopping fraud. The following is a list of some of the innovations developed at the State and Local level:

RELATOR SHARE INCENTIVES

The various State FCA schemes have developed different approaches to the incentives for Relators.

- For instance in California the Relator in an intervened case receives from 15 to 33 percent and in the non-intervened case from 25 to 50 percent.[36] Under the California Insurance Frauds Prevention Act the incentive is 30 to 40 percent if intervened and 40-50 percent if not intervened.[37]

PROSECUTION AT DIFFERENT LEVELS OF GOVERNMENT

Various State schemes have either delegated the prosecution and intervention to local Government authorities or delegated the authority to create false claims systems at the local Government level.

- In New York any local Government defined as any "county, city town, village, school district, board of cooperative educational services, local public benefit

[35] "State False Claims Act Reviews." Office of Inspector General, U.S. Department of Health and Human Services, 2013. Web. 27 Jan 2014.
[36] Cal. Gov. Code § 12650 et seq. (2006).
[37] Cal. Ins. Code § 1871.7 et seq. (2006).

corporation, or other municipal corporation or political subdivision of the state" or the State can have primary authority to prosecute the action.[38]

EXPANSION OF THE FALSE CLAIMS ACT SYSTEM TO FRAUDS AGAINST INSURANCE SYSTEMS

Two states have also taken the Qui Tam concept developed in prosecuting frauds against the Government and applied them to prosecuting frauds against private insurers:

- The California Commissioner of Insurance can institute proceedings there under the Insurance Frauds Protection Act.[39]
- The California Insurance Frauds Protection Act allows privately initiated litigation against anyone defrauding either the Workers' Compensation insurance program or any private insurance company.[40]
- In Illinois the Insurance Claims Fraud Prevention Act extends to any claim against any insurance fraud.[41]

STATE LEVEL CLARIFICATIONS OF FEDERAL PRECEDENT

Restrictive Federal Rulings as to the Definition of Government Entity

- The Federal judiciary has on occasion curtailed the reach of the False Claims Act in certain circumstances such as the infamous case discussed in Part V, *Totten v. Bombardier Corp.*[42] Often there have been significant time delays before the Congress and Senate could agree on language in an amendment to clarify these matters. Because there are many State legislatures involved, many of these issues have been clarified in the State legislation before this has taken place at the Federal level.
  - With regard to the *Totten* issue, the 2009 Fraud Enforcement and Recovery Act amendments make it clear that an action will lie against an entity receiving funds from the Government even if not a direct subdivision of the Government.

Rules of Civil Procedure

- The Rule 9(b) Specificity Issue
  - As discussed below, at the Federal level there has been significant litigation as to whether the pleadings had substantial enough specificity concerning the fraud to state a claim. To deal with this issue a number of jurisdictions have either eliminated the word fraud or defrauding from their statutory schemes

[38] New York State Finance Law § 189 et seq. (2007).
[39] Cal. Ins. Code § 1871.7 et seq. (2006).
[40] Cal. Ins. Code § 1871.7 et seq. (2006).
[41] 740 Ill. Comp. Stat. Ann § 92/1 et seq. (2006).
[42] *United States ex. rel. Totten v. Bombardier Corp*, 380 F.3d 488 (D.C. Cir., 2004).

(Montana[43] and District of Columbia[44]), or like Nevada,[45] added with or without intent to defraud.

PART III KEY POINTS

The Federal, State (Provincial) and Local Government False Claims Act statutory schemes can act in unison to ferret out fraud, privately prosecute it and reward whistleblowers.

[43] Mont. Code Ann & 17-8-40.
[44] D. C. Code § 2-308.13 et seq. (2006).
[45] Nev. Rev. State Ann. & 357.010.

PART IV. ADDITIONAL UNITED STATES WHISTLEBLOWER PROGRAMS

The success of the False Claims Act since 1986, and various financial scandals such as the famous Bernie Madoff $20 billion Ponzi scheme, have resulted in the creation of parallel whistleblower protection and reward programs in three other Federal programs. However each of these programs, while perhaps laudable, has been structured in a very different manner than the False Claim Act. That is they have allowed for significant rewards to be paid out by the three Governmental departments but they have not provided for citizen initiated prosecutions of civil cases. Not surprisingly the programs to date have not been particularly effective and the Government departments have not necessarily acted on the information nor paid particularly large sums in rewards.

The Internal Revenue Service

In 2006 Congress, under the leadership of Senator Charles Grassley, the same Senator who had been instrumental in creating the amended False Claims Act mandated a reward program to ferret out large tax evasion schemes. Appendix D.1 contains the IRS statutory whistleblower program.

- The program does not allow the whistleblower to play any role other than reporting of the fraud or underpayment in taxes on a Form 211.
- It only applies to situations where there is $2 million per taxpayer in liability.
- The award percentage that could potentially be paid under the statutory scheme is from 15 to 30 percent.

Because there is no private right of action and because the IRS keeps taxpayers information confidential, this program up to this point in time has resulted in very few awards.

In a recent September 26, 2013 letter, see Appendix D.2, Senator Grassley lambasted the IRS stating that he feared "the IRS is not using [the IRS Whistleblower Program] to its full capability." He went on to state that the IRS' own Treasury and Chief Counsel "have undermined the program and have discouraged whistleblowers from coming forward."

Most significantly he stated that the "Payouts under the program are few and far between and IRS agents refuse to fully utilize the whistleblower's knowledge and expertise to identify and expose tax cheats."[46]

The clear problem with the program is that if left to its own devices, a large bureaucracy will not cooperate with private citizens and then gratuitously reward them. The Senator suggests that a possible remedy might be joint cooperation agreements with the whistleblower and his attorney. It is clear that what is at the heart of the effectiveness of a

[46] Grassley, Charles E. "Letter to The Honorable John A. Koskinen.". *Senator Chuck Grassley of Iowa*. 26 Sept. 2013. Web. 27 Sept 2013.

whistleblower program is both financial incentives and the right of a citizen acting on his own to prosecute against a malefactor upon behalf of the Government, even when the Government may not choose to go forward with its own resources.

As of the most recent IRS Whistleblower Office Annual Report[47], the IRS paid out 128 awards of $125 million in 2012, out of a penalty collection of $592 million.

The Securities and Exchange Commission

A financial analyst, Harry Markopolos had brought the full detailed description of the Madoff Ponzi scheme in writing with data and convincing evidence to the SEC and it had been ignored by the SEC investigation unit. Mr. Markopolos eventually testified before Congress and assisted with the creation of the new statutory provisions. These provisions became part of the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) signed by President Obama in 2010. [48] Appendix D.3 contains the SEC statutory whistleblower program.

The purpose of the SEC whistleblower program is to incentivize individuals with knowledge about securities fraud to report that information to the SEC. If the SEC investigates these claims and there has been a violation of the Federal Securities laws, then the person is entitled to an award based on the amount of money the SEC, or other regulator and law enforcement authorities, collect.

- This award system only applies to situations where the monetary sanctions are in excess of $1 million.
- The amount of the award that could potentially be paid is between 10 and 30 percent of the monetary sanctions collected.

Again there is no private right of action under this scheme. However, because there is a great deal of interest in securities fraud and no veil of confidentiality, there have been a large number of notifications concerning possible market manipulation, corporate misrepresentations and offering frauds.

Since the program only became effective in August 2011, there is only data on the first year of operations of the program. In 2012 there were 3001 whistleblower tips received by the SEC and the first whistleblower incentive awards were made during fiscal year 2012, but the award was less than $50,000.00.[49]

The first significant reward payment to a whistleblower in the amount of $14 million was made in 2013.[50] It remains to be seen whether the SEC program will become effective

[47] "FY 2012 Report to Congress on the Use of Section 7623." *IRS*. Internal Revenue Service, 2013. Web. 7 Oct 2013.
[48] Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. no. 111–203, 124 Stat. 1376 (2010). Print.
[49] "Annual Report on the Dodd-Frank Whistleblower Program." *SEC*. U.S. Securities and Exchange Commission, 2012. Web. 7 Oct 2013.
[50] "SEC Awards More Than $14 million to Whistleblower." *SEC*. U.S. Securities and Exchange Commission, 2013. Web. 7 Oct 2013.

without a method to tie financial rewards and citizen initiated legal actions against malefactors.

See Appendix D.4, a contributed article, *The Madoff Case & the Global Financial Crises led to the adoption of the U.S. SEC's Whistleblower Program* by Harry Markopolos.

Commodity Futures Trading Commission

The Dodd-Frank Act also created an incentive system that parallels the SEC system for whistleblowers that provide original information about fraud and violations of law in the commodities trading markets. Appendix D.5 contains the statutory scheme.

- The award is available for monetary sanctions exceeding $1 million
- The amount of an award that could potentially be paid is between 10 and 30 percent of the monetary sanctions collected by the Commodity Futures Trading Commission or other related Authorities.

To date there has been little activity by the CFTC based on this program.

PART IV KEY POINTS

Merely having a financial reward system is not as effective as a true False Claims Act system. A vibrant False Claims system is based on a reward and privately initiated prosecution.

PART V. LEGAL PROCESS AND LITIGATION AROUND THE ACT

The FCA, in the period between its modern rebirth in 1986 and the 21st century, began to prove to be astoundingly successful based on any measure, whether it be the number of cases filed, the sophistication of the schemes unearthed or the sheer financial magnitude of the recoveries, as detailed in Part VI. This highly effective statute that has been on the books for 150 years and currently brings into the Government coffers in excess of $3 billion a year has , not surprisingly, created a great deal of litigation.

There are four major law treatises on the Act (see Bibliography):

- Three written from the plaintiff Relator's point of view
  - *The False Claims Act: Fraud Against the Government (Second Ed.)*, by Claire M. Sylvia
  - *False Claims Act: Whistleblower Litigation (Fifth Ed.)*, by James B. Helmer, Jr.
  - *Federal False Claims Act and Qui Tam Litigation , by Joel Androphy*
- One written from the defendant's point of view
  - *Civil False Claims and Qui Tam Actions (Second Ed.)*, by John T. Boese

There is also a journal, published quarterly, devoted exclusively to False Claims Act Cases:

- *False Claims Act &Qui Tam Quarterly Review*, released by Taxpayers Against Fraud, TAF Education Fund, and edited by Cleveland Lawrence III

While it is beyond the scope of this Report to delve into the voluminous case law, it does seem appropriate to briefly discuss first the wide range of litigated issues, and second the accretive impact of the judicial decisions on what one might suppose was the original intention of the framers of the statutory scheme.

THE RANGE OF ISSUES

Attached as Appendix E is the list of topics from the Quarterly Review published by the Taxpayers Against Fraud Education Fund in July 2013. There are more than 300 cases listed in the quarterly volume, which includes:

- Ongoing litigation on both jurisdictional issues and civil procedure issues.
  - The two major jurisdictional carve outs, based on statutory limitations on Relators bringing parasitic cases, namely the 3730(b)(5) first-to-file bar on tag-a-long cases brought after another first filed case or a 3730(3)(4) prohibition against a case brought based on publicly available information as opposed to original source information in the hands of the Relator, are frequently litigated by the defendants. They are also raised by the Government in disputes over the Relator's entitlement to Relator's share of the proceeds.

- Ongoing disputes under civil procedure rules 8(a) and 9(b) concerning the adequacy of the complaints themselves.
  - The first of these center on Federal Rule of Civil Procedure 9(b) whether the complaint alleged adequately the "who, where, when and how of the fraudulent scheme." [51] These specificity arguments are raised by defendants once the case has been unsealed, usually in cases where the Government chose not to intervene. Such arguments have also been raised unsuccessfully by the Government when they have intervened and settled the case and then after the fact argued the inadequacy of the pleading.
- Various cases which deal with the Federal Rule of Civil Procedure 12(b)(5) failure to state a claim, namely that the pleading did not contain the essential element of FCA Liability of falsity, knowledge and materiality.[52]
- Numerous cases dealing with defenses raised by the defendants ranging from statute of limitations defenses, knowledge and sovereign immunity.
- Many cases dealing with all of the mechanisms of the statutory scheme such as the keeping of the case under seal, the discovery procedures with the civil investigative demand, attorney's fees and the calculations of the damages.

THE ACCRETIVE IMPACT OF JUDICIAL DECISIONS

With this plethora of litigation over the first 25 years of the amended Act one can look at the general trend of the Federal Judiciary's interpretation of the Act. The most striking aspect of the impact of the judicial decisions was that the Act came to be circumscribed and limited in ways that were not necessarily intended by the senators, including Charles Grassley or the house members including Howard Berman who drafted the statute. As an example under the famous *Totten* v. *Bombardier Corp.* discussed earlier, the soon to be Supreme Court member Justice John Roberts held that the False Claims Act did not apply to a fraud against the publicly funded Amtrak company because the entity was funded by annual grants not appropriations, and thus was in the Justice's view not part of the Government that could be defrauded. A false claim against Amtrak was held not to be a false claim against the Federal Government.

Another example was reading into the language of the pre-amendment §3729 (a)(2), "to get" a higher level of intent. In *Allison Engine* Co. *v. United States ex rel. Sanders*:

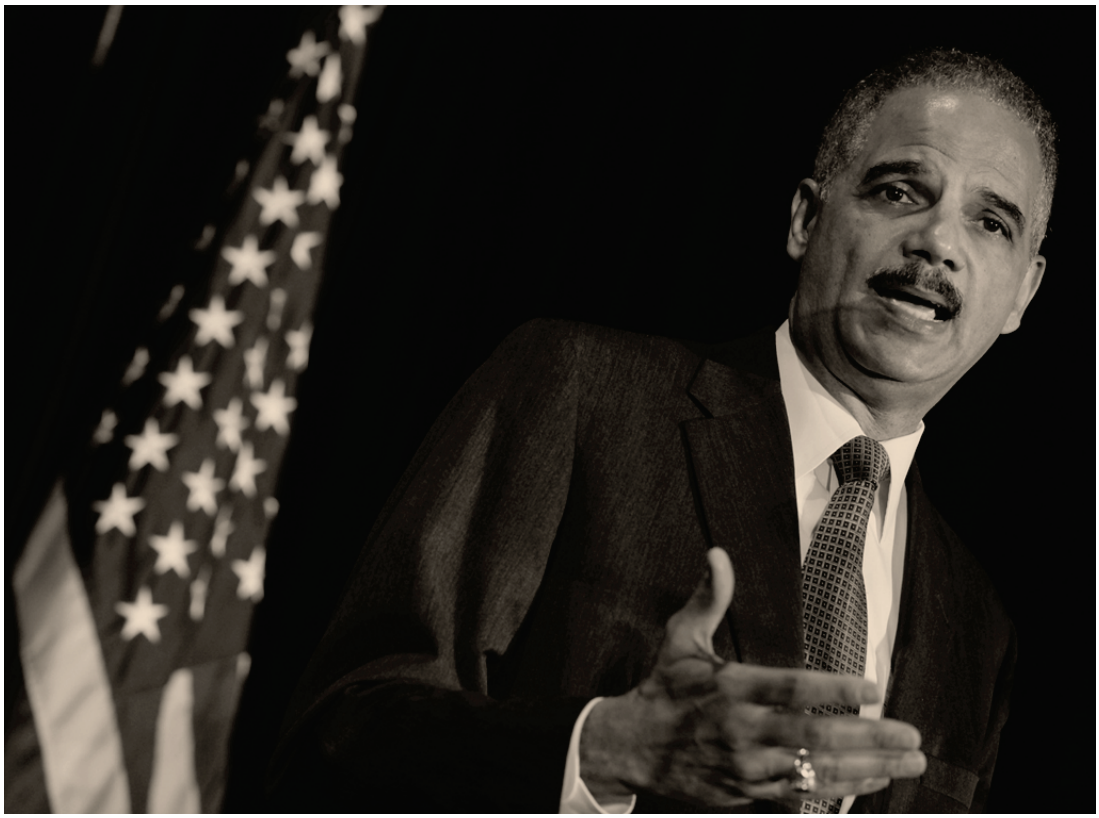
> "a subcontractor makes a false statement to a private entity but does not intend for the Government to rely on the statement as a condition of payment, the direct link between the statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability."[53]

[51] Fed. R. Civ. P. 9(b)
[52] Fed. R. Civ. P. 12(b)(5)
[53] *Allison Engine* Co. *v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2129-30 (2008).

To meet these types of ongoing issues, the Congress undertook a substantial amendment of the Act in 2009. The amendment clarified a number of these issues where the Federal Courts had limited the impact of the Act. As an example, the amendments made it clear that a claim against any entity receiving United States funds could constitute a false claim and that a false record or statement merely needed to be material to the false claim in order for the claim to be brought under the Act.

PART V KEY POINTS

The False Claims Act's statutory language must be updated from time to time to take into account ongoing judicial interpretations.



"In the last quarter century, the False Claims Act's success has been unparalleled with more than $30 billion dollars recovered since it was amended in 1986."

-Attorney General Eric Holder

"Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986." *Justice News*. Department of Justice, Office of Public Affairs. 31 Jan 2012. Web. 7 Oct 2013.

PART VI. THE SUCCESS OF THE FALSE CLAIMS ACT IN UNCOVERING AND DETERRING FRAUD AGAINST THE GOVERNMENT

IN PARTICULAR CONTRACTOR/CONSTRUCTION FRAUD AND KICKBACKS

The next two parts of the report will analyze the success of the False Claims Act over the past quarter century in the United States with particular attention being paid to examples of the FCA's effectiveness in dealing with some of the types of fraud issues facing Québec. Accordingly it will analyze corruption in contracting and construction. It will also point out the effectiveness of the FCA in dealing with kickbacks and the resulting corruption of both the public procurement process and in some instances the integrity of the political system itself. It will look at that success in terms of finding the frauds, the magnitude of the financial recoveries over the years and the investment of Government resources, and finally the overall deterrence of wrongdoing.

Using Citizens to Find Fraud

One of the most striking aspects of the impact of the modern False Claims Act is that the citizens have uncovered a cornucopia of hidden ingenious devious dishonesty undertaken by many of the largest most respected corporations in America. Ironically, when President Reagan signed the 1986 False Claims Act Amendments and spoke about stopping " Waste, Fraud and Abuse" no one expected it would be large corporate entities, not rogue criminals, who have been unmasked not by any diligent Federal investigator but by their own employees and business partners.

Acting Associate Attorney General Tony West recently summed up the impact of the Act:

"The False Claims Act is, quite simply, the most powerful tool we have to deter or redress fraud". He also pointed out that "whistleblowers not only alert the Government to fraud, but they also provide a roadmap to evidence, saving the Government years of effort and millions in investigations costs."[54]

The cases, some $5 billion, including Government initiated cases, in recoveries in 2012 alone, cover the pharmaceutical, healthcare, mortgage, financial and educational industries. The companies paying out these sums (see the table "Top 15 Recoveries to Date,") read like a (dis)honor roll of American Corporations.

In each case the unmasking of the fraud was done by an individual with specific knowledge of the contracts, subcontracts, kickbacks, product production, marketing and billing and false representations in the billing.

[54] "Acting Associate Attorney General Tony West Speaks at Pen and Pad Briefing." *Justice News*. Department of Justice, Office of Public Affairs. 4 Dec 2012. Web. 7 Oct 2013.

TOP 15 RECOVERIES TO DATE[55]

Company	Amount Case Was Settled for ($)	Date
1. GlaxoSmithKline	2,000,000,000	Jul 2012
2. Pfizer	1,000,000,000	Sep 2009
3. Bank of America	1,000,000,000	Mar 2012
4. Tenet Healthcare	900,000,000	Jul 2008
5. Abbott	800,000,000	May 2012
6. HCA	731,000,000	Dec 2000
7. Merck	650,000,000	Jan 2008
8. HCA	631,000,000	Jun 2003
9. GlaxoSmithKline	600,000,000	Oct 2010
10. Serono Group	567,000,000	Oct 2005
11. TAP Pharmaceuticals Products Inc.	559,000,000	Oct 2001
12. New York State & New York City	540,000,000	Jul 2009
13. Astra Zeneca	520,000,000	Apr 2010
14. Ranbaxy Laboratories	500,000,000	Mar 2013
15. Schering Plough	435,000,000	Aug 2008

Examples of Fraudulent Schemes Unearthed by Whistleblowers

CONSTRUCTION

The FCA has been used extensively to combat fraudulent kickbacks, bid rigging, and misuse of Government supplied contractor funds. The types of frauds exposed clearly echo some of the same situations that have been exposed by the Commission. Samples of those types of frauds are listed below:

CONTRACTOR KICKBACKS

- In *Crown Roofing Services*[56] the defendant agreed to pay $3 million to settle allegations that it made improper kickback payments to National Aeronautics and Space Administration (NASA) contracting officers in order to obtain contracts to supply roofing for the NASA Johnson Space Center in 2005. In that scheme the

[55] "Top 30 False Claims Act Settlements of FY2012." *TAF*. Taxpayers Against Fraud Education Fund, 2012. 10 Oct. 2012. Web. 7 Oct. 2013.
[56] *United States ex rel. Garrison and Gaona, Jr. v. Crown Roofing Services, Inc.* No. 4:07-cv-01018 (S. D. Tex., 2012)

prime subcontracted part of the work to a firm owned by one of the NASA parties.

- In *Fluor Hanford LLC*[57] the company agreed to pay the federal Government $1.1 million dollars to settle allegations that the company used federal funds to conduct lobbying to increase funding on the very contract paid for by the Government.

BID RIGGING

- In *Harbert Corporation et al,*[58] Harbert Corporation and several affiliated companies agree to pay $47 million to settle allegations that the companies submitted and caused others to submit false claims to the U.S. Agency for International Development for a contract to build a sewer in Egypt. The allegations were that the defendant entered into pay off agreements with other potential bidders who agreed to either bid high or not to bid at all.

OVERBILLING

- In *U.S. ex rel. Coleman v. Fluor Corp.,*[59] the company paid $12.5 million after a former finance manager at the company brought to light that the Government had been billed for luxury condos in Palm Springs, fine art collections including a Chippendale Chair and a Mercedes automobile.

- In U.S. *ex rel. Hudalla v. Walsh Construction* Co.,[60] an employee at the construction company alleged that the company, a general contractor, purposefully billed general work under the wrong category in order to fraudulently receive amounts over and above the billing categories maximum and to in effect double bill the Government for amounts already included in the total construction costs.

STATE ROAD CONTRACTS

- In *U.S. ex rel . Roederer v. Gohmann Asphalt and Construction* Co.,[61] a former asphalt crew supervisor alleged that the company deliberately engaged in a process known as "core swapping" in which samples of good high density asphalt were substituted for the actual low density and thus poor quality asphalt used on the road contracts. This resulted in higher compensation. The company paid $8.2 million to settle the claims.

[57] *United States ex rel. Rambo v. Fluor Hanford, LLC et al.*, No. cv-11-5037 (E.D. Wash., 2013)
[58] *United States ex rel. Miller v. Bill Harbert Intern. Const. et al.*, 608 F.3d 871 (D.C. 2010)
[59] *False Claims Act &Qui Tam Quarterly Review Volume 40. TAF*. TAF Education Fund, 2006. Web. 8 Oct 2013.
[60] *United States ex rel. Hudalla v. Walsh Construction Co.,* 2011 WL 6028315 (N.D. Ill., 2011).
[61] *United States ex rel. Roederer v. Gohmann Asphalt and Construction* Co., Case No. 3:03CV375 (W. D. Ky., 2007).

DANGEROUS CONSTRUCTION MATERIALS – THE BIG DIG

- Perhaps the most notorious FCA construction case in recent memory involved the Big Dig contractors who managed to build the I-93 tunnels under Boston in such a manner that the roof continues to fall on the cars in the tunnels and in one instance killed a driver. A number of cases were brought by both the Government itself and by various FCA Relators.

- In *Commonwealth of Massachusetts, et. al. v. Bechtel Corporation, et. al.*[62] the United States intervened in a Qui Tam law suit filed by Daniel Johnston against a number of contractors and consulting firms including Bechtel and Parson Brinkerhoff for fraudulent billing and false certifications. The allegations were that the contractors failed to provide adequate oversight of the construction of the I-93 tunnel walls, the ceiling bolts, the work by the various contractors and the monitoring of the concrete used for the walls. The two main contractors agreed to pay more than $407 million to the United States and to the Commonwealth of Massachusetts to settle criminal and civil allegations.

- In *United States ex rel. Johnston v. Aggregate Industries PLC. et al*,[63], one of the contractors, working under the supervision of Bechtel and Parsons, Aggregate Industries Northeast Region, Inc. agreed to pay $50 million and to provide an addition $75 million in insurance coverage. Aggregate was alleged to have been involved in a fraudulent scheme to deliver adulterated concrete to the Big Dig. Aggregate had delivered 5,700 truckloads of concrete which turned out to include recycled concrete that was over ninety minutes old, adulterated with excess water or not batched correctly to be safely installed. The company allegedly falsified the concrete batch slips delivered to the Big Dig inspectors.

FAILURE TO TEST

There have been a wide variety of situations where products were not tested and did not meet requirements that were uncovered by insiders that would undoubtedly have gone undetected until it was too late and the product failed during Government service.

- In a Department of Defense case, this defense contractor produced flares that could ignite if dropped from only ten feet. The contractor was aware of this defect when it billed the Government for the flares.[64]

- In another Department of Defense case, the global telecommunications company gave misleading information concerning its design and building of an emergency

[62] *Commonwealth of Massachusetts, et. al. v. Bechtel Corporation, et. Al.,* Civil Action No. 04-1151 (Mass. Sup. Ct., 2006).
[63] *United States ex rel. Johnston v. Aggregate Industries et al*, Civil Action No. 06-11379-GAO (D. Mass., 2006).
[64] "ATK Launch Systems Inc. Settles False Claims Product Substitution Case for Nearly $37 million." *Justice News*. Department of Justice, Office of Public Affairs. 23 Apr 2012. Web. 7 Oct 2013.

response system in Iraq. A former manager came forward to show that it had certified that it had successfully tested the system when it had not done so.[65]

FRAUDULENT MARKETING AND PROMOTION

There have been a number of cases where the company has marketed and promoted a prescription drug to treat diseases for which the drug was not approved by the Food and Drug Administration. This off-label promotion has caused not only large expenditures but also endangered patients.

- A medical device company agreed to pay $30 million to settle an allegation that it paid kickbacks to surgeons in exchange for using the products in patients in procedures paid for by the Government. They gave surgeons sham consulting contracts and fake research grants and free travel and entertainment.
- In a Los Angeles case a hospital group paid $16.5 million to settle allegations that it used recruiters to bring homeless individuals from skid row in Los Angeles to hospitals by ambulance for medically unnecessary treatment that was then billed to the Government program.
- A reimbursement specialist for a hospital group provided the Government a laundry list of frauds perpetrated by the group and filed a False Claims Act against an accounting firm which had advised six hospitals to set up reserve funds in case the inflated costs they were reporting were discovered in a Medicare audit. The accounting advisors settled for $9 million,[66] while the hospital eventually settled multiple fraud allegations, brought forth by 30 whistleblowers, for a combined total of $1.36 billion plus an additional $108 million in criminal fines.[67]

There have also been a wide variety of situations where the product was delivered and met the contract criteria but the method of production failed to meet contract standards.

FAILURE TO PROVIDE QUALITY SERVICE OR PRODUCT

- A Texas based pharmaceutical company paid $48 million to resolve allegations that it caused false claims for a drug which had no FDA approval and the safety and efficacy of data for the drug was unproved.
- In a Department of Education case, the company paid $10 million to settle allegations that it fabricated attendance records for a federal program for underprivileged children to seek payment for tutoring services that it did not provide to the children.

[65] "Alcatel-lucent Subsidiary Agrees to Pay U.S. $4.2 million to Settle False Claims Act Allegations." *Justice News*. Department of Justice, Office of Public Affairs. 21 Sep 2012. Web. 7 Oct 2013.
[66] "KPMG Peat Marwick to Pay the United States over $9 million." *Justice News*. Department of Justice, Office of Public Affairs. 23 Oct 2001. Web. 7 Oct 2013.
[67] "Whistleblower Stories." *TAF*. Taxpayers Against Fraud Education Fund, 2013. Web. 7 Oct 2013.

- A chemist and pharmaceutical manufacturing quality control expert at a pharmaceutical company discovered a factory with out of date equipment and bad management. She reported contaminated water and an unsterile facility to her employer and was fired. Three years later, $2 billion worth of pharmaceuticals were confiscated from the factory by the FDA. To settle FCA allegations that the company knew it was selling contaminated drugs, it agreed to pay $750 million.[68]
- A newly hired head researcher at one of the top ten generic pharmaceutical companies in the world, realized upon being hired that the company's quality control systems were in disarray. On a routine basis, the company had been using drugs made by competitors for testing trials. The FDA banned the company from importing drugs to the U.S., and the company settled the lawsuit for $500 million.[69]

The cases show that the whistleblowers have unearthed bid rigging, defective construction, fraudulent marketing, inflated prices and arcane hidden schemes to take money from the Treasury.

The uncovering of these frauds has protected the beneficiaries of the Federal programs from harm, whether they are drivers on the Interstate Highway system, patients, soldiers, the elderly or students.

It is important to note that the settlement of the False Claims Act cases often include not only the payment of significant sums but also involve corporate integrity agreements to forestall future frauds, and enhanced compliance practices.

In 1986 at the time the amendments were passed the debate in Congress focused on deterring fraud by defense contractors. As expected the first cases were in fact against defense contractors. However, since there are relatively few such corporations and each depends upon Government contracts for their life blood the number of such cases quickly fell as the companies put in controls to attempt to comply with the law.

The healthcare industry is however very different since there are a very large number of suppliers who deal with both private customers and Government financed customers. It has been these companies recently who have consistently paid the largest sums in settlement.

Of the current filings, over two thirds are cases involving health care fraud, with only 10 percent involving defense contractors.

Attached as Appendix F.1 is a list of the 100 largest settlements to-date. Following that as Appendix F.2 is a pie chart showing the various settlements by industry.

[68] "Whistleblower Stories." *TAF*. Taxpayers Against Fraud Education Fund, 2013. Web. 7 Oct 2013.
[69] "Whistleblower Stories." *TAF*. Taxpayers Against Fraud Education Fund, 2013. Web. 7 Oct 2013.

PART VI KEY POINTS

The FCA is very effective at bringing construction kickback and poor quality issues into the open. Whistleblowers have unearthed fraudulent schemes that would be very hard or impossible for trained Government investigators to discover on their own.

PART VII. THE SUCCESS OF THE UNITED STATES FALSE CLAIMS ACT 1986-2012

Based on any measure; number of cases, number of frauds and magnitude of monetary recoveries, the success of the United States False Claims Act since 1986 has been stunning.

The Number of False Claims Act Cases has Increased Substantially.

For a frame of reference, in 1988, even after the False Claims Act 1986 Amendments, the number of false claims act cases brought by the entire federal Government was only 60 cases that year.[70]

- Based on data from 2008-2012, including a recent Freedom of Information Act Request and Department of Justice data, there have been on average been 525 cases filed per year.
- The total number of cases has been increasing each year. The Government has on average intervened in 138 cases each year. Almost 95 percent of the intervened cases have resulted in judgments or settlement.

The Amounts of Damages Collected from Defendants have Increased Dramatically

Since the adoption of the False Claims Act Amendments in 1986 the United States has collected $35 billion in fraud settlements and almost $24 billion of that has been based on Qui Tam cases brought by private citizens. Of that $24 billion collected, the Government has paid Relator share awards totaling almost $4 billion.

In 1978, before the Act was amended, the total amount of monies collected for fraud against the Federal Government was only $15 million.[71] Just after the adoption of the 1986 amendments, the monies collected went up to more than $86 million. On average over the four years 2010 to 2013 the total collected has been more than $3 billion per year.[72] Over the same period the Relators have received approximately 16 percent of those recoveries or $367 million per year.[73]

[70] Flora, Phyllis A. "The Massachusetts' False Claims Law." 3 *Massachusetts Bar Institute, Section Review*, 1 (Spring 2001).
[71] *False Claims Act of 1979, S. 1981, Hearing Before the Subcommittee on Improvements in Judicial Machinery*. Washington: Government Printing Office, 1980. 9.
[72] "Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013." *Justice News*. Department of Justice, Office of Public Affairs. 20 Dec 2013. Web. 29 Jan 2014.
[73] Data obtained from Freedom of Information Act Request to the U.S. Department of Justice for False Claims Act Cases 2008-2012.

YEAR	SETTLEMENT & JUDGMENT
1983	$26,000,000
1987	$86,479,949
2012	$4,959,333,598

TOTAL (1987-2012): $35,192,303,318

Of the 138 cases per year well over half of them (64 percent) had recoveries less than $6 million and 30 percent had recoveries over $6 million with 10 percent of the cases producing recoveries over $40 million.

- The cases that the Government has intervened in have taken significant amount of time. While these cases on average remain under seal for 13 months the larger cases can remain under seal for much longer periods. With cases that result in $40 million or more in recovery almost half stay under seal for over two years.
- The False Claims Act has deterred other entities from engaging in Fraud against the Government. The annual Fulbright and Jaworski survey of litigation trends,[74] which interviews 400 in-house counsels at major corporate entities, has found that more than 25 percent of all corporations in the United States have been subject to allegations by a whistleblower.

The False Claims Act continued to be successful in 2012

A GOOD YEAR

- The Government collected nearly $5 billion in 2012 FCA settlements and Relator awards of $439 million.[75]

Cost of Investigation and Deterrence

[74] "9th Annual Litigation Trends Report." *Fulbright*. Fulbright & Jaworski LLP, 2013. Web. 27 Aug 2013.
[75] "Fraud Statistics - Overview." Civil Division, U.S. Department of Justice. 23 December 2013. Web. 27 Jan 2014.

There are more filings and larger recoveries from Qui Tam False Claims cases every year. Based on the Department of Justice fraud statistics the average annual growth rate of new Qui Tam filings has been 13 percent for the past 24 years. The Federal Government's civil fraud enforcement activities are undertaken by the Department of Justice within the Civil Division and the cases are brought by the civil fraud litigation teams of the local United States' Attorney Offices. Since the Department of Justice has to investigate every Qui Tam case filed in order to determine whether it will intervene this has required a substantial investment in legal and investigative resources.

With some frequency industry groups have attempted to make the case that the False Claims Act has resulted in a waste of Government resources and should be scaled back. These efforts have not been successful to date but these initiatives have resulted in studies of the costs of such investigation and prosecution. Such studies have consistently shown that "for every dollar spent to investigate and prosecute health care fraud in civil cases, the federal Government receives $15 dollars back in return." See page 4 of Appendix G "Fighting Medicare Fraud –More Bang for the Federal Buck."

PART VII KEY POINTS

The FCA has resulted in $35 billion of recoveries since 1986 and in recent years recovered more than $3 billion per year on average.

PART VIII. A FALSE CLAIMS ACT FOR QUÉBEC

POLICY AND LEGAL ARGUMENTS THAT MAY BE RAISED AGAINST THE ACT

After due consideration of the history and success of the United States False Claims Act the Commission may consider recommending the adoption of a False Claims Act for the Province of Québec and its sub-jurisdictions. The two most crucial ingredients for such legislation will be of course the right of a citizen to initiate and prosecute the civil case, either in partnership with the Department of Justice, or privately in the name of the Province or local Government subdivision, and a financial participation in any successful civil proceeding resulting in payment or other alternative remedies to the Province and/or a sub-jurisdiction.

The crucial questions which will then be debated are the public policy issues concerning the role of the citizen and the role of Government in unearthing fraud and then the legality of such a statutory system under Québec Provincial Law and its compliance with Québec and Canadian constitutional rights and freedoms.

This Section of the Report deals with first the type of likely arguments which may be raised by interests in opposition to such legislation. Recent experience in the various States of the Union is instructive. The Section then turns to the likely legal impediments which might be raised.

Political Policy Issues

As mentioned above some but not all of the 50 States have enacted either full or partial Medicaid only False Claims Acts since 1986. Between 1986 and 2006, 28 State legislatures adopted False Claims Acts.[76] In 2006 under the leadership of Senator Charles Grassley, Federal legislation was passed which included provisions to give incentives to the various States to adopt their own false claims statutes and to receive a greater share of any Federal FCA Medicaid fraud recovery.[77] Since 2006, 14 states have passed false claims legislation which meet various requirements such as to be "at least as effective in rewarding and facilitating Qui Tam actions" as those in the Federal FCA and been certified as complying by the OIG HHS.[78] This means that there are fully 21 States that do not have such legislation and it is these states that have been the battleground between supporters of expanded False Claims legislation and those who oppose it.

As an example the State of Virginia has a False Claims Act modeled on the Federal FCA which was passed in 2003 and amended in 2011 and which was determined to be compliant by the OIG HHS.[79] However, in neighboring West Virginia there is a significant political controversy about draft FCA legislation currently before the State Legislature.

In testimony before the West Virginia House Judiciary Committee both proponents and opponents of the draft legislation discussed their policy positions and made written

[76] "States With False Claims Acts," *TAF*. Taxpayers Against Fraud Education Fund, 2013. Web. 29 Jan 2014.
[77] Deficit Reduction Act of 2005. Pub. L. no. 109-171. 120 Stat. 4 (2006).
[78] "State False Claims Act Reviews." Office of Inspector General, U.S. Department of Health and Human Services, 2013. Web. 27 Jan 2014.
[79] Virginia Fraud Against Taxpayers Act. Va. Code Ann. S 8.01-216,1 et seq. (2002).

submissions. See Appendix H.1 by Patrick Burns with Taxpayers Against Fraud (TAF), an advocate for the legislation and Appendix H.2, by Steve Roberts of the West Virginia Chamber and Chris Hamilton of the West Virginia Business & Industry Council, for the opposition to the legislation from business interests.

It is perhaps instructive to examine some of the key points in opposition voiced by the Chamber of Commerce and the Business and Industry Council in that state which have focused on the supposed critical failures in the proposed legislation and to juxtapose those with points drawn from the Federal FCA and from the comments from Taxpayers Against Fraud which has assisted proponents in the 14 States which have passed similar legislation since 2006.

KEY CRITICISMS	*REPLY TO CRITICISM*
Causes frivolous lawsuits	Not likely because: (1) No settlement possible without Attorney General Approval[80] and (2) The judge in the case can impose the costs of the attorney fees of the defendant on the Relator and his counsel if the Qui Tam action was clearly frivolous or clearly vexatious[81]
Overwhelm the Office of the Attorney General and increase Government costs.	As mentioned above, the cost of investigation and prosecution has been shown to be returned 15 fold. In addition if there is that much fraud in the State then additional resources are clearly needed.
The FCA would be a windfall for attorneys.	If private attorneys work on cases that benefit the State by assisting the State to secure treble damages and to deter fraud those attorneys deserve to be compensated.
The FCA would be bad for business and would add to the costs of doing business in the state.	There is no evidence that businesses in states with False Claims Acts are hurt by having to not defraud the state Government. Honest businessmen would benefit from a level playing field without dishonest competitors. Of the 10 States that the National Chamber of Commerce has identified as "Future Boom States," six have state False Claims Acts.[82] [83] Additional costs, such as self-policing and controls to stop fraud would seem to be a benefit to those companies.
Existing remedies are adequate	States without a state False Claims Act have not been particularly successful at securing redress for contract fraud. West Virginia's Attorney General, without a False Claims Act, failed to secure a verdict for $4.5 million against Johnson & Johnson, which did pay $1.391 billion under the Federal False Claims Act for the same activities.[84]

[80] 31 U.S.C. §3730 (b)(1)
[81] 31 U.S.C. §3730 (d)(4)
[82] Praxis Strategy Group, "Enterprising States: Recovery and Renewal for the 21st Century," U.S. Chamber of Commerce. 20 Jun. 2011. Web. 31 Jan. 2014 https://www.uschamber.com/sites/default/files/documents/files/ES2011-full-doc-web.pdf
[83] Praxis Strategy Group, "Enterprising States: Policies that Produce," U.S. Chamber of Commerce. 13 Jun. 2012. Web. 31 Jan. 2014. https://www.uschamber.com/sites/default/files/legacy/reports/Enterprising-States-2012-web.pdf
[84] See *State of West Virginia ex. rel. McGraw, Jr., v. Johnson & Johnson*. No. 04-C-156 (W.Va., 2010).and "Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations." *Justice News*. Department of Justice, Office of Public Affairs. 4 Nov 2013. Web. 31 Jan 2014.

The fundamental policy question is whether private citizens should be granted the power and an incentive to undertake civil fraud prosecution. Put at its simplest this question is whether individual citizens can be trusted to actively assist in the Governmental activity of investigating and holding accountable individuals and corporations which raid the public purse.

The legislative history of the passage and amendments to the False Claims Act in the United States over the past 150 years is instructive. It was often the individuals within the Governmental institutions who fought against the passage or improvements of the Act in order to maintain both their prerogatives and their bureaucratic powers. Those same individuals in maintaining their turf often raised the argument that the Government was doing a fine job of ferreting out fraud when exactly the opposite was true. For Québec then a fundamental question is whether the investigatory and prosecutorial institutions of Government acting alone without a new set of citizen investigators will do any better job at thwarting corruption in the future than they have in the past.

Legal Impediments

It appears that there are three types of legal arguments that might be raised against the implementation of a Québec False Claims Act.[85] There is no precedent for such a civil remedies statute in Canadian law

- Québec does not have the legal authority as a province of the Canadian federation, to enact it; and
- A Québec FCA would comply with the standards of Québec and Canadian constitutional rights and freedoms.

THERE IS NO PRECEDENT FOR SUCH A CIVIL REMEDIES STATUTE UNDER CANADIAN LAW

Similar or analogous civil remedies have often been created by statute in Canada. Listed below are a number of examples:

Federal competition legislation (similar to the United States Sherman Act) – provides in the following terms a right of private enforcement for breach of statutory provisions:

- **36.** (1) Any person who has suffered loss or damage as a result of

  (a) conduct that is contrary to any provision of Part VI, or

  (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

  may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of

[85] The author would like to thank Professor Paul Daly of the University of Montreal for his assistance and research with regards to the following issues in Québec and Canadian law.

any investigation in connection with the matter and of proceedings under this section.

Securities legislation commonly provides both for a regulatory system and for private enforcement across the various provinces. For instance the *Ontario Securities Act*, provides for such privately initiated enforcement.[86] Québec specifically provides in its *Securities Act* for a series of civil remedies for breaches of securities laws. [87]

In the area of municipal governance the Québec legislature has created private rights of action to deal with corruption. The *Act Respecting Elections and Referendums in Municipalities*, was recently amended to include the following provision:[88]

> **312.1.** The Superior Court may, on a motion, if it considers it warranted in the public interest, declare provisionally incapable to perform any duty of office a member of the council of a municipality against whom proceedings have been brought for an offence that is punishable by a term of imprisonment of two years or more.
>
> The motion may be brought by the municipality, the Attorney General or any of the municipality's electors.
>
> To assess whether it is warranted in the public interest, the court considers the connection between the alleged offence and the council member's duties and the extent to which the alleged offence is likely to discredit the administration of the municipality.

In *Boyer c. Lavoie*,[89] the Mayor of Saint-Rémi, who had been charged with abuse of office, conspiracy and fraud, was removed from office pursuant to an application under this provision.

QUÉBEC DOES HAVE THE ABILITY AS A PROVINCE IN THE CANADIAN FEDERATION TO ADOPT A FALSE CLAIMS ACT

Québec was granted broad powers to enact necessary legislation such as a False Claims Act. Québec was specifically granted such broad authority under Section 92(13) of the *Constitution Act, 1867* to enact laws relating to "property and civil rights in the province". It also has an ancillary jurisdiction under section 92(15) to impose fines, penalties or imprisonment for breaches of validly enacted provincial legislation.[90]

The enactment of a False Claims Law, a civil remedy to combat fraud in Government contracting falls under this broad authority. It is exactly this type of civil action and remedies which is within the purview of a province of the Federation.[91]

[86] Securities Act, RSO 1990, c. S. 5, ss. 130. – 138.
[87] Securities Act, CQLR 2013, c. V. 1-1, ss. 213.1 – 236.1
[88] An Act Respecting Elections and Referendums in Municipalities, CQLR 2013, c. E-2.2
[89] Boyer c. Lavoie, 2013 QCCS 4114.
[90] Constitution Act, 1867, 30 & 31 Vict, c. 3
[91] *MacDonald et al. v. Vapor Canada Ltd.*, 1976 CanLII 181 (SCC), [1977] 2 SCR 134

It is important to note that a Québec False Claim Act based on the United States model authorizes only a civil proceeding with damages and civil penalties but does not contain any criminal proceedings. Since only the Federal Parliament has the authority to enact criminal laws, the argument might be made that even this provincial civil remedy relating to matters of fraud in contracts with the Province or its subsidiary jurisdictions might be beyond its powers.

It appears that there is clear precedent establishing Québec's authority to enact this somewhat novel civil remedy. A case in point is the Supreme Court of Canada's decision in *Chatterjee v. Ontario (Attorney General)*[92] to uphold Ontario's *Civil Remedies Act*, (which authorized forfeitures to deter the financial incentives for misbehavior[93]) against constitutional challenge. As Binnie J. summarized his conclusions:

> The CRA method of attack on crime is to authorize in rem forfeiture of its proceeds and differs from both the traditional criminal law which ordinarily couples a prohibition with a penalty…and criminal procedure which in general refers to the means by which an allegation of a particular criminal offence is proven against a particular offender. The appellant's answer, however, is that the effect of the CRA in rem remedy just adds to the penalties available in the criminal process, and as such the CRA invalidly interferes with the sentencing regime established by Parliament. It is true that forfeiture may have de facto punitive effects in some cases, but its dominant purpose is to make crime in general unprofitable, to capture resources tainted by crime so as to make them unavailable to fund future crime and to help compensate private individuals and public institutions for the costs of past crime. These are valid provincial objects.

The same conclusions would apply *a fortiori* to a Québec False Claims Act which would provide the civil remedies of treble damages and penalties for corruption and fraud against the Province. Any crime-suppressing effects would be incidental to the primary purpose of providing a civil remedy to improve the provision of goods and services to the Québec Government and its municipal sub jurisdictions.

A QUÉBEC FALSE CLAIMS ACT WOULD BE IN COMPLIANCE WITH QUÉBEC AND CANADIAN CONSTITUTIONAL RIGHTS AND FREEDOMS

Since the Québec False Claims Act would authorize a civil proceeding which only requires a civil burden of proof, that is by the preponderance of the evidence detractors might attempt to categorize the FCA as being penal in character and thus requiring a criminal burden of proof (beyond all reasonable doubt).

Both the federal *Canadian Charter of Rights and Freedoms* and the provincial *Québec Charter of Human Rights and Freedoms* contain protections for persons accused of criminal offences. For example, section 11 of the federal *Charter* accords a panoply of rights to "[a]ny person charged with an offence".[94]

[92] *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), [2009] 1 SCR 624
[93] Civil Remedies Act, 2001, SO 2001, c 28
[94] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 11

These protections attach not just to classic criminal-law statutes, but also to other provisions the breach of which carries "true penal consequences."[95]

There have been a number of cases which have categorized analogous civil remedies as not being criminal in nature. For instance the Ontario Court of Appeal in *Ontario (Attorney General) v. Chatterjee*, dismissed just such an argument with regard to a civil forfeiture remedy.[96] The Court noted that forfeiture proceedings have not been treated as criminal in nature. This would seem to point to the same conclusion with regards to civil remedies for fraudulent conduct. The Ontario Court also took into account the absence of "the stigma associated with a criminal conviction," a point that is again equally forceful in the context of civil remedies such as treble damages or penalties associated with individual contractual frauds. It might be argued that the cumulative impact of the treble damages and the penalties for many claims under a contract might trigger the penal consequences protections. It is notable that Canadian courts have not regarded regulatory offences with large fines as triggering the "true penal consequences" test. In *Canada (Competition Bureau) v. Chatr Wireless Inc.*, a $10 million regulatory penalty did not attract the protections of the *Charter*.[97]

While it is doubtlessly true that these various legal issues concerning a Québec False Claims Act will each be litigated in the Québec and Federal courts it appears that such arguments would fail in the courts.

PART VIII KEY POINTS

There do not appear to be substantial policy or legal impediments to the adoption of a False Claims Act for Québec.

CONCLUSION

A False Claims Act for Québec would be a very effective tool for preventing collusion and corruption in the awarding of public contracts with a focus on the construction industry.

[95] *R. v. Wigglesworth,* 1987 CanLII 41 (SCC), [1987] 2 SCR 541
[96] *Ontario (Attorney General) v. Chatterjee*, 2007 ONCA 406, 86 O.R. (3d.) 168
[97] *Canada (Competition Bureau) v. Chatr Wireless Inc.,* 2013 ONSC 5315

REPORT TO THE COMMISSION OF INQUIRY ON THE AWARDING AND MANAGEMENT OF PUBLIC CONTRACTS IN THE CONSTRUCTION INDUSTRY:

THE UNITED STATES FALSE CLAIMS ACT

APPENDICES

Appendices

About the Author

Neal A. Roberts is an expert on anti-corruption programs and legislation and, in particular, the United States False Claims Act. He has specialized in providing a wide array of legal consulting services.

FALSE CLAIMS ACT EXPERIENCE

In 2000, commenced lawsuits on behalf of the United States Government pursuant to the False Claims Act (FCA). Developed cases based on industry-wide fraudulent business practices. Brought sets of lawsuits against numerous Fortune 500 companies who are major suppliers of billions of dollars of services and equipment to the United States Government:

2001 – The Travel Fraud Cases involved a number of the largest consulting and accounting companies' practices of charging the Federal Government for the full retail value of airfare and hotel expenses and then receiving undisclosed cash rebates, or "kickbacks," of millions of dollars which these companies then failed to return to the Federal Government.

- Initially filed cases against 12 of these consulting companies.
- Provided expertise to assist the Federal Government in investigating these actions to determine the liability of the entities and the magnitude of the damages, which led the Department of Justice to intervene against five defendants.
- The Government settled the five cases with the defendants and recovered a total of $67,510,000 in damages from PricewaterhouseCoopers, Bearing Point, KPMG, Ernst & Young, and Booz Allen Hamilton.

2004 – The SI Vendor Cases involved high technology companies that advised the United States Government on the installation of systems integration computer systems. The consultants received kickbacks and the hardware and software vendors paid those undisclosed commissions and falsified their prices to the Government.

- Filed a total of eight FCA cases against 32 defendants.
- Worked extensively on the investigation, interviews and analysis of many thousands of documents.
- Worked on a regular basis with the five Justice Department attorneys, nine private attorneys, and twelve Federal investigators who ultimately prosecuted these cases; the Department of Justice ultimately intervened in nine cases.
- Provided depositions on three separate occasions regarding the defendants' fraudulent activities.
- The Government settled the nine cases and recovered a total of $309,698,669 in damages from EMC, Accenture, Hewlett Packard, Cisco, Sun Microsystems, IBM, NCR, PricewaterhouseCoopers, and Computer Science Corp.

PROFESSIONAL EXPERIENCE

Practiced law and then was a consulting partner at Deloitte & Touche and then at PricewaterhouseCoopers

- Emphasis on legal matters involving fraud and the identification and investigation of fraudulent schemes.
- Extensive experience in determining the damages arising from complex frauds and testifying as damages expert in a number of multi-million dollar litigation matters.

ACADEMIC EXPERIENCE

Associate law professor at Osgoode Hall Law School at York University in Toronto, Canada; lecturer at the University of Warwick in Coventry, England; and visiting professor at the UCLA Law School in Los Angeles, California.

INTERNATIONAL EXPERIENCE

Team leader of the Asian Development Bank sponsored Republic of Indonesia Governance Audit of the Public Prosecution Service, reported to the Indonesian Attorney General. Co-led a team of seven international and six Indonesian experts and produced a report with analysis and recommendations covering mission and mandate, integrity and corruption, management and administration, technology and knowledge, and relations with other justice institutions and public accountability. Mr. Roberts also helped design workshops and train facilitators to present the report to stakeholder groups across Indonesia.

EDUCATION

JD, University of California, Berkeley, Boalt Hall School of Law, 1970
MA, University of California, Santa Barbara, Political Science, 1967
BA, University of California, Santa Barbara, Political Science, 1966
Post Doctoral Ford Foundation Scholar in New Delhi, India, 1971

PROFESSIONAL AFFILIATIONS

California Bar, #[redacted], 1971 to date
United States Ninth District Court, 1971
Certified Fraud Examiner
Taxpayers Against Fraud

PUBLICATIONS

Mr. Roberts has published five books and seventeen articles on various legal and financial topics.

Appendix A.

The FCA and Australia
by Lesley Ann Skillen

The FCA and Australia

On October 23, 2012, the Australian National University (ANU) College of Law with the support of the Australian Research Council and the HC Coombs Policy Forum at the Crawford School of Public Policy held a high level, invitation only, full day workshop to investigate aspects of the US False Claims anti-fraud system that could be incorporated into government legislation for Australia. The workshop also explored associated legislative issues, the policy context, public perceptions and the involvement of the legal profession.

The workshop was organized with the assistance of senior Fraud Policy officers in the Australian Government Attorney General's Department. Attendees consisted of the main stakeholders in the Australian government (including representatives of government agencies and law enforcement officials, as well as relevant private sector entities) and also included invited experts from the US Department of Justice and private bar who contributed their knowledge and experience of the US False Claims process.

Research work under the grant was approved by the Chair of the Humanities and Social Sciences Delegated Ethics Research Committee of the Australian National University and was covered by the privacy and confidentiality protections covered therein. Discussion at the workshop operated under the Chatham House Rule.

The Australian Attorney General's Department is in the process of considering the introduction of a False Claims Act in Australia. The subject has been discussed in the press in Australia and there appears to be some support. An article in the Sydney Morning Herald in June 2013 reported:

The Australian Federal Police Association, the Tax Justice Network, whistleblower supporters and academic experts are among those calling for new laws modelled on the False Claims Act - the US law used by Davis, and hundreds of other whistleblowers, to help recoup billions of dollars for the US government.

The idea is being looked at by the Attorney-General's Department.

"The [department] is currently considering the merits of an Australian scheme modeled on the US False Claims Act and how the scheme could best be adapted for the Australian legal context," a spokesman said. "The department has undertaken consultation with key stakeholders regarding this issue."

http://www.smh.com.au/business/warning-blowing-the-whistle-could-mess-up-your-life-20130614-2o9z0.html#ixzz2mLyHVQFG

In 2013, South Australian Senator Nick Xenophon signaled his intention to introduce a law modeled on the US False Claims Act. http://www.smh.com.au/business/the-price-of-speaking-out-20130809-2rngk.html and this is expected in 2014. The Governance Institute of Australia urged that a "targeted" review of whistleblower laws be launched.

http://www.smh.com.au/business/australian-whistleblowers-provide-tipoffs-for-us-scheme-amid-criticism-of-laws-at-home-20140119-312op.html#ixzz2rMTo3Tkm

Additional information can be obtained from Lesley Ann Skillen, lskillen@getnicklaw.com.

Appendix B.1

False Claims Act, Title 31 Sections 3729, 3730 and 3731

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) Liability for certain acts.

(1) In general. Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

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

(2) Reduced damages. If the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

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

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

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

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

(b) Definitions. For purposes of this section--

(1) the terms "knowing" and "knowingly"--

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

(i) has actual knowledge of the information;

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

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

(B) require no proof of specific intent to defraud;

(2) the term "claim"--

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

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

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

(I) provides or has provided any portion of the money or property requested or demanded; or

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

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

(3) the term "obligation" means an established

duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

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

(c) Exemption from disclosure. Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [26 USCS §§ 1 et seq.].

(e) [Redesignated]

History:

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 978; Oct. 27, 1986, P.L. 99-562, § 2, 100 Stat. 3153; July 5, 1994, P.L. 103-272, § 4(f)(1)(O), 108 Stat. 1362.)

(As amended May 20, 2009, P.L. 111-21, § 4(a), 123 Stat. 1621.)

History; Ancillary Laws and Directives:

1. Prior law and revision
2. Amendments
3. Other provisions

1. Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3729	31:231	R.S. Sec. 3490.

In the section, before clause (1), the words "a member of an armed force of the United States" are substituted for "in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States" and "military or naval service" for consistency with title 10. The words "is liable" are substituted for "shall forfeit and pay" for consistency. The words "by reason of the doing or committing such act" are omitted as surplus. The words "civil action" are substituted for "suit" for consistency in the revised title and with other titles of the Code. The words "and such forfeiture and damages shall be sued for in the same suit" are omitted as unnecessary because of rules 8 and 10 of the Federal Rules of Civil Procedure. In clauses (1)-(3), the words "false or fraudulent" are substituted for "false, fictitious, or fraudulent" and "fraudulent or fictitious" to eliminate unnecessary words and for consistency. In clause (1), the words "presents, or causes to be presented" are substituted for "shall make or cause to be made, or present or cause to be presented" for clarity and consistency and to eliminate unnecessary words. The words "officer or employee of the Government or a member of an armed force" are substituted for "officer in the civil, military, or naval service of the United States" for consistency in the revised title and with other titles of the Code. The words "upon or against the Government of the United States, or any department or officer thereof" are omitted as surplus. In clause (2), the word "knowingly" is substituted for "knowing the same to contain any fraudulent or fictitious statement or entry" to eliminate unnecessary words. The word "record" is substituted for "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for consistency in the revised title and with other titles of the Code. In clause (3), the words "conspires to" are substituted for "enters into any agreement, combination, or conspiracy" to eliminate unnecessary words. The words "of the United States, or any department or officer thereof" are omitted as surplus. In clause (4), the words "charge", "or other", and "to any other person having authority to receive the same" are omitted as surplus. In clause (5), the words "document certifying receipt" are substituted for "certificate, voucher, receipt, or other paper certifying the receipt" to eliminate unnecessary words. The words "arms, ammunition, provisions, clothing, or other", "to any other person", and "the truth of" are omitted as surplus. In clause (6), the words "arms, equipments, ammunition, clothes, military stores, or other" are omitted as surplus. The words "member of an armed force" are substituted for "soldier, officer, sailor, or other person called into

or employed in the military or naval service" for consistency with title 10. The words "such soldier, sailor, officer, or other person" are omitted as surplus.

2. Amendments:

1986. Act Oct. 27, 1986, substituted "(a) Liability for certain acts. Any person who--" for introductory matter which read: "A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $ 2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person--"; in subsec. (a), as so designated, in para. (1), substituted "United States Government or a member of the Armed Forces of the United States" for "Government or a member of an armed force", in para. (2), inserted "by the Government", in para. (4), deleted "public" following "control of" and substituted "by the Government" for "in an armed force", in para. (5), substituted "by the Government" for "in an armed force" and deleted "or" following the concluding semicolon, in para. (6), substituted "an officer or employee of the Government, or member of the Armed Forces," for "a member of an armed force" and substituted "; or" for the concluding period, and added para. (7), the intermediate matter following such para., subparas. (A)-(C), and the concluding matter; and added subsecs. (b)-(e).

1994. Act July 5, 1994, in subsec. (e), substituted "1986" for "1954".

2009. Act May 20, 2009 (effective and applicable as provided by § 4(f) of such Act, which appears as a note to this section), substituted subsec. (a) and (b) for former subsecs. (a)-(c) which read:

"(a) Liability for certain acts. Any person who--

"(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

"(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

"(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

"(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

"(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

"(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

"(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

"(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

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

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

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

"(b) Knowing and knowingly defined. For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information--

"(1) has actual knowledge of the information;

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

"(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

"(c) Claim defined. For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.";

redesignated subsecs. (d) and (e) as subsecs. (c) and (d), respectively; and in subsec. (c) as redesignated, substituted "subsection (a)(2)" for "subparagraphs (A) through (C) of subsection (a)".

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729 [31 USCS § 3729]. If the Attorney General finds that a person has violated or is violating section 3729 [31 USCS § 3729], the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 [31 USCS § 3729] for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the

Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 [31 USCS § 3729] upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729 [31 USCS § 3729], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an

action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

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

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

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

(iii) from the news media,

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

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

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from retaliatory actions.

(1) In general. Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter [31 USCS §§ 3721 et seq.].

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

(3) Limitation on bringing civil action. A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

History:

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 978; Oct. 27, 1986, P.L. 99-562, §§ 3, 4, 100 Stat. 3154, 3157; Nov. 19, 1988, P.L. 100-700, § 9, 102 Stat. 4638; May 4, 1990, P.L. 101-280, § 10(a), 104 Stat. 162; July 5, 1994, P.L. 103-272, § 4(f)(1)(P), 108 Stat. 1362.)

(As amended May 20, 2009, P.L. 111-21, § 4(d), 123 Stat. 1624; March 23, 2010, P.L. 111-148, Title X, Subtitle A, § 10104(j)(2), 124 Stat. 901; July 21, 2010, P.L. 111-203, Title X, Subtitle G, § 1079A(c), 124 Stat. 2079.)

History; Ancillary Laws and Directives:

1. Prior law and revision
2. References in text
3. Explanatory notes
4. Amendments

1. Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3730(a)	31:233	R.S. Sec. 3492.
3730(b)(1)	31:232(A), (B)(less words between 3d and 4th commas)	R.S. Sec. 3491(A)-(E); restated Dec. 23, 1943, ch 377, Sec. 1, 57 Stat. 608; June 11, 1960, Pub. L. 86-507, Sec. 1(28), (29), 74 Stat. 202.
3730(b)(2)	31:232(C)(1st-3d sentences, 5th sentence proviso)...	
3730(b)(3)	31:232(C) (4th sentence, 5th sentence less proviso).	
3730(b)(4)	31:232(C) (last sentence), (D)	
3730(c)(1)	31:232(E)(1)	
3730(c)(2)	31:232(E)(2) (less proviso)	
3730(d)	31:232(B) (words between 3d and 4th commas), (E)(2)(proviso).	

In the section, the words "civil action" are substituted for "suit" for consistency in the revised title and with other titles of the Code.

In subsection (a), the words "Attorney General" are substituted for "several district attorneys of the United States [subsequently changed to 'United States attorneys' because of section 1 of the Act of June 25, 1948 (ch. 646, 62 Stat. 909)] for the respective districts, for the District of Columbia, and for the several Territories" because of 28:509. The words "by persons liable to such suit" are omitted as surplus. The words "and found within their respective districts or Territories" are omitted because of the restatement. The words "If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General shall bring a civil action against the person" are substituted for "and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages" for clarity and consistency. The words "as the district judge may order" are omitted as surplus. The words "of the Attorney General" are substituted for "the person bringing the suit" for consistency in the section.

In subsection (b)(1), the words "Except as hereinafter provided" are omitted as unnecessary. The words "for a violation of section 3729 of this title" are added because of the restatement. The words "and carried on", "several", and "full power and" are omitted as surplus. The words "of the action" are substituted for "to hear, try, and determine such suit" to eliminate unnecessary words. The words "Trial is in the judicial district in which the person charged with a violation is found or the violation occurs" are substituted for "within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed" for consistency in the revised title and with other titles of the Code. The words "withdrawn or" and "judge of the" are omitted as surplus. The words "Attorney General" are substituted for "district attorney [subsequently changed to 'United States attorney' because of section 1 of the Act of June 25, 1948 (ch. 646, 62 Stat. 909)], first filed in the case" because of 28:509.

In subsection (b)(2), before clause (A), the words "bill of", "Whenever any such suit shall be brought by any person under clause (B) of this section" and "to the effective prosecution of such suit or" are omitted as surplus. The words "served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.)" are substituted for "notice . . . shall be given to the United States by serving upon the United States Attorney for the district in which such suit shall have been brought . . . and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia" because of 28:509 and to eliminate unnecessary words. The words "proceed with the action" are added for clarity. Clause (A) is substituted for "shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit" for clarity and consistency. In clause (B), the words "a period of" and "therein" are omitted as surplus.

In subsection (b)(3), the words "within said period" are omitted as surplus. The words "proceeds with the action" are substituted for "shall enter appearance in such suit" for consistency. The words "In carrying on such suit" and "and may proceed in all respects as if it were instituting the suit" are omitted as surplus.

In subsection (b)(4), the words "Unless the Government proceeds with the action" are added because of the restatement. The words "shall dismiss an action brought by the person on discovering" are substituted for "shall have no

jurisdiction to proceed with any such suit . . . or pending suit . . . whenever it shall be made to appear that" to eliminate unnecessary words. The words "or any agency, officer, or employee thereof" are omitted as unnecessary. The text of 31:232(C)(last sentence proviso) and (D) is omitted as executed.

In subsection (c), the words "herein provided", "fair and . . . compensation to such person", and "involved therein, which shall be collected" are omitted as surplus.

In subsection (c)(2), the words "whether heretofore or hereafter brought" are omitted as unnecessary. The words "bringing the action or settling the claim" are substituted for "who brought such suit and prosecuted it to final judgment, or to settlement" for clarity and consistency. The words "as provided in clause (B) of this section" are omitted as unnecessary. The words "the civil penalty" are substituted for "forfeiture" for clarity and consistency. The words "to his own use", "the court may", and "to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court" are omitted as surplus.

Subsection (d) is substituted for 31:232(B)(words between 3d and 4th commas) and (E)(2)(proviso) to eliminate unnecessary words.

2. References in text:

The "Federal Rules of Civil Procedure", referred to in subsec. (b)(2), (3), appear as USCS Court Rules, Federal Rules of Civil Procedure.

3. Explanatory notes:

The bracketed word "General" has been inserted in subsec. (d)(1) as the word probably intended by Congress.

4. Amendments:

1986. Act Oct. 27, 1986, substituted this section for one which read:

"(a) The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person. The person may be arrested and bail set for an amount of not more than $ 2,000 and 2 times the amount of damages sworn to in an affidavit of the Attorney General.

"(b)

(1) A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. The district courts of the United States have jurisdiction of the action. Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs. An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.

"(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.). The Government may proceed with the action by entering an appearance by the 60th day after being notified. The person bringing the action may proceed with the action if the Government--

"(A) by the end of the 60-day period does not enter, or gives written notice to the court of intent not to enter, the action; or

"(B) does not proceed with the action with reasonable diligence within 6 months after entering an appearance, or within additional time the court allows after notice.

"(3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

"(4) Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

"(c)

(1) If the Government proceeds with an action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

"(2) If the Government does not proceed with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount may not be more than 25 percent of the proceeds of the action or settlement and shall be paid out of those proceeds. The person may also receive an amount for reasonable expenses the court finds to have been necessarily incurred and costs awarded against the defendant.

"(d) The Government is not liable for expenses a person incurs in bringing an action under this

section.".

Such Act further added subsec. (h).

1988. Act Nov. 19, 1988, in subsec. (d), redesignated former para. (3) as para. (4), and added a new para. (3).

Act Nov. 19, 1988, further purported to amend 28 USCS § 3730 by inserting, in subsec. (c)(4), "the" following "Government proceeds with" and, in subsec. (d)(4), as so redesignated, substituting "action" for "actions" preceding "was clearly frivolous,"; however, such amendments were executed to **31 USCS § 3730** as the probable intent of Congress.

1990. Act May 4, 1990 (effective 1/1/91 as provided by § 10(c) of such Act, which appears as 10 USCS § 2397a note), in subsec. (e)(2)(B), substituted "paragraphs (1) through (8) of section 101(f)" for "201(f)".

1994. Act July 5, 1994, in subsec. (e)(2)(B), substituted "paragraphs (1)" for "section paragraphs (1)".

2009. Act May 20, 2009 (effective on enactment and applicable to conduct on or after the date of enactment, as provided by § 4(f) of such Act, which appears as 31 USCS § 3729 note), substituted subsec. (h) for one which read:

"(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.".

2010. Act March 23, 2010, in subsec. (e), substituted para. (4) for one which read:

"(4)

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

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

Act July 21, 2010 (effective 1 day after enactment, as provided by § 4 of such Act, which appears as 12 USCS § 5301 note), in subsec. (h), in para. (1), substituted "agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter" for "or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter", and added para. (3).

§ 3731. False claims procedure

(a) A subpena [subpoena] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [31 USCS § 3730] may be served at any place in the United States.

(b) A civil action under section 3730 [31 USCS § 3730] may not be brought--
(1) more than 6 years after the date on which the violation of section 3729 [31 USCS § 3729] is committed, or
(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b) [31 USCS § 3730(b)], the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) [31 USCS § 3730(b)] to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730 [31 USCS § 3730], the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730 [31 USCS § 3730].

Return to Practitioner's Toolbox History:

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 979; Oct. 27, 1986, P.L. 99-562, § 5, 100 Stat. 3158.)
(As amended May 20, 2009, P.L. 111-21, § 4(b), 123 Stat. 1623.)

Return to Practitioner's Toolbox History; Ancillary Laws and Directives:

Go to 1. Prior law and revision 1. Prior law and revision
Go to 2. Explanatory notes 2. Explanatory notes
Go to 3. Amendments 3. Amendments

Go back to History; Ancillary Laws and Directives List 1. Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3731(a)	31:232(F)	R.S. Sec. 3491(F); added Nov. 2, 1978, Pub. L. 95-582, Sec. 1, 92 Stat. 2479.
3731(b)	31:235	R.S. Sec. 3494.

In subsection (b), the words "A civil action under section 3730 of this title" are substituted for "Every such suit" for clarity.

Go back to History; Ancillary Laws and Directives List 2. Explanatory notes:
The bracketed word "subpoena" has neem inserted in subsec. (a) as the word probably intended by Congress.

Go back to History; Ancillary Laws and Directives List 3. Amendments:

1986. Act Oct. 27, 1986, substituted subsec. (b) for one which read: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed."; and added subsecs. (c) and (d).

2009. Act May 20, 2009 (effective on enactment and applicable as provided by § 4(f) of such Act, which appears as 31 USCS § 3729 note), redesignated subsecs (c) and (d) as subsecs. (d) and (e), respectively; and inserted new subsec. (c).

Appendix B.2

BEST PRACTICES: PRACTICE ISSUES
By Andrew M. Beato

Stein, Mitchell, Muse & Cipollone LLP
By Andrew M. Beato

Best Practices: Practice Issues[1]

1. Pre-Filing Investigation Issues.

- ☐ Construction of case theories (liability and damages)
- ☐ Consider impact of multiple defendants
- ☐ Determine whether there has been a Freedom of Information Act request or document production. *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S.Ct. 1885 (2011) (FOIA responses produced by a federal agency qualify as publicly disclosed reports under 31 U.S.C. § 3730(e)(4))
- ☐ Establish clear restrictions on insider relator's access to business records in the ordinary course of business, electronic records, etc.
- ☐ Establish protocol for accessing, storing, and possible disclosure of protected information and documents, for example:
  - ☐ Protected health information not de-identified under HIPAA
  - ☐ Trade secret/proprietary information
  - ☐ Documents with security designation
  - ☐ Information and documents potentially subject to a claim of attorney-client privilege and/or work product protection
    - ☐ Client review, segregation, retention, and shielding from counsel
- ☐ Establish protocol for maintaining the privilege in communications by and between relator, counsel, and the government
- ☐ Internal procedures for receiving and storing documents from relator
  - ☐ Administrator-level restricted access to directory/database/email
  - ☐ Dedicated server with restricted access

[1] This checklist was prepared by Stein Mitchell Muse Cipollone LLP for educational purposes. It is not intended to be an exhaustive list of topics that should be considered by relator's counsel. It is not intended to be used as legal advice.

2. Multiple Relator Issues.

- Avoid cross-pollination of knowledge affecting original source
  - Separate interviews
  - No commingling of documents
- Identification and resolution of any conflicts of interest
  - Ethical issues regarding determination of relator share and expenses
  - Allocation of labor between relators
  - Potential effect of the dismissal of one relator
  - Settlement authority

3. Pre-Filing Disclosure Issues.

- Pre-filing communications with government regarding case, claims, administrative resources, etc.
- Voluntary disclosure of relator's information to the government prior to filing under 31 U.S.C. § 3730(e)(4)(b)
- Memorializing date of disclosures/communications

4. Filing and Service Issues.

- Forum selection considerations
- Length of time to wait before filing – first to file and case law considerations
- Filing logistics to comply with the seal (*see* Seal Maintenance Issues)
- Service of the complaint and written disclosure statement of substantially all material evidence under 31 U.S.C. § 3730(b)(2) under Rule 4 of the Federal Rules of Civil Procedure
- Discoverability of non-privileged disclosure statement content in public disclosure challenges

5. Seal Maintenance Issues.

- Purpose of the initial seal period is to allow time for preliminary assessment of claims and identification of any pre-existing civil or criminal investigations
- Seal prohibits disclosure of existence of *qui tam* complaint, but does not seal the nature and existence of fraud. *See Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 254 (4th Cir. 2011) ("Nothing in the FCA prevents the qui tam relator from disclosing the existence of the fraud.").
- Internal procedures to maintain seal, *e.g.*, restricted access to case information
- Inform relator of seal obligations and risks of breaching the seal
- Government seal extensions beyond the initial period and related issues such as consent of relator

6. Post-Filing Conduct by Relator and Working with the Government.

- Independent investigations by relator after filing suit not permitted
- Common interest agreements
  - Access to evidence obtained by the government
  - Institute procedures to segregate government-derived information
- Prepare relator for interview with government authorities
- Consider the impact of a government decision to intervene/declining intervention

7. Settlement and Relator Share Issues.

- Coordinate Federal and State investigations
- Consider the impact of criminal penalties and alternate remedies
- Maximize relator's share based on "substantial contribution" standard
  - Department of Justice guidelines enumerate items that are considered that may increase the percentage awarded. *See* 11 FALSE CLAIMS ACT AND QUI TAM QUARTERLY REVIEW at 17-19 (October 1997).
- FCA's fee-shifting provision entitles the relator to attorney's fees and costs under 31 U.S.C. § 3730(d)

Appendix B.3

Taxpayer Protection Bureau SUGGESTED QUI TAM *PROCEDURES AND INFORMATION FOR* QUI TAM *PLAINTIFF TO INCLUDE IN* QUI TAM *COMPLAINT AND DISCLOSURES*
By Randall M. Fox

TPB Suggested *Qui Tam* Procedures and Information for *Qui Tam* Plaintiff to Include in *Qui Tam* Complaint and Disclosures

Note: This list is a non-exclusive list of procedures and information we appreciate when we receive a *qui tam* complaint and its accompanying disclosure materials. This list is not intended as a legal document. It neither takes positions on any legal issues, nor serves as an exhaustive list of the information that should be disclosed. We recognize that each case can be different and can satisfy the requirement of the False Claims Act in various ways. In each case, our Office evaluates a number of factors in determining whether it is one that we wish to take on or not. We always appreciate the ability to glean information that may be relevant as efficiently as possible.

I. PROCEDURES

A. Service on OAG

1. Note that service on New York in a False Claims Act case must be accomplished as required by NYS regulations under the False Claims Act: by service upon the OAG Managing Clerk's Office at 120 Broadway, 24th Floor, NY, NY 10271.
2. To assist in directing the papers with the Office, it is helpful if the envelope with such papers include an attention line: "ATTENTION: FALSE CLAIMS ACT CASE."
3. Clearly identify date of service of filed complaint on OAG.
4. Upon filing a case, provide the Office with copies of the filed complaint, disclosure statement, request for judicial intervention (in NYS Court), sealing order, and all other papers provided to or issued from the Court.

B. General

1. We appreciate receiving electronic versions of all documents.
2. We ask that relators make themselves available to answer our questions and address issues we may raise about the claims.
3. Do not produce a defendant's privileged information to us. If there is any reason to believe that information and documents in a relator's possession are subject to a claim of privilege by the defendant, you can provide us with a privilege log identifying the documents or information and the basis of the privilege. If you believe that a privilege has been waived by the crime-fraud exception or some other doctrine, provide us with an explanation of the exception without disclosing the privileged information.
4. The New York False Claims Act and the New York regulations under the False Claims Act can be found on the website for the New York Attorney General at the following link: http://www.ag.ny.gov/feature/whistleblowers-new-york-false-claims-act.

II. COMPLAINT & DISCLOSURE MATERIALS

A. Parties

1. Defendant(s):
   - Identify full names of all defendants
   - Identify addresses of all defendants
   - Where useful, identify the SSN or EIN of all defendants (in disclosure statement, not complaint)
   - Describe the nature of business entity defendants (*e.g.*, public corporation, S corp, partnership, LLC, LLP, sole proprietorship, *etc.*)
   - Describe the defendant's business and industry
   - Identify relevant subdivisions or personnel of defendants
   - Describe how each defendant can be served with process (*e.g.*, to address in NYS, through CT Corp., through NYS Secretary of State, *etc.*).

2. Relator(s):
   - Identify full names of all relators
   - Identify addresses of all relators
   - If relator is a business entity, identify the ownership and management of the entity
   - Describe relator as an insider or outsider
   - Describe the relator's basis for knowing the information conveyed in the *qui tam* action
   - Particularly for inside relators, describe relator's job titles and responsibilities and status of employment (*e.g.*, current employee, former employee, *etc.*)
   - Describe whether relator has retaliation claims against defendant(s)
   - Where the relator is a former employee of a defendant, describe the circumstances giving rise to the relator's departure
   - Describe whether relator (or anyone related to him/her/it) has been involved in other litigation with the defendants (*e.g.*, employment disputes, serving as a class representative, *etc.*)
   - Identify whether the relator has any pending litigation against the State of New York, or New York State officers or employees.
   - Describe any other information about the relator that may be relevant to his/her basis for knowledge, effectiveness as a witness, and the quality of his/her evidence.

3. The Governmental Entities Named as Plaintiffs:
   - Identify all the governmental entities on whose behalf relator is raising the same or similar issues (note: some relators bring separate actions in different states on the same essential claim; we would like to know about those consistent with seal obligations in the various jurisdictions).
   - Identify the governmental attorneys handling the matter for these other states, localities, or the federal government.

- For NYS, describe whether the claims are on behalf of the State only, or also on behalf of localities, and identify those localities.

B. Court Information

1. Identify the Court of filing.
2. Identify the assigned judge.
3. Identify the Docket No./Index No.

C. Seal Information

1. Provide the date of the sealing order and its expiration date.
2. If case is in federal court with multiple governmental plaintiffs, identify date of service upon the federal government (both US Attorney's Office and Main Justice).
3. If case is filed in federal court, ensure that the initial sealing order specifically refers to *the state's* time to make an election.
4. For cases filed in NY State Court, we suggest that relators use the form of sealing order we have been sharing and that the New York State Supreme Court for New York County has been signing.

D. Identifying Victim Agencies

1. Identify the NY state and local governmental agencies affected by conduct alleged to have violated the False Claims Act.
2. Describe any relevant interaction the relator or counsel has had with the agencies or localities.
3. To the extent possible, describe any relevant interactions the defendants have had with agencies or localities.
4. To the extent the claims concern actions or communications involving NY state and local governmental agencies, identify to the fullest degree possible the subdivisions and personnel involved.

E. Nature of Claims

1. Description of the nature of the misconduct that is claimed to violate the False Claims Act.
2. Identify which subsections of the NY FCA §189(1) are claimed to have been violated.
3. Identify how each element of the claimed violation is satisfied, including, *e.g.*, what claims were false or fraudulent, what specific statements and records were false or fraudulent, what obligation was owed to the government and how (e.g., by contract, by law, *etc.*), what is the basis for claiming that defendants acted with knowledge, how the public fisc was affected, how the matter at issue is material, *etc*.
4. Identify the legal basis for the violations. If, *e.g.*, relator is alleging a reverse false claim based on violation of the Tax Law, then identify the relevant Tax Law provisions and relevant guidance and precedent and explain cogently why there has been a violation.

5. Describe any public policy matters we should consider, even if they are not directly linked to the False Claims Act causes of action.
6. For procurement cases, describe how the State, locality or victim agencies acquire the goods or services in question (*e.g.*, through RFPs, through centralized purchasing contracts with the NYS Office of Government Services, *etc.*)
7. For governmental grant cases, describe the flow of money to the beneficiary organization, including whether the funds can properly be characterized as federal, state or local funds. Also describe the promises, certifications, *etc.* the beneficiaries made to obtain such funding.
8. In multistate cases, describe why New York has been named as a plaintiff, *e.g.*, did NY governmental entities purchase the product, license the organization, *etc.*
9. Describe the time frame of the misconduct alleged, including whether the misconduct has stopped.
10. Describe as much as possible about the damages to the government, including the amount of damages, sources of information relevant to determining damages, and how damages may reasonably be calculated.
11. Do not withhold information. If there is adverse information, disclose and explain it to the extent possible.

F. Related Case Information

1. Identify any other cases, proceedings or matters that address the same subject matter as the *qui tam* case. This may include separately filed cases against the same defendants, audits of the defendants, filings with the IRS Whistleblower Office or SEC Whistleblower Office, investigations by criminal law enforcement, *etc.*
2. Identify any other information that sheds light on the matters being alleged, including, *e.g.*, reports by inspectors general, media coverage, settlements, *etc.*

G. Documents

1. As required by the False Claims Act, relator is under an obligation to provide our Office with substantially all material evidence and information that he or she possesses.
2. When documents are attached to a disclosure statement, identify the documents and explain their context and relevance.

Appendix C.1

The New York State False Claims Act
ARTICLE BY DAVID KOENIGSBERG

MENZ BONNER KOMAR & KOENIGSBERG LLP
ATTORNEYS AT LAW
TEL: [redacted] FAX: [redacted]

The New York State False Claims Act

(January 16, 2014)

By: David A. Koenigsberg[1]©

A major weapon of the United States' federal government to combat fraud against government programs over the last twenty-five years has been the False Claims Act. The Act was signed into law 150 years ago by President Abraham Lincoln to combat dishonest suppliers to the Union Army during the Civil War. Among the key features of the modern version of the False Claims Act (31 U.S.C. §§ 3729-3733) is that the federal government can recover up to three times the damages caused when unscrupulous government contractors or health care providers use false statements or documents to obtain federal funds, plus penalties of up to $11,000 for each false claim submitted. Another key feature of the law are its *qui tam*[2] provisions that empower private citizens to blow the whistle on wrongdoers by initiating a law suit on behalf of the federal government and sharing as much as 30% of any recovery obtained by the federal government.

Based upon the effectiveness of the federal False Claims Act and its *qui tam* provisions, and with some encouragement from the federal government, over twenty-five states have enacted their own versions of false claims laws to help state governments combat fraud and

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[2] "*Qui tam* is short for '*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*' which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 463 n. 2 (2007).

abuse at the state and local level. In 2007, New York enacted the New York False Claims Act, which enables the New York Attorney General, local governments, and private parties, to initiate civil lawsuits against persons who obtain state or local funds by means of false statements or documents. The New York State False Claims Act is codified at N.Y. State Finance Law §§ 187-184 ("NY FCA").

Summary of the State New York False Claims Act

The NY FCA permits the state, through the Office of the Attorney General, or any local government, to bring suit against any person who obtains state or local funds by knowingly using false claims or documents to obtain funds from the state or a local government. The law defines local government to mean any county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state. State Finance Law § 188(4). The NY FCA provides that anyone found liable under the law shall pay a civil penalty of from $6,000 to $12,000 per false claim and three times the damages sustained by the state and/or local government as a result of such false claim. State Finance Law § 189(1)(g).

The NY FCA provides that the Attorney General has the authority to investigate and initiate an action under the law on behalf of the state or a local government. The law also authorizes a local government to investigate and bring a civil action to recover for damages sustained by such local government. Whereas local governments can be charged as defendants under the federal False Claims Act, the NY FCA specifically precludes bringing any such action against the federal government, the state, or a local government, or any officer or employee of the state or a local government in such person's official capacity. State Finance Law § 190(1).

The NY FCA's *qui tam* provisions also authorize a private person to bring a civil action under the law on behalf of the state or a local government. When a person brings such a case, the *qui tam* plaintiff, known as a relator, must file the complaint in the New York State Supreme Court for the local county, in camera. The case shall remain under seal for at least sixty days and is not served upon the defendant until the court so orders. State Finance Law § 190(2). In addition, the *qui tam* plaintiff must serve a copy of the complaint and all material evidence and information the person has upon the Office of the Attorney General. State Finance Law § 190(2)(b). If the case alleges damages to a local government, the attorney general may provide a copy of the complaint and evidence to the attorney for the local government. State Finance Law § 190(2)(b). The NY FCA further provides that after the matter is investigated by the Attorney General, the Attorney General may file a complaint for the state and be substituted as plaintiff or intervene and aid the *qui tam* plaintiff. If the case involves damages against a local government, the attorney general may grant permission to the local government to file its own complaint or intervene and assist the *qui tam* plaintiff. State Finance Law § 190(2)(c). Finally, if neither the state nor the local government intervenes in a case begun by a *qui tam* plaintiff, the *qui tam* plaintiff can proceed with the lawsuit alone. State Finance Law § 190(2)(f).[3]

The statute also provides that in any action successfully brought under the NY FCA, the court may award attorneys' fees, expenses and the costs of suit to the state, to any local government that participates as a party in the action, and to the *qui tam* plaintiff. Any such expenses, fees and costs are awarded against the defendant and are in addition to the proceeds of the action. State Finance Law § 190(7).

[3] If the relator chooses not to proceed after a declination, the relator can dismiss the case, which will remain under seal unless the Attorney General seeks to unseal the case. *See* 13 N.Y. Code of Rules and Regulations § 400.4(c)(2). In this way, the relator can maintain her anonymity.

In 2010, the NY FCA was amended to provide that cases may be based on violations of the state's tax laws. State Finance Law § 189(4). This is a new development in *qui tam* law as the federal False Claims Act specifically forbids a whistleblower to bring a case for claims that arise under the Internal Revenue Code. *See* 31 U.S.C. § 3729(d). The NY FCA's tax provision is limited, however, to cases where the taxpayer's annual income exceeds $1,000,000 and the amount of unpaid taxes exceeds $350,000. State Finance Law § 189(4)(a). In addition, before intervening in any *qui tam* action, the Attorney General must consult with the Commissioner of the Department of Taxation and Finance. State Finance Law § 189(4)(b). In the event that the Attorney General declines to intervene in a tax based *qui tam* action, the *qui tam* relator must obtain approval from the Attorney General before making any motion to compel the Department of Taxation and Finance to disclose tax records. *Id.*

In addition to the tax provision, the amended law has other provisions that enhance its effectiveness as compared to the federal statute. The law provides for a blanket 10-year statute of limitations. State Finance Law § 192(a). The statute also provides that a relator does not have to make allegations in a *qui tam* complaint of "specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of" the law occurred. State Finance Law § 192(1-a). In addition, while a *qui tam* suit may not be based on publicly disclosed allegations of wrongdoing, as in a prior civil complaint or criminal indictment, news report or government audit report, the NY FCA provides that documents obtained from a government agency under any public information access law, such as the federal Freedom of Information Act or the New York State Freedom of Information Law, does not, contrary to the federal False Claims Act, constitute a public disclosure that would

prevent a person from using such documents to pursue a *qui tam* action. State Finance Law § 190(9)(b)(ii). In addition, a disclosure in the "news media" does not include "information of allegations or transactions . . . posted on the internet or on a computer network." State Finance Law § 190(9)(b)(iii). Thus, information posted on the internet on an electronic bulletin board or internet chat room, for example, would not constitute public disclosure that would bar a *qui tam* suit.

The NY FCA authorizes the Attorney General to promulgate regulations that are "necessary to effectuate the purposes of this" law. State Finance Law § 194. The regulations appear at 13 N.Y.C.R.R. Part 400, entitled "Procedural Regulations of the False Claims Act." A recently adopted amendment to the regulations, entitled "Application of the damage multiplier" provides that the

> state or a local government's damages shall be trebled or doubled … before any subtractions are made for compensatory payments received by the government from any source, including but not limited to the defendant, or before any subtractions are otherwise made because of any offset or credit received by the government from any source, including but not limited to the defendant.

13 N.Y.C.R.R. § 400.6. This rule was created to counteract the impact that the decision of the United States Court of Appeals in *United States v. Anchor Mortgage Corp*., 711 F.3d 745 (7th Cir. 2013), might have on the how damages are assessed under the False Claims Act. In the *Anchor Mortgage* case, the court held that the multiplier should be applied to the government's "net loss" from paying out false claims, and not the gross amount paid on the false claims. The NY FCA regulation provides that the government's gross damages should be trebled or doubled before any credits are given for recoveries from other sources.

The New York Attorney General's Office

The agency charged with enforcing the New York False Claims Act is the Office of the New York Attorney General. Before 2007, the New York Attorney General's Office prosecuted Medicaid fraud cases through the Medicaid Fraud Control Unit, a special division within the Office of the Attorney General, partially funded by the federal government's Department of Health and Human Services. Medicaid is a joint state and federal program that provides health insurance benefits to low income persons, as compared to the Medicare program, a wholly federal government program that provides health insurance benefits principally to the elderly.

When the NY FCA was passed in 2007, the new law applied across the board to claims arising under any state or local government program, not just Medicaid. While there was expertise and experience investigating and prosecuting Medicaid fraud cases, there was no bureau or unit dedicated to investigating and prosecuting non-Medicaid *qui tam* cases. Thus, after 2007, most recoveries under the NY FCA were made in Medicaid cases. Nevertheless, in 2010 the Attorney General recovered $1 million from a company that understated the amount of trash it delivered to a county landfill, thereby underpaying fees for dumping. This was the first non-Medicaid recovery in a NY FCA case. Later that year, the office recovered $20 million from a company that delivered food to public school lunch programs for failing to pass on savings it had obtained from vendor rebates.

In 2011, after Eric Schneiderman was elected New York's Attorney General, he created a new unit, known as the Taxpayer Protection Bureau, to handle all non-Medicaid fraud cases. In addition to creating a staff of attorneys dedicated to investigating non-Medicaid fraud *qui tam* cases, the Taxpayer Protection Bureau operates in a very relator friendly manner. The

Bureau's attorneys are available to meet with relator's counsel in pre-filing screening meetings to help counsel gauge whether or not to file a case. The attorneys also welcome the assistance of responsible relator's counsel in conducting the investigation, including creating document data bases that permit relator's counsel to help review voluminous documentation.

The Taxpayer Protection Bureau has pursued several notable cases since its creation. In January 2013, the Bureau obtained a $2.4 million recovery from a national medical waste disposal company that imposed fraudulent price increases for its services charged to New York State and local government customers. This was accomplished in the context of a Federal FCA case that is pending in federal court in Illinois that was declined by the U.S. Department of Justice.

The first tax recovery came in a case involving a Manhattan based custom tailor who made custom suits who agreed to pay $5.5 million arising out of his failure to pay state sales and income taxes. The defendant also pleaded guilty to criminal charges and will serve time in prison.

In October 2011, the Attorney General intervened in a whistleblower suit that alleged that the Bank of New York/Mellon overcharged customers for currency conversions. The victims are state and city public pension funds. In April 2012, the Attorney General intervened in a case against the national wireless carrier Sprint Communications. The Attorney General alleges that Sprint failed to pay the proper amount of sales tax on flat rate calling plans. The Attorney General alleges damages of $100 million.

Conclusion

New York's False Claims Act, as amended, is a model False Claims Act statute. The law's provisions are designed to be relator friendly to enable cases to be filed and prosecuted. In addition, the structure and organization of the New York Attorney General's Office to investigate and prosecute civil frauds against state and local governments, will enhance the effectiveness of the statute.

Appendix C.2

CALIFORNIA STATUTE

GOVERNMENT CODE SECTION 12650-12656

12650. (a) This article shall be known and may be cited as the False Claims Act.

(b) For purposes of this article:

(1) "Claim" means any request or demand, whether under a contract or otherwise, for money, property, or services, and whether or not the state or a political subdivision has title to the money, property, or services that meets either of the following conditions:

(A) Is presented to an officer, employee, or agent of the state or of a political subdivision.

(B) Is made to a contractor, grantee, or other recipient, if the money, property, or service is to be spent or used on a state or any political subdivision's behalf or to advance a state or political subdivision's program or interest, and if the state or political subdivision meets either of the following conditions:

(i) Provides or has provided any portion of the money, property,or service requested or demanded.

(ii) Reimburses the contractor, grantee, or other recipient for any portion of the money, property, or service that is requested or demanded.

(2) "Claim" does not include requests or demands for money,property, or services that the state or a political subdivision has paid to an individual as compensation for employment with the state or political subdivision or as an income subsidy with no restrictions on that individual's use of the money, property, or services.

(3) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

(A) Has actual knowledge of the information.

(B) Acts in deliberate ignorance of the truth or falsity of the information.

(C) Acts in reckless disregard of the truth or falsity of the information. Proof of specific intent to defraud is not required.

(4) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money, property,or services.

(5) "Obligation" means an established duty, whether or not fixed,arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

(6) "Political subdivision" includes any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.

(7) "Political subdivision funds" means funds that are the subject of a claim.

(8) "Prosecuting authority" refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision.

(9) "Person" includes any natural person, corporation, firm,association, organization, partnership, limited liability company, business, or trust.

(10) "State funds" mean funds that are the subject of a claim.

12651. (a) Any person who commits any of the following enumerated acts in this subdivision shall have violated this article and shall be liable to the state or to the political subdivision for three times the amount of damages that the state or political subdivision sustains because of the act of that person. A person who commits any of the following enumerated acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and shall be liable to the state or political subdivision for a civil penalty of not less than five thousand five hundred dollars ($5,500) and not more than eleven thousand dollars ($11,000) for each violation:

(1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim.

(3) Conspires to commit a violation of this subdivision.

(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less than all of that property.

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(7) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or to any political subdivision, or knowingly conceals or knowingly and improperly avoids, or

decreases an obligation to pay or transmit money or property to the state or to any political subdivision.

(8) Is a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.

(b) Notwithstanding subdivision (a), the court may assess not less than two times and not more than three times the amount of damages which the state or the political subdivision sustains because of the act of the person described in that subdivision, and no civil penalty, if the court finds all of the following:

(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information.

(2) The person fully cooperated with any investigation by the state or a political subdivision of the violation.

(3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(c) Liability under this section shall be joint and several for any act committed by two or more persons.

(d) This section does not apply to any controversy involving an amount of less than five hundred dollars ($500) in value. For purposes of this subdivision, "controversy" means any one or more false claims submitted by the same person in violation of this article.

(e) This section does not apply to claims, records, or statements made pursuant to Division 3.6 (commencing with Section 810) of Title 1 or to workers' compensation claims filed pursuant to Division 4 (commencing with Section 3200) of the Labor Code.

(f) This section does not apply to claims, records, or statements
made under the Revenue and Taxation Code.

(g) This section does not apply to claims, records, or statements for the assets of a person that have been transferred to the Commissioner of Insurance, pursuant to Section 1011 of the Insurance Code.

12652. (a) (1) The Attorney General shall diligently investigate violations under Section 12651 involving state funds. If the Attorney General finds that a person has violated or is violating Section 12651, the Attorney General may bring a civil action under this section against that person.

(2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in this action, serve by mail with "return receipt requested" a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph (2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met.

(b) (1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person.

(2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General.

(3) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party.

(B) Notify the court that it declines to proceed with the action, in which case the prosecuting authority shall have the right to conduct the action.

(c) (1) A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court and the Attorney General or prosecuting authority of a political subdivision, or both, as appropriate under the allegations of the civil action, taking into account the best interests of the

parties involved and the public purposes behind this act. No claim for any violation of Section 12651 may be waived or released by any private person, except if the action is part of a court approved settlement of a false claim civil action brought under this section. Nothing in this paragraph shall be construed to limit the ability of the state or political subdivision to decline to pursue any claim brought under this section.

(2) A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed.

(3) On the same day as the complaint is filed pursuant to paragraph (2), the qui tam plaintiff shall serve by mail with "return receipt requested" the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(4) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve state funds but not political subdivision funds, the Attorney General may elect to intervene and proceed with the action.

(5) The Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal pursuant to paragraph (2). The motion may be supported by affidavits or other submissions in camera.

(6) Before the expiration of the 60-day period or any extensions obtained under paragraph (5), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the Attorney General and the seal shall be lifted.

(B) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(7) (A) Within 15 days after receiving a complaint alleging violations that exclusively involve political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure of material evidence and information to the appropriate prosecuting authority for disposition, and shall notify the qui tam plaintiff of the transfer.

(B) Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to subparagraph (A), the prosecuting authority may elect to intervene and proceed with the action.

(C) The prosecuting authority may, for good cause shown, move for extensions of the time during which the complaint remains under seal.The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the 45-day period or any extensions obtained under subparagraph (C), the prosecuting authority shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the prosecuting authority and the seal shall be lifted.

(ii) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(8) (A) Within 15 days after receiving a complaint alleging violations that involve both state and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority.

(B) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve both state and political subdivision funds, the Attorney General or the prosecuting authority, or both, may elect to intervene and proceed with the action.

(C) The Attorney General or the prosecuting authority, or both, may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the 60-day period or any extensions obtained under subparagraph (C), the Attorney General shall do one of the following:

(i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the Attorney General and the seal shall be lifted.

(ii) Notify the court that it declines to proceed with the action but that the prosecuting authority of the political subdivision involved intends to proceed with the action, in which case the seal shall be lifted and the action shall be conducted by the prosecuting authority.

(iii) Notify the court that both it and the prosecuting authority decline to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(E) If the Attorney General proceeds with the action pursuant to clause (i) of subparagraph (D), the prosecuting authority of the political subdivision shall be permitted to intervene in the action

within 60 days after the Attorney General notifies the court of its intentions. The court may authorize intervention thereafter upon a showing that all the requirements of Section 387 of the Code of Civil Procedure have been met.

(9) The defendant shall not be required to respond to any complaint filed under this section until 30 days after the complaint is unsealed and served upon the defendant pursuant to Section 583.210 of the Code of Civil Procedure.

(10) When a person brings an action under this subdivision, no other person may bring a related action based on the facts underlying the pending action.

(d) (1) No court shall have jurisdiction over an action brought under subdivision (c) against a Member of the State Senate or Assembly, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought.

(2) A person may not bring an action under subdivision (c) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party.

(3) (A) The court shall dismiss an action or claim under this section, unless opposed by the Attorney General or prosecuting authority of a political subdivision, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in any of the following:

(i) A criminal, civil, or administrative hearing in which the state or prosecuting authority of a political subdivision or their agents are a party.

(ii) A report, hearing, audit, or investigation of the Legislature, the state, or governing body of a political subdivision.

(iii) The news media.

(B) Subparagraph (A) shall not apply if the action is brought by the Attorney General or prosecuting authority of a political subdivision, or the person bringing the action is an original source of the information.

(C) For purposes of subparagraph (B), "original source" means an individual who either:

(i) Prior to a public disclosure under subparagraph (A), has voluntarily disclosed to the state or political subdivision the information on which allegations or transactions in a claim are based.

(ii) Has knowledge that is independent of, and materially adds to, the publicly disclosed allegations or transactions, and has voluntarily provided the information to the state or political subdivision before filing an action under this section.

(4) In all actions brought under subdivision (c), except for those in which the complaint alleges one or more violations under Section 12651 involving claims related to California's Medicaid Program, as defined by the Medi-Cal Act (Chapter 7(commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code) a court shall not have jurisdiction over an action based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time.

(e) (1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action.

(2) (A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(f) (1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed under subdivision (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(2) (A) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff.

(B) If the state or political subdivision is allowed to intervene under paragraph (A), the qui tam plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

(g) (1) (A) If the Attorney General initiates an action pursuant to subdivision (a) or assumes control of an action initiated by a prosecuting authority pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the office of the Attorney General shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims.

(B) If a prosecuting authority initiates and conducts an action pursuant to subdivision (b), the office of the prosecuting authority shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims.

(C) If a prosecuting authority intervenes in an action initiated by the Attorney General pursuant to paragraph (3) of subdivision (a) or remains a party to an action assumed by the Attorney General pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery under subparagraph (A), taking into account the prosecuting authority's role in investigating and conducting the action.

(2) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive at least 15 percent but not more than 33 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action. When it conducts the action, the Attorney General's office or the office of the prosecuting authority of the political subdivision shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision. When both the Attorney General and a prosecuting authority are involved in a qui tam action pursuant to subparagraph (C) of paragraph (6) of subdivision (c), the court at its discretion may award the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action.

(3) If the state or political subdivision does not proceed with an action under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of these proceeds.

(4) If the action is one provided for under paragraph (4) of subdivision (d), the present or former employee of the state or political subdivision is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's attempts to report and gain recovery of the falsely claimed funds through official channels.

(5) Whether or not the state or political subdivision proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of Section 12651 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that the person would otherwise receive under this subdivision, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. The court, however, shall not award the qui tam plaintiff more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, the scope of the person's involvement in the fraudulent activity, the person's attempts to avoid or resist the activity, and all other circumstances surrounding the activity.

(6) The portion of the recovery not distributed pursuant to paragraphs (1) to (5), inclusive, shall revert to the state if the underlying false claims involved state funds exclusively and to the political subdivision if the underlying false claims involved political subdivision funds exclusively. If the violation involved both state and political subdivision funds, the court shall make an apportionment between the state and political subdivision based on their relative share of the funds falsely claimed.

(7) For purposes of this section, "proceeds" include civil penalties as well as double or treble damages as provided in Section 12651.

(8) If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action under subdivision (c), the qui tam plaintiff shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable costs and attorney's fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision.

(9) (A) If the state or political subdivision does not proceed with the action and the qui tam plaintiff conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses against the party that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(B) If the state or political subdivision proceeds with the action, the court may award the defendant its reasonable attorney's fees and expenses against the state or political subdivision that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(h) The court may stay an act of discovery of the person initiating the action for a period of not more than 60 days if the Attorney General or local prosecuting authority show that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. This showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Attorney General or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(i) Upon a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's or local prosecuting authority's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including the following:

(1) Limiting the number of witnesses the person may call.

(2) Limiting the length of the testimony of the witnesses.

(3) Limiting the person's cross-examination of witnesses.

(4) Otherwise limiting the participation by the person in the litigation.

(j) The False Claims Act Fund is hereby created in the State Treasury. Proceeds from the action or settlement of the claim by the Attorney General pursuant to this article shall be deposited into this fund. Moneys in this fund, upon appropriation by the Legislature, shall be used by the Attorney General to support the ongoing investigation and prosecution of false claims in furtherance of this article.

12652.5. Notwithstanding any other provision of law, the University of California shall be considered a political subdivision, and the General Counsel of the University of California shall be considered a prosecuting authority for the purposes of this article, and shall have the right to intervene in an action brought by the Attorney General or a private party or investigate and bring an action, subject to Section 12652, if it is determined that the claim involves the University of California.

12653. (a) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of his or her employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this section or other efforts to stop one or more violations of this article.

(b) Relief under this section shall include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, and where appropriate, punitive damages. The defendant shall also be required to pay litigation costs and reasonable attorneys' fees. An action under this section may be brought in the appropriate superior court of the state.

(c) A civil action under this section shall not be brought more than three years after the date when the retaliation occurred.

12654. (a) A civil action under Section 12652 shall not be filed more than six years after the date on which the violation of Section 12651 is committed, or more than three years after the date when facts material to the right of action are known or reasonably should have been known by the Attorney General or prosecuting authority with jurisdiction to act under this article, but in no event more than 10 years after the date on which the violation is committed, whichever of the aforementioned occurs last.

(b) A civil action under Section 12652 may be brought for activity prior to January 1, 1988, if the limitations period set in subdivision (a) has not lapsed.

(c) In any action brought under Section 12652, the state, the political subdivision, or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, except for a plea of nolo contendere made prior to January 1, 1988, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subdivision (a), (b), or (c) of Section 12652.

(e) Subdivision (b) of Section 47 of the Civil Code shall not be applicable to any claim subject to this article.

12654.5. For statute of limitations purposes as provided herein, any pleading filed by the Attorney General or prosecuting authority pursuant to this article shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the state or political subdivision arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

12655. (a) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(b) If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of the provision to other persons or circumstances shall not be affected thereby.

(c) This article shall be liberally construed and applied to promote the public interest.

12656. (a) If a violation of this article is alleged or the application or construction of this article is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, the person or political subdivision that commenced that proceeding shall serve a copy of the notice or petition initiating the proceeding, and a copy of each paper, including briefs, that the person or political subdivision files in the proceeding within three days of the filing, on the Attorney General, directed to the attention of the False Claims Section in Sacramento, California.

(b) Timely compliance with the three-day time period is a jurisdictional prerequisite to the entry of judgment, order, or decision construing or applying this article by the court in which the proceeding occurs, except that within that three-day period or thereafter, the time for compliance may be extended by the court for good cause.

(c) The court shall extend the time period within which the Attorney General is permitted to respond to an action subject to this section by at least the same period of time granted for good cause pursuant to subdivision (b) to the person or political subdivision that commenced the proceeding.

Appendix C.3

STATES WITH THE FALSE CLAIMS ACT

States with False Claims Acts

■	California *	■	Minnesota *
□	Colorado *	■	Montana *
□	Connecticut *	■	Nevada *
■	Delaware *	■	New Hampshire *
■	District of Columbia	■	New Jersey *
■	Florida *	■	New Mexico *
■	Georgia *	■	New York *
■	Hawaii *	■	North Carolina *
■	Illinois *	■	Oklahoma *
■	Indiana *	■	Rhode Island *
□	Iowa *	■	Tennessee *
□	Louisiana *	□	Texas *
□	Maryland	■	Virginia *
■	Massachusetts *	□	Washington *
□	Michigan[a] *	□	Wisconsin *

NOTE: New York City, Chicago, Philadelphia and Allegheny County have their own local FCAs

KEY

■ States with FCA

□ States with Medicaid only FCA

* State FCA Laws reviewed by OIG HHS

[a] There is FCA legislation pending in Michigan. As of January 27, 2014, the bill had passed in the House and was awaiting Senate consideration (information from Taxpayers Against Fraud member Patricia A. Stamler).

Appendix C.4

NEW YORK STATUTE

NEW YORK FALSE CLAIMS ACT

STATE FINANCE LAW, ART. XIII
(2013)

§ 187. SHORT TITLE

This article shall be known and may be cited as the "New York false claims act".

§ 188. DEFINITIONS

As used in this article, the following terms shall mean:

1. "Claim"

(a) means any request or demand, whether under a contract or otherwise, for money or property that:

(i) is presented to an officer, employee or agent of the state or a local government; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the state or a local government's behalf or to advance a state or local government program or interest, and if the state or local government (A) provides or has provided any portion of the money or property requested or demanded; or (B) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;

(b) does not include requests or demands for money or property that the state or a local government has already paid to an individual as compensation for government employment or as an income subsidy with no restrictions on that individual's use of the money or property.

2. "False claim" means any claim which is, either in whole or part, false or fraudulent.

3. "Knowing and knowingly"

(a) means that a person, with respect to information:

(i) has actual knowledge of the information;

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

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

(b) require no proof of specific intent to defraud, provided, however that acts occurring by mistake or as a result of mere negligence are not covered by this article.

4. "Obligation" means an established duty, whether or not fixed, arising from an

express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

5. "Material" means having a natural tendency to influence, or be capable of influencing the payment or receipt of money or property.

6. "Local government" means any New York county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state, or of such local government.

7. "Original source" means a person who:

(a) prior to a public disclosure under paragraph (b) of subdivision nine of section one hundred ninety of this article has voluntarily disclosed to the state or a local government the information on which allegations or transactions in a cause of action are based; or

(b) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state or a local government before or simultaneous with filing an action under this article.

8. "Person" means any natural person, partnership, corporation, association or any other legal entity or individual, other than the state or a local government.

9. "State" means the state of New York and any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office or other governmental entity performing a governmental or proprietary function for the state.

§ 189. LIABILITY FOR CERTAIN ACTS

1. Subject to the provisions of subdivision two of this section, any person who:

(a) knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval;

(b) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(c) conspires to commit a violation of paragraph (a), (b), (d), (e), (f) or (g) of this subdivision;

(d) has possession, custody, or control of property or money used, or to be used, by the state or a local government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(e) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or a local government and, intending to defraud the state or a local government, makes or delivers the receipt without completely

knowing that the information on the receipt is true;

(f) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or a local government knowing that the officer or employee violates a provision of law when selling or pledging such property;

(g) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government; or

(h) Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same; shall be liable to the state or a local government, as applicable, for a civil penalty of not less than six thousand dollars and not more than twelve thousand dollars, plus three times the amount of all damages, including consequential damages, which the state or local government sustains because of the act of that person.

2. The court may assess not more than two times the amount of damages sustained because of the act of the person described in subdivision one of this section, if the court finds that:

(a) the person committing the violation of this section had furnished all information known to such person about the violation, to those officials responsible for investigating false claims violations on behalf of the state and any local government that sustained damages, within thirty days after the date on which such person first obtained the information;

(b) such person fully cooperated with any government investigation of such violation; and

(c) at the time such person furnished information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation.

3. A person who violates this section shall also be liable for the costs, including attorneys' fees, of a civil action brought to recover any such penalty or damages.

4.(a) This section shall apply to claims, records, or statements made under the tax law only if

(i) the net income or sales of the person against whom the action is brought equals or exceeds one million dollars for any taxable year subject to any action brought pursuant to this article;

(ii) the damages pleaded in such action exceed three hundred and fifty thousand dollars; and

(iii) The person is alleged to have violated paragraph (a), (b), (c), (d), (e), (f) or (g) of subdivision one of this section; provided, however, that nothing in this subparagraph shall be deemed to modify or restrict the application of

such paragraphs to any act alleged that relates to a violation of the tax law.

(b) The attorney general shall consult with the commissioner of the department of taxation and finance prior to filing or intervening in any action under this article that is based on the filing of false claims, records or statements made under the tax law. If the state declines to participate or to authorize participation by a local government in such an action pursuant to subdivision two of section one hundred ninety of this article, the qui tam plaintiff must obtain approval from the attorney general before making any motion to compel the department of taxation and finance to disclose tax records.

§ 190. CIVIL ACTIONS FOR FALSE CLAIMS

1. Civil enforcement actions.

The attorney general shall have the authority to investigate violations under section one hundred eighty-nine of this article. If the attorney general believes that a person has violated or is violating such section, then the attorney general may bring a civil action on behalf of the people of the state of New York or on behalf of a local government against such person. A local government also shall have the authority to investigate violations that may have resulted in damages to such local government under section one hundred eighty-nine of this article, and may bring a civil action on its own behalf, or on behalf of any subdivision of such local government, to recover damages sustained by such local government as a result of such violations. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity. The attorney general shall consult with the office of medicaid inspector general prior to filing any action related to the medicaid program.

2. Qui tam civil actions.

(a) Any person may bring a qui tam civil action for a violation of section one hundred eighty-nine of this article on behalf of the person and the people of the state of New York or a local government. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity. For purposes of subparagraphs (i) and (iv) of paragraph (a) of subdivision eight of section seventy-three of the public officers law, any activity by a former government employee in connection with the securing of rights, protections or benefits related to preparing or filing an action under this article shall not be deemed to be an appearance or practice before any agency.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the state pursuant to subdivision one of section three hundred seven of the civil practice law and rules. Any complaint filed in a court of the state of New York shall be filed in supreme court in camera, shall remain under seal for at least sixty days, and shall not be served on the defendant until the court so orders. The seal shall not preclude the attorney

general, a local government, or the qui tam plaintiff from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action, on relevant state or local government agencies, or on law enforcement authorities of the state, a local government, or other jurisdictions, so that the actions may be investigated or prosecuted, except that such seal applies to the agencies or authorities so served to the same extent as the seal applies to other parties in the action.

If the allegations in the complaint allege a violation of section one hundred eighty-nine of this article involving damages to a local government, then the attorney general may at any time provide a copy of such complaint and written disclosure to the attorney for such local government; provided, however, that if the allegations in the complaint involve damages only to a city with a population of one million or more, or only to the state and such a city, then the attorney general shall provide such complaint and written disclosure to the corporation counsel of such city within thirty days. The state may elect to supersede or intervene and proceed with the action, or to authorize a local government that may have sustained damages to supersede or intervene, within sixty days after it receives both the complaint and the material evidence and information; provided, however, that if the allegations in the complaint involve damages only to a city with a population of one million or more, then the attorney general may not supersede or intervene in such action without the consent of the corporation counsel of such city.

The attorney general shall consult with the office of the medicaid inspector general prior to superseding or intervening in any action related to the medicaid program.

The attorney general may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under this subdivision. Any such motions may be supported by affidavits or other submissions in camera.

(c) Prior to the expiration of the sixty day period or any extensions obtained under paragraph (b) of this subdivision, the attorney general shall notify the court that he or she:

(i) intends to file a complaint against the defendant on behalf of the people of the state of New York or a local government, and thereby be substituted as the plaintiff in the action and convert the action in all respects from a qui tam civil action brought by a private person into a civil enforcement action by the attorney general under subdivision one of this section;

(ii) intends to intervene in such action, as of right, so as to aid and assist the plaintiff in the action; or

(iii) if the action involves damages sustained by a local government, intends to grant the local government permission to:

(A) file and serve a complaint against the defendant, and thereby be substituted as the plaintiff in the action and convert the action in all respects from a qui tam civil action brought by a private person into a civil enforcement action by the local government under subdivision one of this

section; or

(B) intervene in such action, as of right, so as to aid and assist the plaintiff in the action. The attorney general shall provide the local government with a copy of any such notification at the same time the court is notified.

(d) If the state notifies the court that it intends to file a complaint against the defendant and thereby be substituted as the plaintiff in the action, or to permit a local government to do so, such complaint, whether filed separately or as an amendment to the qui tam plaintiff's complaint, must be filed within thirty days after the notification to the court. For statute of limitations purposes, any such complaint filed by the state or a local government shall relate back to the filing date of the complaint of the qui tam plaintiff, to the extent that the cause of action of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the complaint of the qui tam plaintiff.

(e) If the state notifies the court that it intends to intervene in the action, or to permit a local government to do so, then such motion to intervene, whether filed separately or as an amendment to the qui tam plaintiff's complaint, shall be filed within thirty days after the notification to the court. for statute of limitations purposes, any complaint filed by the state or a local government, whether filed separately or as an amendment to the qui tam plaintiff's complaint, shall relate back to the filing date of the complaint of the qui tam plaintiff, to the extent that the cause of action of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the complaint of the qui tam plaintiff.

(f) If the state declines to participate in the action or to authorize participation by a local government, the qui tam action may proceed subject to judicial review under this section, the civil practice law and rules, and other applicable law. The qui tam plaintiff shall provide the state or any applicable local government with a copy of any document filed with the court on or about the date it is filed, or any order issued by the court on or about the date it is issued. A qui tam plaintiff shall notify the state or any applicable local government within five business days of any decision, order or verdict resulting in judgment in favor of the state or local government.

3. Time to answer.

If the state decides to participate in a qui tam action or to authorize the participation of a local government, the court shall order that the qui tam complaint be unsealed and served at the time of the filing of the complaint or intervention motion by the state or local government. After the complaint is unsealed, or if a complaint is filed by the state or a local government pursuant to subdivision one of this section, the defendant shall be served with the complaint and summons pursuant to article three of the civil practice law and rules. A copy of any complaint which alleges that damages were sustained by a local government shall also be served on such local government. The defendant shall be required to respond to the summons and complaint within the

time allotted under rule three hundred twenty of the civil practice law and rules.

4. Related actions.

When a person brings a qui tam action under this section, no person other than the attorney general, or a local government attorney acting pursuant to subdivision one of this section or paragraph (b) of subdivision two of this section, may intervene or bring a related civil action based upon the facts underlying the pending action; provided, however, that nothing in this subdivision shall be deemed to deny persons the right, upon leave of court, to file briefs amicus curiae.

5. Rights of the parties of qui tam actions.

(a) If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, then the state shall have the primary responsibility for prosecuting the action.

If the attorney general elects to intervene in the qui tam civil action then the state and the person who commenced the action, and any local government which sustained damages and intervenes in the action, shall share primary responsibility for prosecuting the action.

If the attorney general elects to permit a local government to convert the action into a civil enforcement action, then the local government shall have primary responsibility for investigating and prosecuting the action. If the action involves damages to a local government but not the state, and the local government intervenes in the qui tam civil action, then the local government and the person who commenced the action shall share primary responsibility for prosecuting the action.

Under no circumstances shall the state or a local government be bound by an act of the person bringing the original action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (b) of this subdivision. Under no circumstances shall the state be bound by the act of a local government that intervenes in an action involving damages to the state.

If neither the attorney general nor a local government intervenes in the qui tam action then the qui tam plaintiff shall have the responsibility for prosecuting the action, subject to the attorney general's right to intervene at a later date upon a showing of good cause.

(b) (i) The state may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the motion. If the action involves damages to both the state and a local government, then the state shall consult with such local government before moving to dismiss the action. If the action involves damages sustained by a local government but not the state, then the local government may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the

motion.

(ii) The state or a local government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after an opportunity to be heard, that the proposed settlement is fair, adequate, and reasonable with respect to all parties under all the circumstances. Upon a showing of good cause, such opportunity to be heard may be held in camera.

(iii) Upon a showing by the attorney general or a local government that the original plaintiff's unrestricted participation during the course of the litigation would interfere with or unduly delay the prosecution of the case, or would be repetitious or irrelevant, or upon a showing by the defendant that the original qui tam plaintiff's unrestricted participation during the course of the litigation would be for purposes of harassment or would cause the defendant undue burden, the court may, in its discretion, impose limitations on the original plaintiff's participation in the case, such as (A) limiting the number of witnesses the person may call; (B) limiting the length of the testimony of such witnesses; (C) limiting the person's cross-examination of witnesses; or (D) otherwise limiting the participation by the person in the litigation.

(c) Notwithstanding any other provision of law, whether or not the attorney general or a local government elects to supersede or intervene in a qui tam civil action, the attorney general and such local government may elect to pursue any remedy available with respect to the criminal or civil prosecution of the presentation of false claims, including any administrative proceeding to determine a civil money penalty or to refer the matter to the office of the medicaid inspector general for medicaid related matters. If any such alternate civil remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

(d) Notwithstanding any other provision of law, whether or not the attorney general elects to supersede or intervene in a qui tam civil action, or to permit a local government to supersede or intervene in the qui tam civil action, upon a showing by the state or local government that certain actions of discovery by the person initiating the action would interfere with the state's or a local government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than sixty days. Such a showing shall be conducted in camera. The court may extend the period of such stay upon a further showing in camera that the state or a local government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

6. Awards to qui tam plaintiff.

(a) If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, or to permit a local government to convert the action

into a civil enforcement action by such local government, or if the attorney general or a local government elects to intervene in the qui tam civil action, then the person or persons who initiated the qui tam civil action collectively shall be entitled to receive between fifteen and twenty-five percent of the proceeds recovered in the action or in settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action. Where the court finds that the action was based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, in a legislative or administrative report, hearing, audit or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the person or persons bringing the action in advancing the case to litigation. Any such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, reasonable attorneys' fees, and costs pursuant to article eighty-one of the civil practice law and rules. all such expenses, fees, and costs shall be awarded against the defendant.

(b) If the attorney general or a local government does not elect to intervene or convert the action, and the action is successful, then the person or persons who initiated the qui tam action which obtains proceeds shall be entitled to receive between twenty-five and thirty percent of the proceeds recovered in the action or settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action. Such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, reasonable attorneys' fees, and costs pursuant to article eighty-one of the civil practice law and rules. all such expenses, fees, and costs shall be awarded against the defendant.

(c) With the exception of a court award of costs, expenses or attorneys' fees, any payment to a person pursuant to this paragraph shall be made from the proceeds.

(d) If the attorney general or a local government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

7. Costs, expenses, disbursements and attorneys' fees.

In any action brought pursuant to this article, the court may award any local government that participates as a party in the action an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees, plus costs pursuant to article eighty-one of the civil practice law

and rules. All such expenses, fees and costs shall be awarded directly against the defendant and shall not be charged from the proceeds, but shall only be awarded if a local government prevails in the action.

8. Exclusion from recovery.

If the court finds that the qui tam civil action was brought by a person who planned or initiated the violation of section one hundred eighty-nine of this article upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise be entitled to receive under subdivision six of this section, taking into account the role of such person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the qui tam civil action is convicted of criminal conduct arising from his or her role in the violation of section one hundred eighty-nine of this article, that person shall be dismissed from the qui tam civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the attorney general to supersede or intervene in such action and to civilly prosecute the same on behalf of the state or a local government.

9. Certain actions barred.

(a) The court shall dismiss a qui tam action under this article if:

(i) it is based on allegations or transactions which are the subject of a pending civil action or an administrative action in which the state or a local government is already a party;

(ii) the state or local government has reached a binding settlement or other agreement with the person who violated section one hundred eighty-nine of this article resolving the matter and such agreement has been approved in writing by the attorney general, or by the applicable local government attorney; or

(iii) against a member of the legislature, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the state when the action was brought.

(b) The court shall dismiss a qui tam action under this article, unless opposed by the state or an applicable local government, or unless the qui tam plaintiff is an original source of the information, if substantially the same allegations or transactions as alleged in the action were publicly disclosed:

(i) in a state or local government criminal, civil, or administrative hearing in which the state or a local government or its agent is a party;

(ii) in a federal, New York state or New York local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public; provided that such information shall not be

deemed "publicly disclosed" in a report or investigation because it was disclosed or provided pursuant to article six of the public officers law, or under any other federal, state or local law, rule or program enabling the public to request, receive or view documents or information in the possession of public officials or public agencies;

(iii) in the news media, provided that such allegations or transactions are not "publicly disclosed" in the "news media" merely because information of allegations or transactions have been posted on the internet or on a computer network.

10. Liability.

Neither the state nor any local government shall be liable for any expenses which any person incurs in bringing a qui tam civil action under this article.

§ 191. REMEDIES

1. Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop one or more violations of this article, shall be entitled to all relief necessary to make the employee, contractor or agent whole. Such relief shall include but not be limited to:

(a) an injunction to restrain continued discrimination;

(b) hiring, contracting or reinstatement to the position such person would have had but for the discrimination or to an equivalent position;

(c) reinstatement of full fringe benefits and seniority rights;

(d) payment of two times back pay, plus interest; and

(e) compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

2. For purposes of this section, a "lawful act" shall include, but not be limited to, obtaining or transmitting to the state, a local government, a qui tam plaintiff, or private counsel solely employed to investigate, potentially file, or file a cause of action under this article, documents, data, correspondence, electronic mail, or any other information, even though such act may violate a contract, employment term, or duty owed to the employer or contractor, so long as the possession and transmission of such documents are for the sole purpose of furthering efforts to stop one or more violations of this article. Nothing in this subdivision shall be interpreted to prevent any law enforcement authority from bringing a civil or criminal action against any person for violating any provision of law.

3. An employee, contractor or agent described in subdivision one of this section may bring an action in the appropriate supreme court for the relief provided in this section.

§ 192. LIMITATION OF ACTIONS, BURDEN OF PROOF

(1) A civil action under this article shall be commenced no later than ten years after the date on which the violation of this article is committed. Notwithstanding any other provision of law, for the purposes of this article, an action under this article is commenced by the filing of the complaint.

(1-a) For purposes of applying rule three thousand sixteen of the civil practice law and rules, in pleading an action brought under this article the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section one hundred eighty-nine of this article are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government effectively to investigate and defendants fairly to defend the allegations made.

(2) In any action brought under this article, the state, a local government that participates as a party in the action, or the person bringing the qui tam civil action, shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

§ 193. OTHER LAW ENFORCEMENT AUTHORITY AND DUTIES

This article shall not:

1. preempt the authority, or relieve the duty, of other law enforcement agencies to investigate and prosecute suspected violations of law;

2. prevent or prohibit a person from voluntarily disclosing any information concerning a violation of this article to any law enforcement agency; or

3. limit any of the powers granted elsewhere in this chapter and other laws to the attorney general or state agencies or local governments to investigate possible violations of this article and take appropriate action against wrongdoers.

§ 194. REGULATIONS

The attorney general is authorized to adopt such rules and regulations as is necessary to effectuate the purposes of this article.

Appendix C.5

Standard Clauses for New York State Contracts

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS (2010)

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STANDARD CLAUSES FOR NYS CONTRACTS

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licenser, licensee, lessor, lessee or any other party):

1. EXECUTORY CLAUSE . In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

2. NON-ASSIGNMENT CLAUSE . In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

3. COMPTROLLER'S APPROVAL . In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds $50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds $10,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed $85,000 (State Finance Law Section 163.6.a).

4. WORKERS' COMPENSATION BENEFITS . In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

5. NON-DISCRIMINATION REQUIREMENTS . To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, sexual orientation, age, disability, genetic predisposition or carrier status, or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of $50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

6. WAGE AND HOURS PROVISIONS . If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public

work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

7. NON-COLLUSIVE BIDDING CERTIFICATION . In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

8. INTERNATIONAL BOYCOTT PROHIBITION. In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds $5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2NYCRR 105.4).

9. SET-OFF RIGHTS . The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

10. RECORDS . The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION . (a) FEDERAL EMPLOYER IDENTIFICATION NUMBER and/or FEDERAL SOCIAL SECURITY NUMBER. All invoices or New York State standard vouchers submitted for payment for the sale of goods or services or the lease of real or personal property to a New York State agency must include the payee's identification number, i.e., the seller's or lessor's identification number. The number is either the payee's Federal employer identification number or Federal social security number, or both such numbers when the payee has both such numbers. Failure to include this number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or New York State standard voucher, must give the reason or reasons why the payee does not have such number or numbers.
(b) PRIVACY NOTIFICATION**.** (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the

purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in New York State's Central Accounting System by the Director of Accounting Operations, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN . In accordance with Section 312 of the Executive Law, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of $25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of $100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of $100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then:
(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;
(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations herein; and
(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.
Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over $25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State; or (iii) banking services, insurance policies or the sale of securities. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Governor's Office of Minority and Women's Business Development pertaining hereto.

13. CONFLICTING TERMS . In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

14. GOVERNING LAW . This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

15. LATE PAYMENT . Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

16. NO ARBITRATION . Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

17. SERVICE OF PROCESS . In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to

the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.
In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES . In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

20. OMNIBUS PROCUREMENT ACT OF 1992 . It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.
Information on the availability of New York State subcontractors and suppliers is available from:
NYS Department of Economic Development
Division for Small Business
[redacted]5
Telephone: [redacted]
Fax: [redacted]
http://www.empire.state ny.us
A directory of certified minority and women-owned business enterprises is available from:
NYS Department of Economic Development
Division of Minority and Women's Business Development
[redacted]
Telephone: [redacted]
Fax: [redacted]
http://www.empire.state ny.us
The Omnibus Procurement Act of 1992 requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than $1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;
(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;
(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and
(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

21. RECIPROCITY AND SANCTIONS PROVISIONS . Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT . Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW . If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

24. PROCUREMENT LOBBYING. To the extent this agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.

To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

Appendix C.6

LOUISIANA STATUTE

PART VI-A. MEDICAL ASSISTANCE

SUBPART A. GENERAL PROVISIONS

§437.1. Short title

This Part may be cited as the "Medical Assistance Programs Integrity Law".

§437.2. Legislative intent and purpose

A. This Part is enacted to combat and prevent fraud and abuse committed by some health care providers participating in the medical assistance programs and by other persons and to negate the adverse effects such activities have on fiscal and programmatic integrity.

B. The legislature intends the secretary of the Department of Health and Hospitals, the attorney general, and private citizens of Louisiana to be agents of this state with the ability, authority, and resources to pursue civil monetary penalties, liquidated damages, or other remedies to protect the fiscal and programmatic integrity of the medical assistance programs from health care providers and other persons who engage in fraud, misrepresentation, abuse, or other ill practices, as set forth in this Part, to obtain payments to which these health care providers or persons are not entitled.

§437.3. Definitions

As used in this Part the following terms shall have the following meanings:

(1) "Administrative adjudication" means adjudication and the adjudication process contained in the Administrative Procedure Act.

(2) "Agent" means a person who is employed by or has a contractual relationship with a health care provider or who acts on behalf of the health care provider.

(3) "Billing agent" means an agent who performs any or all of the health care provider's billing functions.

(4) "Billing" or "bills" means submitting, or attempting to submit, a claim for goods, services, or supplies.

(5) "Claim" means any request or demand, whether under a contract or otherwise, for money or property, whether or not the state or department has title to the money or property, that is drawn in whole or in part on medical assistance programs funds that are either of the following:

(a) Presented to an officer, employee, or agent of the state or department.

(b) Made to a contractor, grantee, or other recipient, if the money or property is to be spent or used in any manner in any program administered by the department under the authority of federal or state law, rule, or regulation, and if the state or department does either of the following:

(i) Provides or has provided any portion of the money or property requested or demanded.

(ii) Reimburses the contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

A claim may be based on costs or projected costs and includes any entry or omission in a cost report or similar document, book of account, or any other document which supports, or attempts to support, the claim. A claim may be made through electronic means if authorized by the department. Each claim may be treated as a separate claim or several claims may be combined to form one claim.

(7) "False or fraudulent claim" means a claim which the health care provider or his billing agent submits knowing the claim to be false, fictitious, untrue, or misleading in regard to any material information. "False or fraudulent claim" shall include a claim which is part of a pattern of incorrect submissions in regard to material information or which is otherwise part of a pattern in violation of applicable federal or state law or rule.

(8) "Good, service, or supply" means any good, item, device, supply, or service for which a claim is made, or is attempted to be made, in whole or part.

(9) "Health care provider" means any person furnishing or claiming to furnish a good, service, or supply under the medical assistance programs, any other person defined as a health care provider by federal or state law or by rule, and a provider-in-fact.

(10) "Ineligible recipient" means an individual who is not eligible to receive health care through the medical assistance programs.

(11) "Knowing" or "knowingly" means that the person has actual knowledge of the information or acts in deliberate ignorance or reckless disregard of the truth or falsity of the information.

(12) "Managing employee" means a person who exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operations of a health care provider. "Managing employee" shall include but is not limited to a chief executive officer, president, general manager, business manager, administrator, or director.

(13) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(14) "Medical assistance programs" means the Medical Assistance Program (Title XIX of the Social Security Act), commonly referred to as "Medicaid", and other programs operated by and funded in the department which provide payment to health care providers.

(15) "Misrepresentation" means the knowing failure to truthfully or fully disclose any and all information required, or the concealment of any and all information required on a claim or a provider agreement or the making of a false or misleading statement to the department relative to the medical assistance programs.

(16) "Obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor, grantee, or licensor-licensee relationship, from a free-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

(17) "Order" means a final order imposed pursuant to an administrative adjudication.

(18) "Ownership interest" means the possession, directly or indirectly, of equity in the capital or the stock, or the right to share in the profits, of a health care provider.

(19) "Payment" means the payment to a health care provider from medical assistance programs funds pursuant to a claim, or the attempt to seek payment for a claim.

(20) "Property" means any and all property, movable and immovable, corporeal and incorporeal.

(21) "Provider agreement" means a document which is required as a condition of enrollment or participation as a health care provider under the medical assistance programs.

(23) "Recipient" means an individual who is eligible to receive health care through the medical assistance programs.

(24) "Recoupment" means recovery through the reduction, in whole or in part, of payment to a health care provider.

(25) "Recovery" means the recovery of overpayments, damages, fines, penalties, costs, expenses, restitution, attorney fees, or interest or settlement amounts.

(26) "Rule" means any rule or regulation promulgated by the department in accordance with the Administrative Procedure Act and any federal rule or regulation promulgated by the federal government in accordance with federal law.

(27) "Sanction" shall include but is not limited to any or all of the following:

(a) Recoupment.

(b) Posting of bond, other security, or a combination thereof.

(c) Exclusion as a health care provider.

(d) A monetary penalty.

(28) "Secretary" means the secretary of the Department of Health and Hospitals, or his authorized designee.

(29) "Secretary or attorney general" means that either party is authorized to institute a proceeding or take other authorized action as provided in this Part pursuant to a memorandum of understanding between the two so as to notify the public as to whether the secretary or the attorney general is the deciding or controlling party in the proceeding or other authorized matter.

(30) "Withhold payment" means to reduce or adjust the amount, in whole or in part, to be paid to a health care provider for a pending or future claim during the time of a criminal, civil, or departmental investigation or proceeding or claims review of the health care provider.

§437.4. Claims review and administrative sanctions

A.(1) Pursuant to rules and regulations promulgated in accordance with the Administrative Procedure Act, the secretary shall establish a process to review a claim made by a health care provider to determine if the claim should be or should have been paid as required by federal or state law or by rule.

(2) Claims review may occur prior to or after payment is made to a health care provider.

(3) The secretary may withhold payment to a health care provider during claims review if necessary to protect the fiscal integrity of the medical assistance programs.

B. The secretary may establish various types of administrative sanctions pursuant to rules and regulations promulgated in accordance with the Administrative Procedure Act which may be imposed on a health care provider or other person who violates any provision of this Part or any other applicable federal or state law or rule related to the medical assistance programs.

(2) A party aggrieved of an order may seek judicial review only in the Nineteenth Judicial District Court for the parish of East Baton Rouge.

(3) Judicial review of the order shall be conducted in compliance with the Administrative Procedure Act.

D. All state rules and regulations issued on or before August 15, 1997, shall be deemed to have been issued in compliance with and under the authority of this Section.

§437.5. Settlement

A. The secretary or the attorney general may agree to settle a matter for which recovery may be sought on behalf of the medical assistance programs or for a violation of this Part. The terms of the settlement shall be reduced to writing and signed by the parties to the agreement. The terms of the settlement shall be public record.

B. At a minimum, the settlement shall ensure that the recovery agreed to by the parties covers the estimated loss sustained by the medical assistance programs. The settlement shall include the method and means of payment for recovery, including but not limited to adequate security for the full amount of the settlement.

§437.6. Injunctive relief; lis pendens; disclosure of property and liabilities

A.(1) Concurrently with a withholding of payment, a sanction being imposed, or the institution of a criminal, civil, or departmental proceeding against a health care provider or other person, the secretary or the attorney general may bring an action for a temporary restraining order or injunction under Code of Civil Procedure Articles 3601 through 3613 to prevent a health care provider or other person from whom recovery may be sought from transferring property or to protect the business.

(2) To obtain such relief, the secretary or the attorney general shall demonstrate all necessary requirements for the relief to be granted.

(3) If an injunction is granted, the court may appoint a receiver to protect the property and business of the health care provider or other person from whom recovery may be sought. The court shall assess the cost of the receiver to the nonprevailing party.

B. Pursuant to Code of Civil Procedure Articles 3751 through 3753, the secretary or the attorney general may place a notice of pendency of action, lis pendens, on the property of a health care provider or other person during the pendency of a criminal, civil, or departmental proceeding.

C. When requested by the court, the secretary, or the attorney general, a health care provider or other person from whom recovery may be sought shall have an affirmative duty to fully disclose all property and liabilities to the requester.

§437.7. Forfeiture of property for payment of recovery

A. In accordance with the provisions of Subsection B of this Section, the court may order the forfeiture of property to satisfy recovery under the following circumstances:

(1) The court may order the health care provider or other person from whom recovery is due to forfeit property which constitutes or was derived directly or indirectly from gross proceeds traceable to the violation which forms the basis for the recovery.

B. Prior to the forfeiture of property, a contradictory hearing shall be held during which the secretary or the attorney general shall prove, by clear and convincing evidence, that the property in question is subject to forfeiture pursuant to Subsection A of this Section. No such contradictory hearing shall be required if the owner of the property in question agrees to the forfeiture.

C. If property is transferred to another person within six months prior to the occurrence or after the occurrence of the violation for which recovery is due or within six months prior to or after the institution of a criminal, civil, or departmental investigation or proceeding, it shall be prima facie evidence that the transfer was to avoid paying recovery or was an attempt to protect the property from forfeiture.

D. The health care provider or other person from whom recovery is due shall have an affirmative duty to fully disclose all property and liabilities, and all transfers of property which meet the criteria of Subsection C of this Section, to the court, the secretary and the attorney general.

§437.8. Venue

An action instituted pursuant to R.S. 46:437.6 or 437.7 may be brought in any of the following courts:

(1) The Nineteenth Judicial District Court for the parish of East Baton Rouge.

(2) A district court in the parish in which a health care provider or other person from whom recovery may be sought has its principal place of business or is domiciled.

§437.9. Privilege; nondischargeability

A. Recovery shall be granted a privilege under state law as to all property owned by the health care provider or other person from whom recovery is due and shall be effective as to third parties only if notice of pendency, lis pendens, is placed on the property , if recorded and reinscribed in accordance with Civil Code Articles 3320 through 3327, or if the conditions of Subsection C of this Section are applicable.

B. As to the property owned by the health provider, the privilege provided in Subsection A of this Section shall rank ahead of any other privilege, mortgage, or secured interest possessed by the health care provider, his agent, or his managing employee except the first mortgage executed upon the property.

C. If property is transferred to a third party to avoid paying of recovery, or in an attempt to protect the property from forfeiture, the privilege provided in Subsection A of this Section shall rank ahead of any other privilege, mortgage, or secured interest on the transferred property obtained or possessed by the person who obtains an ownership interest in the transferred property.

D. Recovery for a violation of R.S. 46:438.2 or R.S. 46:438.3 shall be considered a nondischargeable liability under the provisions of Title 11, U.S.C. Chapters 7, 11, and 13.

§437.10. Continuing liability; assumption of liability

A. A health care provider or person from whom recovery is due shall remain liable for the recovery regardless of any sale, merger, consolidation, dissolution, or other disposition of the health care provider or person, provided the obligation is recorded and reinscribed in accordance with Civil Code Articles 3320 through 3337.

§437.11. Provider agreements

A. The department shall make payments from medical assistance programs funds for goods, services, or supplies rendered to recipients to any person who has a provider agreement in effect with the department, who is complying with all federal and state laws and rules pertaining to the medical assistance programs, and who agrees that no person shall be subjected to discrimination under the medical assistance programs because of race, creed, ethnic origin, sex, age, or physical condition.

B. Each provider agreement shall require the health care provider to comply fully with all federal and state laws and rules pertaining to the medical assistance programs, to licensure, if required, and the practice of medicine, osteopathy, surgery, and midwifery. The provider agreement shall require the health care provider to provide goods, services, or supplies only if medically necessary and that are within the scope and quality of standard care.

C. Each provider agreement shall be a voluntary contract between the department and the health care provider in which the health care provider agrees to comply with federal and state laws and rules pertaining to the medical assistance programs when furnishing goods, services, or supplies to a recipient and the department agrees to pay a sum, determined by fee schedule, payment methodology, or other method, for the goods, services, or supplies provided to the recipient. However, a provider agreement shall not be construed to be a contract for the purposes of R.S. 42:1113(D).

D.(1) Unless the provider agreement is terminated by the secretary for cause as provided in Paragraph (2) of this Subsection, a health care provider agreement shall be effective for a stipulated period of time, shall be terminable by either party thirty days after receipt of written notice, and shall be renewable by mutual agreement.

(2) The secretary may terminate a provider agreement immediately and without written notice if a health care provider is the subject of a sanction or of a criminal, civil, or departmental proceeding.

E. Each health care provider who has a provider agreement with the department shall receive at least one provider number but may receive more than one provider number.

§437.12. Provider agreement requirements

A. In addition to the requirements specified in R.S. 46:437.11, the provider agreement developed by the department shall require the health care provider to comply with the following:

(1) At the time of signing the provider agreement, have in his possession a valid professional or facility license or certificate pertinent to the goods, services, or supplies being provided, as required by applicable federal and state laws and rules, and maintain such license or certificate in good standing with the department throughout the effective period of the provider agreement.

(2) Maintain medical assistance programs-related records in a systematic and orderly manner that the department requires and determines are relevant to the goods, services, or supplies being provided.

(3) Retain medical assistance programs-related records for a period of five years to satisfy all necessary inquiries by the department.

(5) Permit the department, the attorney general, the federal government, and any authorized agent of each of these entities access to all medical assistance programs-related records pertaining to goods, services, or supplies billed to the medical assistance programs, including access to all patient records and other health care provider information if the health care provider cannot easily separate records for recipients from other records.

(6) Bill other insurers and third parties, including the Medicare program, before billing the medical assistance programs, if after reasonable inquiry it is known that the recipient is eligible for payment for health care or related services from another insurer or person, and comply with all applicable federal and state laws and rules in regard to this billing.

(7) Report and refund any monies received in error or in excess of the amount to which the health care provider is entitled from the medical assistance programs.

(8) Be liable for and indemnify, defend, and hold the department harmless from any cause of action or recovery arising out of the negligence or omission of the health care provider in the course of providing goods, services, or supplies to a recipient or a person believed to be a recipient.

(9) At the option of the department, provide proof of liability insurance and maintain such insurance in effect for any period of time during which goods, services, or supplies are furnished to recipients.

(10)(a) Accept payment from the medical assistance programs as payment in full, and prohibit the health care provider from billing or collecting any additional amount from the recipient or the recipient's responsible party except, and only to the extent the department permits or requires, a co-payment, coinsurance, or a deductible to be paid by the recipient for the goods, services, or supplies provided.

(b) The payment-in-full policy shall not apply to goods, services, or supplies provided to a recipient if the goods, services, or supplies are not covered by the medical assistance programs or the recipient is determined not to be covered by medical assistance programs.

(11) Agree to be subject to claims review.

B. A provider agreement shall provide that, if the health care provider sells or transfers a business interest or practice that substantially constitutes the entity named as the health care provider in the provider agreement, or sells or transfers a facility that is of substantial importance to the entity named as the health care provider in the provider agreement, the health care provider shall maintain and make available to the department medical assistance programs-related records that relate to the sale or transfer of the business interest, practice, or facility in the same manner as though the sale or transaction had not taken place, unless the health care provider enters into an agreement with the purchaser of the business interest, practice, or facility to fulfill this requirement and provides a copy of this agreement to the department.

C. A provider agreement shall provide that any sale, merger, consolidation, or other disposition of a health care provider shall be subject to any and all outstanding debts and liabilities owed or which may be owed to the medical assistance programs.

D. A provider agreement shall provide that, if the department withholds payment or is entitled to recovery, such withholding or assessment of recovery may be imposed on any and all provider numbers in which the health care provider has an interest or in which he may have an interest.

§437.13. Powers and duties of the department

A. The department shall:

(1) Make payment timely at the established rate for goods, services, or supplies furnished to a recipient by the health care provider upon receipt of a properly completed and properly supported claim.

(2) Require certification on the claim form that the goods, services, or supplies have been completely furnished to a recipient eligible to receive the goods, services, or supplies and that, with the exception of those goods, services, or supplies specified by the department, the amount billed does not exceed the health care provider's usual and customary charge for the same goods, services, or supplies.

(3) Not demand repayment from the health care provider in any instance in which the medical assistance programs overpayment is attributable to error of the department in the determination of eligibility of a recipient.

B. The department may:

(1) Adopt, and include in the provider agreement, such other requirements and stipulations on either party as the department finds necessary to properly and efficiently administer the medical assistance programs.

(2)(a) Revoke any provider agreement as the result of a change of ownership in the named health care provider.

(b) Require a health care provider to give the department sixty days written notice before making any change in ownership of the person named in the provider agreement as the health care provider.

(3) Require, as a condition of participating in the medical assistance programs and before entering into the provider agreement, the following:

(a) An on-site inspection of the health care provider's service location by department representatives or other personnel designated by the secretary to assist in this function.

(b) A letter of credit, a surety bond, or a combination thereof, from the health care provider not to exceed fifty thousand dollars. The letter of credit, surety bond, or combination thereof may be required only if either of the following conditions is met:

(i) A letter of credit, surety bond, or any combination thereof is required for each health care provider in that category of health care provider.

(ii) The health care provider is the subject of a sanction or of a criminal, civil, or departmental proceeding.

(c) The submission of information concerning the professional, business, and personal background of the health care provider, any person having an ownership interest in the health care provider, and any agent of the health care provider. Such information shall include:

(i) Proof of holding a valid license or operating certificate, as applicable, if required by federal or state law or by rule or by a local jurisdiction in which the health care provider is located.

(ii) Any prior violation, fine, suspension, termination, or other administrative action taken under federal or state law or rule or the laws or rules of any other state relative to medical assistance programs, Medicare, or a regulatory body.

(iii) Any prior violation of the rules or regulations of any other public or private insurer.

(iv) Full and accurate disclosure of any financial or ownership interest that the health care provider, or a person with an ownership interest in that health care provider, may hold in any other health care provider or health care related entity or any other entity that is licensed by the state to provide health or residential care and treatment to persons.

C. Upon receipt of a completed, signed, and dated application, and after any necessary investigation by the department, which may include the Department of Public Safety and Corrections, office of state police background checks, the department shall either:

(1) Enroll the applicant as a Medicaid provider.

(2) Deny the application if, based on the grounds listed in R.S. 46:437.14, the secretary determines that it is in the best interest of the medical assistance programs to do so, specifying the reasons for denial.

D. In accordance with the provisions of 42 CFR 433.318(d)(2)(ii), the department is hereby granted the authority to certify that a provider enrolled in the Medical Assistance Program is out of business and that any overpayments made to the provider cannot be collected under state law.

§437.14. Grounds for denial or revocation of enrollment

A. The department may deny or revoke enrollment in the medical assistance programs to a health care provider if any of the following are found to be applicable to the health care provider, his agent, a managing employee, or any person having an ownership interest equal to five percent or greater in the health care provider:

(1) Misrepresentation.

(2) Previous or current exclusion, suspension, termination from, or the involuntary withdrawing from participation in, the medical assistance programs, any other state's Medicaid program, Medicare, or any other public or private health or health insurance program.

(3) Conviction under federal or state law of a criminal offense relating to the delivery of any goods, services, or supplies, including the performance of management or administrative services relating to the delivery of the goods, services, or supplies, under the medical assistance programs, any other state's Medicaid program, Medicare, or any other public or private health or health insurance program.

(4) Conviction under federal or state law of a criminal offense relating to the neglect or abuse of a patient in connection with the delivery of any goods, services, or supplies.

(5) Conviction under federal or state law of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

(6) Conviction under federal or state law of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

(7) Conviction under federal or state law of a criminal offense punishable by imprisonment of a year or more which involves moral turpitude, or acts against the elderly, children, or infirmed.

(8) Conviction under federal or state law of a criminal offense in connection with the interference or obstruction of any investigation into any criminal offense listed in Paragraphs (3) through (9) of this Subsection.

(9) Sanction pursuant to a violation of federal or state laws or rules relative to the medical assistance programs, any other state's Medicaid program, Medicare, or any other public health care or health insurance program.

(10) Violation of licensing or certification conditions or professional standards relating to the licensure or certification of health care providers or the required quality of goods, services, or supplies provided.

(11) Failure to pay recovery properly assessed or pursuant to an approved repayment schedule under the medical assistance programs.

(12) Failure to meet any condition of enrollment.

B. Before signing a provider agreement and at the discretion of the department, a person may become eligible to receive payment from the medical assistance programs from the time the goods, services, or supplies were furnished, if:

(1) The goods, services, or supplies provided were otherwise compensable.

(2) The person met all other requirements of a health care provider at the time the goods, services, or supplies were provided.

(3) The person agrees to abide by the provisions of the provider agreement to be effective from the date the goods, services, or supplies were provided.

SUBPART B. CIVIL CAUSES OF ACTION

§438.1. Civil actions authorized

A. The secretary or the attorney general may institute a civil action in the courts of this state to seek recovery from persons who violate the provisions of this Part.

B. An action to recover costs, expenses, fees, and attorney fees shall be ancillary to, and shall be brought and heard in the same court as, the civil action brought under the provision of Subsection A of this Section.

C.(1) A prevailing defendant may only seek recovery for costs, expenses, fees, and attorney fees if the court finds, following a contradictory hearing, that either of the following apply:

(a) The action was instituted by the secretary or attorney general pursuant to Subsection A of this Section after it should have been determined by the secretary or attorney general to be frivolous, vexatious, or brought primarily for the purpose of harassment.

(b) The secretary or attorney general proceeded with the action instituted pursuant to Subsection A of this Section after it should have been determined by the secretary or attorney general that proceeding would be frivolous, vexatious, or for the purpose of harassment.

(2) Recovery awarded to a prevailing defendant shall be awarded only for those reasonable, necessary, and proper costs, expenses, fees, and attorney fees actually incurred by the prevailing defendant.

D. An action to recover costs, expenses, fees, and attorney fees may be brought no later than sixty days after the rendering of judgment by the district court, unless the district court decision is appealed. If the district court decision is appealed, such action may be brought no later than sixty days after the rendering of the final opinion on appeal by the court of appeal or, if applicable, by the supreme court.

§438.2. Illegal remuneration

(1) In return for referring an individual to a health care provider, or for referring an individual to another person for the purpose of referring an individual to a health care provider, for the furnishing or arranging to furnish any good, supply, or service for which payment may be made, in whole or in part, under the medical assistance programs.

(2) In return for purchasing, leasing, or ordering, or for arranging for or recommending purchasing, leasing, or ordering, any good, supply, or service, or facility for which payment may be made, in whole or in part, under the medical assistance programs.

(3) To a recipient of goods, services, or supplies, or his representative, for which payment may be made, in whole or in part, under the medical assistance programs.

(4) To obtain a recipient list, number, name, or any other identifying information.

B. An action brought pursuant to the provisions of this Section shall be instituted within one year of when the department knew that the prohibited conduct occurred. Such prohibited conduct shall be referred to in this Part as "illegal remuneration".

C. By rules and regulations promulgated in accordance with the Administrative Procedure Act, the secretary may provide for additional "safe harbor" exceptions to which the provisions of this Section shall not apply.

D. The following are "safe harbor" exceptions to which the provisions of this Section shall not apply:

(1) A discount or other reduction in price obtained by a health care provider under the medical assistance programs if the reduction in price is properly disclosed to the department and is reflected in the claim made by the health care provider.

(2) Any amount paid by an employer to an employee, who has a bona fide employment relationship with such employer, for the provision of covered goods, services, or supplies.

(3) Any discount amount paid by a vendor of goods, services, or supplies to a person authorized to act as a purchasing agent for a group of health care providers who are furnishing goods, services, or supplies paid or reimbursed under the medical assistance programs provided the following criteria are met:

(a) The person acting as the purchasing agent has a written contract with each health care provider specifying the amount to be paid to the purchasing agent, which amount may be a fixed amount or a fixed percentage of the value of the purchases made by each such health care provider under the contract, or a combination of both.

(b) The health care provider discloses the information contained in the required written contract to the secretary in such form or manner as required under rules and regulations promulgated by the secretary in accordance with the Administrative Procedure Act.

(4) Any other "safe harbor" exception created by federal or state law or by rule.

§438.3. False or fraudulent claim; misrepresentation

A. No person shall knowingly present or cause to be presented a false or fraudulent claim.

B. No person shall knowingly engage in misrepresentation or make, use, or cause to be made or used, a false record or statement material to a false or fraudulent claim.

D. No person shall conspire to defraud, or attempt to defraud, the medical assistance programs through misrepresentation or by obtaining, or attempting to obtain, payment for a false or fraudulent claim.

E.(1) No person shall knowingly submit a claim for goods, services, or supplies which were medically unnecessary or which were of substandard quality or quantity.

(2) If a managed care health care provider or a health care provider operating under a voucher system under the medical assistance programs fails to provide medically necessary goods, services, or supplies or goods, services, or supplies which are of substandard quality or quantity to a recipient, and those goods, services, or supplies are covered under the managed care contract or voucher contract with the medical assistance programs, such failure shall constitute a violation of Paragraph (1) of this Subsection.

(3) "Substandard quality" in reference to services applicable to medical care as used in this Subsection shall mean substandard as to the appropriate standard of care as used to determine medical malpractice, including but not limited to the standard of care provided in R.S. 9:2794.

F. Each violation of this Section may be treated as a separate violation or may be combined into one violation at the option of the secretary or the attorney general.

G. No action shall be brought under this Section unless the amount of alleged actual damages is one thousand dollars or more.

H. No action brought pursuant to this Section shall be instituted later than ten years after the date upon which the alleged violation occurred.

§438.4. Illegal acts regarding eligibility and recipient lists

A. No person shall knowingly make, use, or cause to be made or used a false, fictitious, or misleading statement on any form used for the purpose of certifying or qualifying any person for eligibility for the medical assistance programs or to receive any good, service, or supply under the medical assistance programs which that person is not eligible to receive.

B. No unauthorized person, or no authorized person for an unauthorized purpose, shall obtain a recipient list, number, name, or any other identifying information, nor shall that person use, possess, or distribute such information.

C. An action brought pursuant to the provisions of this Section shall be instituted within one year of when the department knew that the prohibited conduct occurred.

§438.5. Civil monetary penalty

A. In a civil action instituted in the courts of this state pursuant to the provisions of this Part, the secretary or the attorney general may seek a civil monetary penalty provided in R.S. 46:438.6(C) from any of the following:

(1) A health care provider or other person sanctioned by order pursuant to an administrative adjudication.

(2) A health care provider or other person determined by a court to have violated any provision of this Part.

(4) A health care provider or other person who has been charged with a violation of R.S. 14:70.1, R.S. 14:133, or R.S. 46:114.2.

(5) A health care provider or other person who has been found liable in a civil action filed in federal court pursuant to 18 U.S.C. 1347, et seq., 42 U.S.C. 1359nn(h)(6), or 42 U.S.C. 1320a-7(b).

(6) A health care provider or other person who has pled guilty to, pled nolo contendere to, or has been convicted in federal court of criminal conduct arising out of circumstances which would constitute a violation of this Part.

B.(1) If a health care provider is sanctioned by order pursuant to an administrative adjudication and if judicial review of the order is sought, a civil suit may be filed for imposition and recovery of the civil monetary penalty during the pendency of such judicial review. The reviewing court may consolidate both actions and hear them concurrently.

(2) If judicial review of an order is sought, the secretary or the attorney general shall file the action for recovery of the civil monetary penalty within one year of service on the secretary of the petition seeking judicial review of the order.

(3) If no judicial review of an order is sought, the secretary or the attorney general may file the action for recovery of the civil monetary penalty within one year of the date of the order.

(4) Any action brought under the provisions of this Subsection shall be filed in the Nineteenth Judicial District Court for the parish of East Baton Rouge.

C. In the instance of a state criminal action, the action for recovery of the civil monetary penalty may be brought as part of the criminal action or shall be brought within one year of the date of the criminal conviction or final plea.

D.(1) In the case of a civil judgment rendered in federal court, the action for recovery of the civil monetary penalty may be brought once the judgment becomes enforceable and no later than one year after written notification to the secretary of the enforceable judgment.

(2) In the case of a criminal conviction or plea in federal court, the action under this Section may be brought once the conviction or plea is final and no later than one year after written notification to the secretary of the rendering of the conviction or final plea.

(3) Any action brought under the provisions of this Subsection shall be filed in the Nineteenth Judicial District Court for the parish of East Baton Rouge.

E. If an action is brought pursuant to this Part, the request for the imposition of a civil monetary penalty shall only be considered if made part of the original or amended petition.

§438.6. Recovery

A. Actual damages. (1) Actual damages incurred as a result of a violation of the provisions of this Part shall be recovered only once by the medical assistance programs and shall not be waived by the court.

(2) Except as provided by Paragraph (3) of this Subsection, actual damages shall equal the difference between what the medical assistance programs paid, or would have paid, and the amount that should have been paid had not a violation of this Part occurred plus interest at the maximum rate of legal interest provided by R.S. 13:4202 from the date the damage occurred to the date of repayment.

B. Civil fine. (1) Any person who is found to have violated R.S. 46:438.2 shall be subject to a civil fine in an amount not to exceed ten thousand dollars per violation, or an amount equal to three times the value of the illegal remuneration, whichever is greater.

(2) Except as limited by this Section, any person who is found to have violated R.S. 46:438.3 shall be subject to a civil fine in an amount not to exceed three times the amount of actual damages sustained by the medical assistance programs as a result of the violation.

C. Civil monetary penalty. (1) In addition to the actual damages provided in Subsection A of this Section and the civil fine imposed pursuant to Subsection B of this Section, the following civil monetary penalties shall be imposed on the violator:

(a) Not less than five thousand five hundred dollars but not more than eleven thousand dollars for each false or fraudulent claim, misrepresentation, illegal remuneration, or other prohibited act as contained in R.S. 46:438.2, 438.3, or 438.4.

(b) Payment of interest on the amount of the civil fine imposed pursuant to Subsection B of this Section at the maximum rate of legal interest provided by R.S. 13:4202 from the date the damage occurred to the date of repayment.

(2) Prior to the imposition of a civil monetary penalty, the court shall consider if there are extenuating circumstances as provided in R.S. 46:438.7.

(3) The penalties provided in this Subsection shall be adjusted according to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461.

D. Costs, expenses, fees, and attorney fees. (1) Any person who is found to have violated this Subpart shall be liable for all costs, expenses, and fees related to investigations and proceedings associated with the violation, including attorney fees.

(2) All awards of costs, expenses, fees, and attorney fees are subject to review by the court using a reasonable, necessary, and proper standard of review.

(3) The secretary or attorney general shall promptly remit awards for those costs, expenses, and fees incurred by the various clerks of court or sheriffs involved in the investigations or proceedings to the appropriate clerk or sheriff.

E. Damages. (1) If recovery is due from a health care provider under the provisions of Subsections A and B of this Section, such recovery shall constitute civil liquidated damages for breach of the conditions and requirements of participation in the medical assistance programs which are and shall be construed by the courts to be remedial, but not retroactive, in nature.

(2) Any award of civil liquidated damages, costs, expenses, and attorney fees shall be in addition to criminal penalties and to the civil monetary penalty provided in Subsection C of this Section.

§438.7. Reduced damages

If requested by the secretary or the attorney general, the court may reduce to not less than twice the actual damages or any recovery required to be imposed under the provisions of this Subpart if all of the following extenuating circumstances are found to be applicable:

(2) The violator cooperated fully with all federal or state investigations concerning the specific allegation.

(3) At the time the violator furnished the information concerning the specific allegation to the department or the attorney general, no criminal, civil, or departmental investigation or proceeding had been commenced as to the alleged violation.

§438.8. Burden of proof; prima facie evidence; standard of review

A. The burden of proof in an action instituted pursuant to this Part shall be on the medical assistance programs and by a preponderance of the evidence, except that the defendant shall carry the burden of proving that goods, services, or supplies were actually provided to an eligible recipient in the quantity and quality submitted on a claim. In all other aspects, the burden of proof shall be as set forth in the Code of Civil Procedure and other applicable laws.

B. Proof by a preponderance of the evidence of a false or fraudulent claim or illegal remuneration shall be deemed to exist under the following circumstances:

(1) If the defendant has pled guilty to, been convicted of, or entered a nolo contendere plea to a criminal charge in any federal or state court to charges arising out of the same circumstances as would be a violation of this Subpart.

(2) If an order has been rendered against a defendant finding the defendant to have violated this Subpart.

C.(1) The submission of a certified or true copy of an order, civil judgment, or criminal conviction or plea shall be prima facie evidence of the same.

(2) The submission of the bill of information or of the indictment and the minutes of the court shall be prima facie evidence as to the circumstances underlying a criminal conviction or plea.

D.(1) In determining whether a pattern of incorrect submissions exists in regard to an alleged false or fraudulent claim, the court shall give consideration as to whether the total amount of the incorrect submissions by a health care provider is material in relation to the total claims submitted by the health care provider.

(2) "Material" as used in this Subsection shall have the same meaning as defined by rules and regulation promulgated by the secretary in accordance with the Administrative Procedure Act which incorporate the same definition of "material" as recognized by the American Institute of Certified Public Accountants.

SUBPART C. QUI TAM ACTION

§439.1. Qui tam action, civil action filed by private person

A. A private person may institute a civil action in the courts of this state on behalf of the medical assistance programs and himself to seek recovery for a violation of R.S. 46:438.2, 438.3, or 438.4 pursuant to the provisions of this Subpart. The institutor shall be known as a "qui tam plaintiff" and the civil action shall be known as a "qui tam action".

B. No qui tam action shall be instituted more than six years after the date on which the violation of the Louisiana Medical Assistance Programs Integrity Law is committed or more than three years after the date the facts material to the right of action are known or reasonably should have been known by the official of the state of Louisiana charged with the responsibility to act in the circumstances, but no more than ten years after the date on which the violation is committed, whichever occurs last.

C. The burden of proof in a qui tam action instituted pursuant to this Subpart shall be the same as that set forth in R.S. 46:438.8.

D.(1) The court shall dismiss an action or claim in accordance with this Section, unless opposed by the government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in any of the following:

(a) A criminal, civil, or administrative hearing in which the government or its agent is a party.

(b) A congressional or government accountability office or other federal report, hearing, audit, or investigation.

(c) The news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information.

(2) For the purposes of this Subsection, "original source" means an individual who, prior to a public disclosure in accordance with this Subsection, has voluntarily disclosed to the government the information on which allegations or transactions in a claim are based or who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the government before filing an action in accordance with this Subpart.

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

(1) Relief in accordance with this Subsection shall include reinstatement with the same seniority status the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney fees. An action in accordance with this Section may be brought in the appropriate district court of competent jurisdiction for the relief provided in this Section.

(2) A civil action in accordance with this Section may not be brought more than three years after the date the retaliation occurred.

F. The court shall allow the secretary or the attorney general to intervene and proceed with the qui tam action in the district court at any time during the qui tam action proceedings.

G. Notwithstanding any other law to the contrary, a qui tam complaint and information filed with the secretary or attorney general shall not be subject to discovery or become public record until judicial service of the qui tam action is made on any of the defendants, except that the information contained therein may be given to other governmental entities or their authorized agents for review and investigation. The entities and their authorized agents shall maintain the confidentiality of the information provided to them under this Subsection.

§439.2. Qui tam action procedures

A. The following procedures shall be applicable to a qui tam action:

(1) The complaint shall be captioned: "Medical Assistance Programs Ex Rel.: [insert name of qui tam plaintiff(s)] v. [insert name of defendant(s)]". The qui tam complaint shall be filed with the appropriate state or federal district court.

(2) A copy of the qui tam complaint and written disclosure of substantially all material evidence and information each qui tam plaintiff possesses shall be served upon the secretary or the attorney general in accordance with the applicable rules of civil procedure.

(3) When a person brings an action in accordance with this Subpart, no person other than the secretary or attorney general may intervene or bring a related action based on the same facts underlying the pending action.

(4)(a) The complaint and information filed with the court shall be made under seal, shall remain under seal for at least ninety days from the date of filing, and shall be served on the defendant when the seal is removed.

(b) For good cause shown, the secretary or the attorney general may move the court for extensions of time during which the petition remains under seal. Any such motions may be supported by affidavits or other submissions in camera and under seal.

B.(1) If the secretary or the attorney general elects to intervene in the action, the secretary or the attorney general shall not be bound by any act of a qui tam plaintiff. The secretary or the attorney general shall control the qui tam action proceedings on behalf of the state and the qui tam plaintiff may continue as a party to the action. For prescription purposes, any government complaint in intervention, whether filed separately or as an amendment to the relator's complaint, shall relate back to the filing date of the complaint, to the extent that the claim of the government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the relator's complaint.

(2) The qui tam plaintiff and his counsel shall cooperate fully with the secretary or the attorney during the pendency of the qui tam action.

(3) If requested by the secretary or the attorney general and notwithstanding the objection of the qui tam plaintiff, the court may dismiss the qui tam action provided the qui tam plaintiff has been notified by the secretary or the attorney general of the filing of the motion to dismiss and the court has provided the qui tam plaintiff a contradictory hearing on the motion.

(4)(a) If the secretary or the attorney general does not intervene, the qui tam plaintiff may proceed with the qui tam action unless the secretary or the attorney general shows that proceeding would adversely affect the prosecution of any pending criminal actions or criminal investigations into the activities of the defendant. Such a showing shall be made to the court in camera and neither the qui tam plaintiff or the defendant shall be informed of the information revealed in camera. In which case, the qui tam action shall be stayed for no more than one year.

(b) When a qui tam plaintiff proceeds with the action, the court, without limiting the status and rights of the qui tam plaintiff, may nevertheless permit the secretary or the attorney general to intervene at a later date upon a showing of good cause.

(5) If the qui tam plaintiff objects to a settlement of the qui tam action proposed by the secretary or the attorney general, the court may authorize the settlement only after a hearing to determine whether the proposed settlement is fair, adequate, and reasonable under the circumstances.

C. Repealed by Acts 2011, No. 185, §2.

D. A defendant shall have thirty days from the time a qui tam complaint is served on him to file a responsive pleading.

E. The qui tam plaintiff and the defendant shall serve all pleadings and papers filed, as well as discovery, in the qui tam action on the secretary and the attorney general.

F.(1) Whether or not the secretary or the attorney general proceeds with the action, upon showing by the secretary or the attorney general that certain actions of discovery by the qui tam plaintiff or defendant would interfere with a criminal, civil, or departmental investigation or proceeding arising out of the same facts, the court shall stay the discovery for a period of not more than ninety days.

(2) Upon a further showing that federal or state authorities have pursued the criminal, civil, or departmental investigation or proceeding with reasonable diligence and any proposed discovery in the qui tam action would unduly interfere with the criminal, civil, or departmental investigation or proceeding, the court may stay the discovery for an additional period, not to exceed one year.

(3) Such showings shall be conducted in camera and neither the defendant nor the qui tam plaintiff shall be informed of the information presented to the court.

(4) If discovery is stayed pursuant to this Subsection, the trial and any motion for summary judgment in the qui tam action shall likewise be stayed.

§439.3. Qui tam action procedures; alternative remedies

Notwithstanding any other provision of this Subpart, the secretary or the attorney general may elect to pursue an administrative or civil action against a qui tam defendant through any alternative remedy available to the secretary or the attorney general. If an alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights he would have had if the action had continued in accordance with this Subpart. Any finding of fact or conclusion of law made in the other proceeding that has become final shall be conclusive on all parties to an action in accordance with this Subpart. A finding or conclusion is final if it has been finally determined on appeal, if all delays for the filing of an appeal regarding the finding or conclusion have expired, or if the finding or conclusion is not subject to judicial review.

§439.4. Recovery awarded to a qui tam plaintiff

A.(1) Except as provided by Subsection D of this Section and Paragraph (3) of this Subsection, if the secretary or the attorney general intervenes in the action brought by a qui tam plaintiff, the qui tam plaintiff shall receive at least fifteen percent, but not more than twenty-five percent, of recovery.

(2) In making a determination of award to the qui tam plaintiff, the court shall consider the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action.

(3) If the court finds the allegations in the qui tam action to be based primarily on disclosures of specific information, other than information provided by the qui tam plaintiff, relating to allegations or transactions in criminal, civil, or administrative hearings, or from the news media, the court may award such sum it considers appropriate, but in no case may the court award more than ten percent of the proceeds, considering the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person in accordance with this Subsection shall be made from the proceeds recovered.

B. Except as provided by Subsection D of this Section, if the secretary or the attorney general does not intervene in the qui tam action, the qui tam plaintiff shall receive an amount, not less than twenty-five but not more than thirty percent of recovery, which the court decides is reasonable for the qui tam plaintiff pursuing the action to judgment or settlement.

C.(1) In addition to all other recovery to which he is entitled and if he prevails in the qui tam action through litigation or settlement, the qui tam plaintiff shall be entitled to an award against the defendant for costs, expenses, fees, and attorney fees, subject to review by the court using a reasonable, necessary, and proper standard of review.

(2) If the secretary or the attorney general does not intervene and the qui tam plaintiff conducts the action, the court shall award costs, expenses, fees, and attorney fees to a prevailing defendant if the court finds that the allegations made by the qui tam plaintiff were meritless or brought primarily for the purposes of harassment. A finding by the court that qui tam allegations were meritless or brought primarily for the purposes of harassment may be used by the prevailing defendant in the qui tam action or any other civil proceeding to recover losses or damages sustained as a result of the qui tam plaintiff filing and pursuing such a qui tam action.

D. Whether or not the secretary or the attorney general intervenes, if the court finds that the action was brought by a person who planned and initiated the violation which is the subject of the action, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the qui tam plaintiff would otherwise receive under Subsection A or B of this Section, taking into account the role the qui tam plaintiff played in advancing the case to judgment or settlement and any relevant circumstances pertaining to the qui tam plaintiff's participation in the violation.

E. When more than one party serves as a qui tam plaintiff, the share of recovery each receives shall be determined by the court. In no case, however, shall the total award to multiple qui tam plaintiffs be greater than the total award allowed to a single qui tam plaintiff under Subsection A or B of this Section.

F. In no instance shall the secretary, the medical assistance programs, the attorney general, or the state be liable for any costs, expenses, fees, or attorney fees incurred by the qui tam plaintiff or for any award entered against the qui tam plaintiff.

G. The percentage of the share awarded to or settled for by the qui tam plaintiff shall be determined using the total amount of the award or settlement.

SUBPART D. FRAUD AND ABUSE DETECTION AND PREVENTION

§440.1. Medical Assistance Programs Fraud Detection Fund

A. The Medical Assistance Programs Fraud Detection Fund, hereafter referred to as the "fund", is created in the state treasury as a special fund. The monies in the fund shall be invested by the state treasurer in the same manner as monies in the state general fund and interest earned on the investment of monies in the fund shall be credited to the fund. All unexpended and unencumbered monies in the fund at the end of each fiscal year shall remain in the fund.

B. After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund, and prior to monies being placed in the state general fund, all monies received by the state pursuant to a civil award granted or settlement under the provisions of this Part, except for the amount to make the medical assistance programs whole, shall be deposited into the fund.

C. Fifty percent of the monies collected and deposited into the fund shall be allocated to the Medicaid Fraud Control Unit within the office of the attorney general.

D. Fifty percent of the monies collected and deposited into the fund shall be allocated to the Department of Health and Hospitals to be used solely for Medicaid fraud detection and for the purposes specified in Subsection E of this Section.

E. The monies in the fund shall not be used to replace, displace, or supplant state general funds appropriated for the daily operation of the department or the medical assistance programs and may be appropriated by the legislature for the following purposes only:

(1) To pay costs or expenses incurred by the department or the attorney general relative to an action instituted pursuant to this Part.

(2) To enhance fraud and abuse detection and prevention activities related to the medical assistance programs.

(3) To pay rewards for information concerning fraud and abuse as provided in Subpart B of this Part.

(4) To provide a source of revenue for the Medical Assistance Program in the event of a change in federal policy which results in an increase in state participation or a shortfall in state general fund due to a decrease in the official forecast, as defined in R.S. 39:2(30), during a fiscal year.

§440.2. Rewards for fraud and abuse information

A. The secretary may provide a reward of up to two thousand dollars to an individual who submits information to the secretary which results in recovery pursuant to the provisions of this Part, provided such individual is not himself subject to recovery under this Part.

B. The secretary shall grant rewards only to the extent monies are appropriated for this purpose from the Medical Assistance Programs Fraud Detection Fund. The secretary shall determine the amount of a reward, not to exceed two thousand dollars per individual per action, and establish a process to grant the reward in accordance with rules and regulations promulgated in accordance with the Administrative Procedure Act.

§440.3. Whistleblower protection and cause of action

A. No employee shall be discharged, demoted, suspended, threatened, harassed, or discriminated against in any manner in the terms and conditions of his employment because of any lawful act engaged in by the employee or on behalf of the employee in furtherance of any action taken pursuant to this Part in regard to a health care provider or other person from whom recovery is or could be sought. Such an employee may seek any and all relief for his injury to which he is entitled under state or federal law.

B. No individual shall be threatened, harassed, or discriminated against in any manner by a health care provider or other person because of any lawful act engaged in by the individual or on behalf of the individual in furtherance of any action taken pursuant to this Part in regard to a health care provider or other person from whom recovery is or could be sought except that a health care provider may arrange for a recipient to receive goods, services, or supplies from another health care provider if the recipient agrees and the arrangement is approved by the secretary. Such an individual may seek any and all relief for his injury to which he is entitled under state or federal law.

C.(1) An employee of a private entity may bring his action for relief against his employer or the health care provider in the same court as the action or actions were brought pursuant to this Part or as part of an action brought pursuant to this Part.

(2) A person aggrieved of a violation of Subsection A or B of this Section shall be entitled to exemplary damages.

D. A qui tam plaintiff shall not be entitled to recovery pursuant to this Section if the court finds that the qui tam plaintiff instituted or proceeded with an action that was frivolous, vexatious, or harassing.

Appendix C.7

Taxpayers Against Fraud SAMPLE DRAFT OF STATE FCA

Model State FCA

Sections

§ 1 Definitions

For purposes of this Act:
(A) "Claim" includes any request or demand, whether under a contract or otherwise, for money or property, whether or not the State has title to the money or property that:

(1) Is presented to an officer, employee, or agent of the State; or

(2) Is made to a contractor, grantee, or other recipient of the money or property, if the money or property is to be spent or used on the State's behalf or to advance a State program or interest, and if the State:

(a) Provides or has provided any portion of the money or property requested or demanded; or

(b) Will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

(3) "Claim" does not include a request or demand for money or property that the State has paid to an individual as compensation for State employment or as an income subsidy with no restrictions on that individual's use of the money or property.

(B) "Employer" includes any natural person, corporation, firm, association, organization, partnership, business, trust, or State-affiliated entity involved in proprietary function, including State universities and State hospitals.

(C) "Knowingly" or "knowing" mean that a person, with respect to information:

(1) Has actual knowledge of the information;

(2) Acts in deliberate ignorance of the truth or falsity of the information; or

(3) Acts in reckless disregard of the truth or falsity of the information.

(4) "Knowingly" and "knowing" require no specific intent to defraud.

(D) "Material" or "materially" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(E) "Obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or rule, or from the retention of any overpayment.

(F) "Person" means any natural person, partnership, corporation, organization, association, business, trust or other legal entity, other than the State.

§ 2 Acts subjecting person to treble damages, costs and civil penalties; exceptions

(A) Any person who commits any of the following acts shall be liable to the State for three times the amount of damages which the State sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the State for the costs, including attorneys' fees, of a civil action brought to recover any of those penalties or damages, and may be liable to the State for a civil penalty of not less than $5,500 and not more than $11,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), for each violation:

(1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval;
(2) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
(3) Has possession, custody, or control of money or property used or to be used by the State and knowingly delivers or causes to be delivered less than all of that money or property;
(4) Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the State and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(5) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer, employee, or agent of the State who is not lawfully authorized to sell or pledge the property;
(6) Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State;
(7) Knowingly conceals, or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State;
(8) Conspires to violate any paragraph (A)(1) to (7) of this section.

(B) This section does not apply to claims, records, or statements made under the State [Tax laws].

(C) **Damages Limitation.** Notwithstanding section 2(A), a person who violates any of the provisions of subsection (A)(1) through (8) is liable to the State for not less than two

times the amount of damages that the State sustains because of the violation and the costs of a civil action brought to recover the damages, but no civil penalties, if the court finds all of the following:

(a) The person committing the violation provided officials of the State who are responsible for investigating false claims violations with all information known to that person about the violation within thirty days after the date on which the person first obtained the information;

(b) The person fully cooperated with any State investigation of the violation; and

(c) At the time the person provided the State with information about the violation, no criminal prosecution, civil action, or administrative proceeding had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

§ 3 Attorney general investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as *qui tam* plaintiff and as private citizens; jurisdiction of courts

(A) **Responsibilities of the Attorney General.** The Attorney General diligently shall investigate a violation under section 2(A). If the Attorney General finds that a person has violated or is violating section 2(A), the Attorney General may bring a civil action under this section against that person.

(B) **Actions by private persons.**

(1) A person may bring a civil action for a violation of this Act for the person and for the State in the name of the State. No action may be filed pursuant to this subsection against the federal government, the State, or any officer or employee thereof acting in his or her official capacity. The person bringing the action shall be referred to as the *qui tam* plaintiff. Once filed, the action may be dismissed only with the written consent of the court and the Attorney General, taking into account the best interest of the parties involved and the public purposes behind this act.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the State Attorney General. The complaint shall also be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The State may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and the information. Any information or documents furnished by the relator to the attorney general in connection with the initiation of a *qui tam* action or investigation under subsection (B)(2) is not a public record and is exempt from disclosure under [applicable State FOIA law].

(3) The State may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under subsection (B)(2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until after the complaint is unsealed and served upon the defendant pursuant to State Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the State shall—

(a) proceed with the action, in which case the Attorney General shall intervene and conduct the action on behalf of the State; or

(b) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings a valid action under this subsection, no person other than the State may intervene or bring a related action based on the facts underlying the pending action.

(C) Rights of the parties to *qui tam* actions.

(1) If the State proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (a) The State may seek to dismiss the action for good cause notwithstanding the objections of the *qui tam* plaintiff if the *qui tam* plaintiff has been notified by the State of the filing of the motion and the court has provided the *qui tam* plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(b) The State may settle the action with the defendant notwithstanding the objections of the *qui tam* plaintiff if the court determines, after a hearing providing the *qui tam* plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(c) Upon a showing by the State that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(d) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the State elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the State's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the State to intervene at a later date upon a showing of good cause.

(4) Whether or not the State proceeds with the action, upon a showing by the State that certain actions of discovery by the person initiating the action would interfere with the State's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such

a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the State has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection 3(B), the State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the State, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(D) Award to *qui tam* plaintiff.

(1) If the State proceeds with an action brought by a person under subsection 3(B), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions specifically in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the State does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the State proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 2 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the

role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 2, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the State to continue the action.

(4) If the State does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(E) Certain actions barred.

(1) No court shall have jurisdiction over an action brought under subsection 3(B) against a member of the State legislative branch, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the State when the action was brought.

(2) In no event may a person bring an action under subsection 3(B) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party.

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

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

(ii) in a federal or State congressional or other report, hearing, audit, or investigation; or

(iii) from the news media,

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

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(3)(A), has voluntarily disclosed to the State the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the State before filing an action under this section.

(F) State not liable for certain expenses. The State is not liable for expenses which a person incurs in bringing an action under this section.

(G) Private Action for Retaliatory Actions. Any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by the employer of the employee, contractor, or agent because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought or to be brought under section 3, or other efforts to stop 1 or more violations of this Act, including investigation

for, initiation of, testimony for, or assistance in the action, shall be entitled to all relief necessary to make the employee, contractor, or agent whole. The relief shall include reinstatement with the same seniority status the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee, contractor, or agent may bring an action in the appropriate court for the relief provided under this section. The action may not be brought under this section more than three years after the last act of the employer that is alleged to violate this section.

§ 4 Limitation of actions; activities antedating this article; burden of proof

(A) A civil action under Section 3 may not be brought –

(1) more than 6 years after the date on which the violation of section 2 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the State charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(B) Retroactivity. A civil action under Section 3 may be brought for activity prior to the effective date of this Act if the limitations period set in section 4(A) has not lapsed.

(C) If the State elects to intervene and proceed with an action brought under section 3(B), the State may file its own complaint or amend the complaint of a person who has brought an action under section 3(B) to clarify or add detail to the claims in which the State is intervening and to add any additional claims with respect to which the State contends it is entitled to relief. For statute of limitations purposes, any such State pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the State arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(D) Estoppel. Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or *nolo contendre*, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (A) or (B) of Section 3.

(E) An action under subsection 3(A) or 3(B) of this section may be brought in [list court(s)] in any county in which the defendant or any one of multiple defendants can be found, resides, or transacts business, or in any county in which any act prohibited by section 2(A) occurred. The attorney general or the person who brought the action shall prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

§ 5 Remedies under other laws; severability of provisions; liberality of legislative construction; adoption of legislative history

(A) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(B) If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of the provision to other persons or circumstances shall not be affected thereby.

(C) This Act shall be liberally construed and applied to promote the public interest. This Act also adopts the congressional intent behind the Federal False Claims Act, 31 U.S.C. §§ 3729-3733, including the legislative history underlying the 1986, 2009, and 2010 Amendments to the Federal False Claims Act.

§ 6 Applicable Rules of Civil Procedure

[**NOTE**: TAF Education Fund recommends that the States adopt provisions that address issues of venue and discovery, including provisions empowering the State to utilize subpoena powers similar to the civil investigative demands authorized under section 3733 of the federal False Claims Act. *See* 31 U.S.C. § 3733. Because these issues of civil procedure vary from state to state, TAF Education Fund has chosen not to include such provisions in this Model State False Claims Act.]

Appendix D.1

IRS WHISTLEBLOWER PROGRAM

Internal Revenue Code (IRC) 7623(b)

- The law applies to claims filed after enactment date December 20, 2006.
- The award percentage ranges are statutory, with a general range between 15% to 30%, with some exceptions. There is no limit on the dollar amount of the award.
- A reduced award amount of up to 10% in cases based principally on disclosure of specific allegations resulting from:
    - Judicial or administrative hearings,
    - From a governmental report, hearing, audit or investigation,
    - Or from the news media.
    - An appropriate reduction if the whistleblower “planned and initiated” the non-compliance.
- The law applies to cases in which the amount in dispute exceeds $2 million. If the taxpayer is an individual, the individual's gross income must exceed $200,000 for any taxable year at issue in a claim.
- Requires the Whistleblower Office to analyze these $2 million cases, and authorizes the IRS to request assistance from the whistleblower and their counsel.
- Individuals are elig ble for awards based on additions to tax, penalties, interest, and other amounts collected as a result of any administrative or judicial action resulting from the information provided.
- Awards are subject to appeal to the U.S. Tax Court.
- If the thresholds in 7623(b) are not met, section 7623(a) authorizes, but does not require, the Service to pay for information relating to violations of the internal revenue law that result in recovery of tax.

IRC Section 7623(a)

Informant Award (Whistleblower)

Page Last Reviewed or Updated: 07-Mar-2013

Appendix D.2

LETTER FROM SENATOR GRASSLEY TO THE IRS

REPLY TO:
[redacted]

REPLY TO:
[redacted]

United States Senate
CHARLES E. GRASSLEY
WASHINGTON, DC 20510–1501

September 26, 2013

The Honorable John A. Koskinen
Nominee, Commissioner of Internal Revenue
Internal Revenue Service
[redacted]

Dear Mr. Koskinen:

I congratulate you on your nomination as Commissioner of the Internal Revenue Service (IRS). I am writing to bring to your attention the need for greater focus by the IRS on legitimate enforcement and collection activities. There is much the IRS can do in this area by taking full advantage of two important initiatives that will help the IRS fulfill its mission – without the need for additional appropriations. These two initiatives are: the IRS' authority to use private debt collectors; and, the IRS whistleblower program – both programs that I have long championed.

On August 23, 2013, the Treasury Inspector General for Tax Administration (TIGTA) released a report that examined IRS' collection and enforcement activities. According to TIGTA, enforcement revenue has decreased for two straight years and is 13 percent less than the amount in Fiscal Year 2010.[1] There were mixed results in IRS Collection function, but Tax Delinquent Accounts continue to increase with the amount in the Queue growing by 46% over the past 5 years. Additionally, accounts receivable have increased by approximately $100 billion in last ten years.

As TIGTA notes, the IRS has been faced with many challenges these past years due to the fiscal realities we currently face, as well as its role in implementing and enforcing the Affordable Care Act. The primary role of the IRS is to collect the revenue necessary to fund the government. While the IRS' role has been expanded over the years, and vastly so with the implementation of the Affordable Care Act, it is important the chief mission of the IRS is not degraded.

As is evident from recent news reports, whether it's over indulgent spending on conferences or paying out unnecessary bonuses, there are opportunities for the IRS to better use its resources. In the grand scheme of things the additional dollars saved by curtailing these excesses may not be enough to cover all the challenges on the IRS' plate. Yet, given the current fiscal imbalance, the answer cannot solely be ever larger appropriations from Congress. It is incumbent on the IRS to work smarter and utilize *all* the resources currently at its disposal.

[1] TIGTA, *Trends in Compliance Activities Through Fiscal Year 2012*, Ref. Num.: 2012-30-078, August 23, 2013

Over the past decade I have sought to provide the IRS with additional tools to track down tax cheats and collect funds through the enactment of the Private Debt Collection (PDC) program and the expansion of the IRS whistleblower program. Unfortunately, both programs have been fought every step of the way by some within Treasury and IRS who have an ideological disposition to oppose any program that seeks to utilize "private" or non-government resources to reduce the burden on the IRS.

As part of the 2004 American Jobs Creation Act, Congress added an arrow to IRS' quiver with the authorization of the PDC Program. This program authorized the IRS to contract with private agencies to collect owed taxes that the IRS wasn't collecting on its own. For two and a half years private agencies were contracted by the IRS to work cases the IRS wouldn't work because they were deemed low yield. In this short time, this fledgling program collected nearly $100 million in revenue that otherwise would have gone uncollected.[2] Additionally, IRS' own information showed the private employees' quality ratings were consistently higher than that of IRS employees. However, those with a vested interest in seeing the PDC program fail got their wish in March of 2009 when the IRS chose not to renew contracts with the private debt collecting agencies.

IRS' decision was based on a study it claimed showed IRS employees could collect the tax debts cheaper and better than private employees. However, it is evident from a 2010 Government Accountability Office (GAO) study that IRS cooked the books to get the result it wanted. GAO found the IRS study contained numerous flaws and "was not a soundly designed cost-effectiveness comparison for supporting IRS's decision."[3] GAO made several suggestions on how to fix the study and any future studies. Yet, the IRS doggedly refused to reevaluate the PDC program in light of GAO's findings.

The IRS decision was further undermined by a 2011 TIGTA report. TIGTA unequivocally found that it was "clear that the Federal Government benefited from PCAs working these…cases."[4] Despite IRS' assertion that its employees would work the cases and do so more effectively, TIGTA found that IRS worked only 47% of cases that were reassigned to the IRS in 2009 as a result of the cancellation of the PDC. TIGTA further estimated that as much as $516 million could have been collected over the next five years if similar cases would have been assigned to the PDC collection program. This is consistent with Treasury Department's own analysis from 2004 that estimated the program would collect approximately $1.4 billion over ten years.

The PDC Program remains authorized and is a proven tool currently at this Administration's disposal. The IRS has not shown that it has the resources or willingness to go after the "low priority" cases that are eligible to be assigned to PDCs. Thus, as TIGTA recommended in 2011,

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[2] TIGTA, *Collection Actions Were Not Always Pursued on Cases Returned From the Private Debt Collection Program*, Ref. Num.: 2011-30-114, September 27,2011

[3] GAO, *Tax Debt Collection: IRS Could Improve Future Studies By Establishing Appropriate Guidance*, GAO-10-963, September 2010. ("We continue to believe that the study was not a soundly designed cost-effectiveness comparison for supporting IRS's decision. Our report discusses our reasoning in detail, focusing on the study's methodological errors, narrow scope, and lack of adherence to guidance for doing such studies.")

[4] TIGTA 2011, *Supra*

"the IRS should consider reinstituting the PDC Program and funding all Program costs through Program collections."[5]

I encourage you to show the leadership necessary to set aside narrow-minded ideology that grips some at Treasury and the IRS and put good tax administration first – and reinstate the PDC Program immediately. I ask that you familiarize yourself with the program, provide me your detailed views prior to your confirmation and commit to a decision on this matter within your first 60 days as Commissioner.

The expanded IRS Whistleblower program I authored in 2006 is an additional tool I fear the IRS is not using to its full capability. This program has the potential to be an excellent enforcement tool for tracking down high dollar tax fraud and evasion. Its potential has already been shown by the billions of dollars that have been brought in from illegal offshore accounts. The key for these billions is the work of whistleblowers coming forward and opening the curtain to secret bank accounts.

Yet, despite this success, many at the IRS, and especially Treasury and Chief Counsel have undermined the program and have discouraged whistleblowers from coming forward. Payouts under the program are few and far between and IRS agents refuse to fully utilize the whistleblower's knowledge and expertise to identify and expose tax cheats. Moreover, whistleblowers who often are putting their whole career on the line frequently have to wait for years in the dark with no information as to whether or when the IRS will act on their claim. Finally, Treasury is proposing regulations that will further undercut the whistleblower program – with a shortsighted view that will save a penny today and lose the Treasury much more in the future due to discouraged whistleblowers' not coming forward.

The statute gives the IRS Whistleblower Office clear authority to not only award whistleblowers, but to also enter into contracts with whistleblowers and their attorneys to assist the IRS in its work (while at the same time protecting taxpayer confidentiality).[6] The Department of Justice has found success to the tune of billions of dollars recovered under the False Claims Act (FCA), working with whistleblowers and their representatives. The IRS would find similar success working with whistleblowers and their attorneys – if it would only get out of its own way. Unfortunately, the IRS has taken this opportunity to partner with whistleblowers and buried it. It is my understanding that the IRS has delegated the authority to request whistleblower assistance solely to IRS field offices. To my knowledge, such contracting with whistleblowers has never happened because of the reality that the field has no understanding, guidance or support for such an undertaking. This is inexcusable. Whistleblowers and their representatives stand at the ready to assist the IRS, cutting down enormously the time and effort needed by the IRS to conduct an examination – and instead the naysayers at the IRS find ways to gum up the works. I ask for your commitment to affirm the IRS Whistleblower Office's authority to contract with

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[5] *Id.* ("The Director, Collection, Small Business/Self-Employed Division, should ensure collection policy and procedures are reviewed for inventory assignment practices to determine if cases that otherwise would have been assigned to the PDC Program can be worked. *Alternatively, the IRS should consider reinstituting the PDC Program and funding all Program costs through Program collections.*" Emphasis added)

[6] Pub.L. 109-432, Div. A, Title IV, § 406(b)(1)(C), ("[The Whistleblower Office] in its sole discretion, may ask for additional assistance from such individual or any legal representative of such individual.")

whistleblowers and their representatives and to provide clear direction that contracting is encouraged and should be a priority.

For the whistleblower program to reach its full potential, the IRS must reassure whistleblowers that they are valued and will be treated fairly. In December of 2012 the IRS issued proposed whistleblower regulations that continue to await finalization. I, as well as many in the whistleblower community, have expressed deep concerns that the regulations as proposed will hamstring the program by limiting whistleblower awards and discouraging knowledgeable insiders from coming forward. Treasury and IRS should work expeditiously to finalize the regulations taking into account all the comments and concerns they have received. The final regulations must assure whistleblowers that it's worth risking their career to come forward to expose those who are skirting our tax laws.

These regulations require your approval before they are made final. I ask that you review closely these proposed regulations, as well as all my correspondence with the Treasury and IRS on this matter overall as well as the regulations, and also the comments on the regulations by the leading whistleblower representatives. Additionally, please provide me your thoughts on the whistleblower program overall, the steps you intend to take to ensure its success is realized – particularly those steps you can take under your own authority such as improved communication with whistleblowers during the process -- and your views on the proposed regulations – especially on the issues of "related action," "collected proceeds," and "planned and initiated."

The impact of the proposed regulations as they are written would be to greatly discourage whistleblowers and to give comfort to tax cheats. Time and time again the writers of the proposed regulation turn a blind eye to the plain meaning of the statute I wrote, the policy of the statute of rewarding whistleblowers, and the precedence of the False Claims Act.

Certain actions by the IRS have further fostered a level of distrust between whistleblowers and the IRS. One glaring example is the case of *Anonymous 1 and Anonymous 2 v. Commissioner,* in which the IRS whistleblower office denied a whistleblower's claim, yet another branch of the IRS opened its own investigation into the same company identified by the whistleblower.[7] This case resulted in the Tax Court Judge admonishing the IRS for misleading the court to believe the new investigation was independent and did not rely on information provided by the whistleblower. While this case may be an isolated incident, it gives pause to any whistleblower who may be debating whether it's worth coming forward.

In this light, I ask for you to review the work and role of the IRS Whistleblower Office. The office has excellent staff. However, the Whistleblower Office is small and needs you to support it in the battles at the IRS and Treasury. I suggest this is especially the case where I am hearing more and more of first-rate cases being submitted by whistleblowers – from whistleblowers who are knowledgeable and well-placed and often involving tens of millions if not hundreds of

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[7] *Anonymous 1 and Anonymous 2 v. Commissioner*, United States Tax Court, Docket No. 12471-11w ("Respondent's statement is misleading. The Court was aware that respondent opened a subsequent investigation, however, respondent assured the Court that the SB/SE investigation was independent and that the information petitioners provided in their original Forms 211 was not being used.")

millions of tax dollars -- who are being ignored by IRS field offices as well as Large Business and International Division senior managers.

The IRS Whistleblower Office was given the statutory authority to investigate these good cases itself, or at a minimum to raise them to your attention and review. We cannot have good whistleblower cases go unworked because IRS field agents don't want to be bothered or because senior managers are resistant. And again, staffing is not an excuse when the IRS has the authority to work with the whistleblower and her representatives to assist. I ask for your commitment that you will put in place procedures that will allow the IRS whistleblower office to work cases itself and/or to have good cases that aren't being worked to be subject to review by the most senior management at the IRS. In addition, I ask for your commitment that the work of the IRS whistleblower office will be a priority in your time as Commissioner.

Lastly, let me note that there are a good number of IRS agents that do work well with whistleblowers – and the honest taxpayers have benefitted enormously from those efforts. I ask that the IRS look to recognize and reward those IRS agents and examiners who have had superior accomplishments thanks to working with whistleblowers. Changing the culture at the IRS as it relates to whistleblowers will do much to address the current problems I've cataloged.

The President has made it quite clear that he believes the federal government needs more revenue. But, before increasing taxes on the millions of law-abiding Americans who voluntarily comply with the tax law, Treasury and IRS should make every effort to collect the billions of dollars in taxes that currently go uncollected. The PDC program and the expanded whistleblower program are available tools that the IRS can better utilize to handle its enforcement and collection case load without requiring additional funding from Congress. If this Administration is serious about making individuals "pay their fair share," and closing the tax gap, it will heed my call to embrace both of these programs.

I look forward to your reply prior to your confirmation hearing.

Sincerely,

[redacted]

Charles E. Grassley
U.S. Senator

cc: The Honorable Jacob Lew, Secretary of the Treasury
cc: The Honorable Danny Werfel, Acting IRS Commissioner

Appendix D.3

SEC WHISTLEBLOWER PROGRAM

activities and evaluates the effectiveness of the Ombudsman during the preceding year. The Investor Advocate shall include the reports required under this section in the reports required to be submitted by the Inspector Advocate under paragraph (6).".

Subtitle B—Increasing Regulatory Enforcement and Remedies

SEC. 921. AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.

(a) AMENDMENT TO SECURITIES EXCHANGE ACT OF 1934.—Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o), as amended by this title, is further amended by adding at the end the following new subsection:

"(o) AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.—The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.".

(b) AMENDMENT TO INVESTMENT ADVISERS ACT OF 1940.—Section 205 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–5) is amended by adding at the end the following new subsection:

"(f) AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION.—The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any investment adviser to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.".

SEC. 922. WHISTLEBLOWER PROTECTION.

(a) IN GENERAL.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 21E the following:

"SEC. 21F. SECURITIES WHISTLEBLOWER INCENTIVES AND PROTECTION.

"(a) DEFINITIONS.—In this section the following definitions shall apply:

"(1) COVERED JUDICIAL OR ADMINISTRATIVE ACTION.—The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

"(2) FUND.—The term 'Fund' means the Securities and Exchange Commission Investor Protection Fund.

"(3) ORIGINAL INFORMATION.—The term 'original information' means information that—

"(A) is derived from the independent knowledge or analysis of a whistleblower;

"(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

"(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

"(4) MONETARY SANCTIONS.—The term 'monetary sanctions', when used with respect to any judicial or administrative action, means—

"(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

"(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

"(5) RELATED ACTION.—The term 'related action', when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

"(6) WHISTLEBLOWER.—The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

"(b) AWARDS.—

"(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

"(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

"(2) PAYMENT OF AWARDS.—Any amount paid under paragraph (1) shall be paid from the Fund.

"(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—

"(1) DETERMINATION OF AMOUNT OF AWARD.—

"(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

"(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Commission—

"(i) shall take into consideration—

"(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

"(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

"(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

"(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

"(ii) shall not take into consideration the balance of the Fund.

"(2) DENIAL OF AWARD.—No award under subsection (b) shall be made—

"(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

"(i) an appropriate regulatory agency;

"(ii) the Department of Justice;

"(iii) a self-regulatory organization;

"(iv) the Public Company Accounting Oversight Board; or

"(v) a law enforcement organization;

"(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

"(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1); or

"(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

"(d) REPRESENTATION.—

"(1) PERMITTED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

"(2) REQUIRED REPRESENTATION.—

"(A) IN GENERAL.—Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

"(B) DISCLOSURE OF IDENTITY.—Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information

as the Commission may require, directly or through counsel for the whistleblower.

"(e) NO CONTRACT NECESSARY.—No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

"(f) APPEALS.—Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determination made by the Commission in accordance with section 706 of title 5, United States Code.

"(g) INVESTOR PROTECTION FUND.—

"(1) FUND ESTABLISHED.—There is established in the Treasury of the United States a fund to be known as the 'Securities and Exchange Commission Investor Protection Fund'.

"(2) USE OF FUND.—The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

"(A) paying awards to whistleblowers as provided in subsection (b); and

"(B) funding the activities of the Inspector General of the Commission under section 4(i).

"(3) DEPOSITS AND CREDITS.—

"(A) IN GENERAL.—There shall be deposited into or credited to the Fund an amount equal to—

"(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds $300,000,000;

"(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds $200,000,000; and

"(iii) all income from investments made under paragraph (4).

"(B) ADDITIONAL AMOUNTS.—If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission

in the covered judicial or administrative action on which the award is based.

"(4) INVESTMENTS.—

"(A) AMOUNTS IN FUND MAY BE INVESTED.—The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

"(B) ELIGIBLE INVESTMENTS.—Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

"(C) INTEREST AND PROCEEDS CREDITED.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to the Fund.

"(5) REPORTS TO CONGRESS.—Not later than October 30 of each fiscal year beginning after the date of enactment of this subsection, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on—

"(A) the whistleblower award program, established under this section, including—

"(i) a description of the number of awards granted; and

"(ii) the types of cases in which awards were granted during the preceding fiscal year;

"(B) the balance of the Fund at the beginning of the preceding fiscal year;

"(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

"(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

"(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

"(F) the balance of the Fund at the end of the preceding fiscal year; and

"(G) a complete set of audited financial statements, including—

"(i) a balance sheet;

"(ii) income statement; and

"(iii) cash flow analysis.

"(h) PROTECTION OF WHISTLEBLOWERS.—

"(1) PROHIBITION AGAINST RETALIATION.—

"(A) IN GENERAL.—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

"(i) in providing information to the Commission in accordance with this section;

"(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of

the Commission based upon or related to such information; or

"(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

"(B) ENFORCEMENT.—

"(i) CAUSE OF ACTION.—An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

"(ii) SUBPOENAS.—A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

"(iii) STATUTE OF LIMITATIONS.—

"(I) IN GENERAL.—An action under this subsection may not be brought—

"(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

"(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

"(II) REQUIRED ACTION WITHIN 10 YEARS.—Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

"(C) RELIEF.—Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

"(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

"(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

"(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

"(2) CONFIDENTIALITY.—

"(A) IN GENERAL.—Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section

552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

"(B) EXEMPTED STATUTE.—For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

"(C) RULE OF CONSTRUCTION.—Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

"(D) AVAILABILITY TO GOVERNMENT AGENCIES.—

"(i) IN GENERAL.—Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this Act and to protect investors, be made available to—

"(I) the Attorney General of the United States;

"(II) an appropriate regulatory authority;

"(III) a self-regulatory organization;

"(IV) a State attorney general in connection with any criminal investigation;

"(V) any appropriate State regulatory authority;

"(VI) the Public Company Accounting Oversight Board;

"(VII) a foreign securities authority; and

"(VIII) a foreign law enforcement authority.

"(ii) CONFIDENTIALITY.—

"(I) IN GENERAL.—Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

"(II) FOREIGN AUTHORITIES.—Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

"(3) RIGHTS RETAINED.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

"(i) PROVISION OF FALSE INFORMATION.—A whistleblower shall not be entitled to an award under this section if the whistleblower—

"(1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or

"(2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

"(j) RULEMAKING AUTHORITY.—The Commission shall have the authority to issue such rules and regulations as may be necessary

or appropriate to implement the provisions of this section consistent with the purposes of this section.".

(b) PROTECTION FOR EMPLOYEES OF NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATIONS.—Section 1514A(a) of title 18, United States Code, is amended—

(1) by inserting "or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c)," after "78o(d)),"; and

(2) by inserting "or nationally recognized statistical rating organization" after "such company".

(c) SECTION 1514A OF TITLE 18, UNITED STATES CODE.—

(1) STATUTE OF LIMITATIONS; JURY TRIAL.—Section 1514A(b)(2) of title 18, United States Code, is amended—

(A) in subparagraph (D)—

(i) by striking "90" and inserting "180"; and

(ii) by striking the period at the end and inserting ", or after the date on which the employee became aware of the violation."; and

(B) by adding at the end the following:

"(E) JURY TRIAL.—A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.".

(2) PRIVATE SECURITIES LITIGATION WITNESSES; NONENFORCEABILITY; INFORMATION.—Section 1514A of title 18, United States Code, is amended by adding at the end the following:

"(e) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

"(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

"(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.".

(d) STUDY OF WHISTLEBLOWER PROTECTION PROGRAM.—

STUDY.—The Inspector General of the Commission shall conduct a study of the whistleblower protections established under the amendments made by this section, including—

(A) whether the final rules and regulation issued under the amendments made by this section have made the whistleblower protection program (referred to in this subsection as the "program") clearly defined and user-friendly;

(B) whether the program is promoted on the website of the Commission and has been widely publicized;

(C) whether the Commission is prompt in—

(i) responding to—

(I) information provided by whistleblowers; and

(II) applications for awards filed by whistleblowers;

(ii) updating whistleblowers about the status of their applications; and

(iii) otherwise communicating with the interested parties;

(D) whether the minimum and maximum reward levels are adequate to entice whistleblowers to come forward with

information and whether the reward levels are so high as to encourage illegitimate whistleblower claims;

(E) whether the appeals process has been unduly burdensome for the Commission;

(F) whether the funding mechanism for the Investor Protection Fund is adequate;

(G) whether, in the interest of protecting investors and identifying and preventing fraud, it would be useful for Congress to consider empowering whistleblowers or other individuals, who have already attempted to pursue the case through the Commission, to have a private right of action to bring suit based on the facts of the same case, on behalf of the Government and themselves, against persons who have committee securities fraud;

(H)(i) whether the exemption under section 552(b)(3) of title 5 (known as the Freedom of Information Act) established in section 21F(h)(2)(A) of the Securities Exchange Act of 1934, as added by this Act, aids whistleblowers in disclosing information to the Commission;

what impact the exemption described in clause (i) has had on the ability of the public to access information about the regulation and enforcement by the Commission of securities; and

(iii) any recommendations on whether the exemption described in clause (i) should remain in effect; and

(I) such other matters as the Inspector General deems appropriate.

(2) REPORT.—Not later than 30 months after the date of enactment of this Act, the Inspector General shall—

(A) submit a report on the findings of the study required under paragraph (1) to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House; and

(B) make the report described in subparagraph (A) available to the public through publication of the report on the website of the Commission.

SEC. 923. CONFORMING AMENDMENTS FOR WHISTLEBLOWER PROTECTION.

(a) IN GENERAL.—

(1) SECURITIES ACT OF 1933.—Section 20(d)(3)(A) of the Securities Act of 1933 (15 U.S.C. 77t(d)(3)(A)) is amended by inserting "and section 21F of the Securities Exchange Act of 1934" after "the Sarbanes-Oxley Act of 2002".

(2) INVESTMENT COMPANY ACT OF 1940.—Section 42(e)(3)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a–41(e)(3)(A)) is amended by inserting "and section 21F of the Securities Exchange Act of 1934" after "the Sarbanes-Oxley Act of 2002".

(3) INVESTMENT ADVISERS ACT OF 1940.—Section 209(e)(3)(A) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–9(e)(3)(A)) is amended by inserting "and section 21F of the Securities Exchange Act of 1934" after "the Sarbanes-Oxley Act of 2002".

(b) SECURITIES EXCHANGE ACT.—

(1) SECTION 21.—Section 21(d)(3)(C)(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(3)(C)(i)) is amended

Appendix D.4

THE MADOFF CASE & THE GLOBAL FINANCIAL CRISES LED TO THE ADOPTION OF THE US SEC'S WHISTLEBLOWER PROGRAM

BY HARRY MARKOPOLOS

The Madoff Case & the Global Financial Crises led to the adoption of the US SEC's Whistleblower Program

by

Harry Markopolos, CFA, CFE

On February 4, 2009 I was called to testify before the US House of Representatives Capital Market's Sub-Committee on how and why Bernie Madoff eluded detection by the US Securities & Exchange Commission despite my numerous and repeated warnings to this agency that Madoff was running a Ponzi scheme.

Prior to 2008's Global Financial Crises (GFC) the SEC's whistleblower program was used less than a handful of times in the SEC's then 74 year history and paid out a total sum of less than $USD 200,000. Only narrowly defined insider-trading cases qualified under the old program and no one advertised the program such that the general investing public was unaware that a whistleblower program even existed.

In 2008, the SEC was in charge of regulatory oversight of Wall Street's investment banks and had primary jurisdiction over Bear Stearns, Lehman Brothers, Merrill Lynch, Morgan Stanley and Goldman Sachs. Bear Stearns and Merrill Lynch crumpled and were forced into shotgun marriages with money center banks while Lehman Brothers was allowed to fail outright. Morgan Stanley and Goldman Sachs quickly choose to become full-fledged banks and were kept afloat only by emergency actions undertaken the US Treasury and Federal Reserve Bank.

The SEC was clueless as to what was going on inside these five investment banks despite having full-time SEC staff embedded inside each bank on a daily basis. As a result government policy makers were in the dark about the true nature of the risks contained within the then lightly regulated investment banking sector and were caught by surprise when hundreds of billions in sub-prime mortgage backed securities were revealed to be hidden off-shore, off balance sheet by four of these five investment banks. There was literally no early warning system in place.

Hundreds of thousands of American citizens participated either directly or indirectly in ginning up fraudulent paperwork that resulted in sub-prime mortgage loans to unworthy borrowers who had no ability to repay those loans. But there was no whistleblower program in existence that afforded monetary incentives for citizens in the know about the true nature of the frauds occurring within the real estate agencies, banks, at Fannie Mae and Freddie Mac, and within the ratings agencies to come in and inform government agencies that this was all a house of cards destined to fail with catastrophic effect on the global economy. Tens of millions lost their jobs as a result of the ensuing wave of defaults and the world's GDP growth continues to suffer in the wake of what was an easily preventable crises - but only if the responsible government regulatory agencies had an effective early warning system in place.

Bernard L. Madoff ran an all too successful Ponzi scheme that bilked investors out of over $USD 65 billion notional / $USD 19 billion actual over a period of decades, definitely dating back to the 1970's and likely dating back to the 1960's. I first came across his scheme in late 1999 and turned him into the SEC's Boston Office in May 2000, again in March 2001 and again in October, November and December 2005. My last case submission

to the SEC contained 30 Red Flags, which literally solved the entire case for the SEC. But sadly, the SEC was not set up to receive, collate, analyze and act upon whistleblower submissions during those years.

Pre-2008 the SEC felt it was doing a great job of policing the capital markets when its staff was desk-bound and isolated in its own offices, over-lawyered, had too high of an opinion of its staff to understand complex financial instruments of the 21st century, and had few industry experts with actual finance experience on staff. The SEC enforcement staff relied mostly on its own exam teams and those of industry and exchange Self-Regulatory Organizations (SRO's) to generate cases. All too often cases were generated based upon the previous day's newspaper headlines or from referrals by other law enforcement agencies. Unfortunately, white-collar crime statistics collected by the Association of Certified Fraud Examiners routinely show that law enforcement only catches between 2% - 3% of frauds, so the SEC's over-reliance on examinations was a system poorly designed to catch and stop fraudsters. White-collar criminal statistics show that whistleblowers' turn in 43% of white-collar frauds (source: ACFE 2012 Report to the Nations).

As a Certified Fraud Examiner (CFE) I was well aware that companies with whistleblower programs rooted out fraud over twenty times more effectively than merely relying upon law enforcement or external auditors. I showed those statistics complied by the Association of Certified Fraud Examiners' in their 2008 Report to the Nations during my Congressional Testimony to great effect. A month later I was sitting in SEC Chairman Mary Shapiro's office showing her those same statistics and she remarked, *"We need to do this, we need to be twenty times more effective."* The rest is history and the Dodd-Frank Act included and funded an SEC Whistleblower Program that authorizes the SEC to pay whistleblowers rewards of 10% - 30% for bringing information forward to the agency that results in successful enforcement actions.

Enough of the history lesson, here are eight (8) benefits of instituting a properly constructed whistleblower program will do for Canada:

1. <u>Protect Investors by Stopping Frauds Small</u> before they become multi-billion dollar frauds like Bernie Madoff or multi-trillion dollar frauds like sub-prime loans.
2. <u>Protect Canada's Public Treasury</u> from having to engage in bailing out failed or failing financial institutions like the US did during the Global Financial Crises.
3. <u>Provide Canadian law enforcement agencies with a low-cost source of intelligence</u>, from insiders, industry participants and investors with knowledge of the fraud schemes. The higher quality tips will consist of smoking gun e-mails, transaction ledgers containing fraudulent entries, marketing documents, profit & loss statements that show how much was made in illicit profits and who the victims are.

4. Be a Cost-Effective Force Multiplier for Canadian Law Enforcement as industry insiders explain the who, what, why, how, and how much regarding the scheme, saving countless man-hours of scarce government investigatory resources.

6. Change the Risk-Reward Calculus in Favor of Law Enforcement: Whistleblower programs increase the risk of detecting white-collar fraud schemes. Increasing the risk of getting caught is the best known deterrent to fraud.
7. Close Regulatory Gaps Before they're Exploited: New financial instruments are created monthly and most of them are complex, mathematical in nature, and often difficult for people other than their creators to fully understand. Rarely do government officials or law enforcement have the required expertise to understand the true nature of risks and pitfalls of these new instruments. Whistleblower programs deputize citizens with the requisite knowledge, skills and ability to understand these instruments and empowers them to come forward and alert the authorities.
8. Make the Companies Committing the Fraud Fund Whistleblower Rewards: A properly constructed program will levy sufficient fines and penalties against companies and individuals committing fraud to ensure funding of rewards to whistleblowers.

Appendix D.5

Commodity Futures Trading Commission WHISTLEBLOWER PROGRAM

SEC. 748. COMMODITY WHISTLEBLOWER INCENTIVES AND PROTECTION.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by adding at the end the following:

"SEC. 23. COMMODITY WHISTLEBLOWER INCENTIVES AND PROTECTION.

"(a) DEFINITIONS.—In this section:

"(1) COVERED JUDICIAL OR ADMINISTRATIVE ACTION.—The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under this Act that results in monetary sanctions exceeding $1,000,000.

"(2) FUND.—The term 'Fund' means the Commodity Futures Trading Commission Customer Protection Fund established under subsection (g).

"(3) MONETARY SANCTIONS.—The term 'monetary sanctions', when used with respect to any judicial or administrative action means—

"(A) any monies, including penalties, disgorgement, restitution, and interest ordered to be paid; and

"(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

"(4) ORIGINAL INFORMATION.—The term 'original information' means information that—

"(A) is derived from the independent knowledge or analysis of a whistleblower;

"(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

"(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

"(5) RELATED ACTION.—The term 'related action', when used with respect to any judicial or administrative action brought by the Commission under this Act, means any judicial or administrative action brought by an entity described in subclauses (I) through (VI) of subsection (h)(2)(C) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

"(6) SUCCESSFUL RESOLUTION.—The term 'successful resolution', when used with respect to any judicial or administrative action brought by the Commission under this Act, includes any settlement of such action.

"(7) WHISTLEBLOWER.—The term 'whistleblower' means any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this Act to the Commission, in a manner established by rule or regulation by the Commission.

"(b) AWARDS.—

"(1) IN GENERAL.—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

"(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

"(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

"(2) PAYMENT OF AWARDS.—Any amount paid under paragraph (1) shall be paid from the Fund.

"(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—

"(1) DETERMINATION OF AMOUNT OF AWARD.—

"(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

"(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Commission—

"(i) shall take into consideration—

"(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

"(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

"(III) the programmatic interest of the Commission in deterring violations of the Act (including regulations under the Act) by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and

"(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

"(ii) shall not take into consideration the balance of the Fund.

"(2) DENIAL OF AWARD.—No award under subsection (b) shall be made—

"(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

"(i) a appropriate regulatory agency;

"(ii) the Department of Justice;

"(iii) a registered entity;

"(iv) a registered futures association;

"(v) a self-regulatory organization as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)); or

"(vi) a law enforcement organization;

"(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

"(C) to any whistleblower who submits information to the Commission that is based on the facts underlying the covered action submitted previously by another whistleblower;

"(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule or regulation, require.

"(d) REPRESENTATION.—

"(1) PERMITTED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

"(2) REQUIRED REPRESENTATION.—

"(A) IN GENERAL.—Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower submits the information upon which the claim is based.

"(B) DISCLOSURE OF IDENTITY.—Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

"(e) NO CONTRACT NECESSARY.—No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission, by rule or regulation.

"(f) APPEALS.—

"(1) IN GENERAL.—Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission.

"(2) APPEALS.—Any determination described in paragraph (1) may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission.

"(3) REVIEW.—The court shall review the determination made by the Commission in accordance with section 7064 of title 5, United States Code.

"(g) COMMODITY FUTURES TRADING COMMISSION CUSTOMER PROTECTION FUND.—

"(1) ESTABLISHMENT.—There is established in the Treasury of the United States a revolving fund to be known as the 'Commodity Futures Trading Commission Customer Protection Fund'.

"(2) USE OF FUND.—The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

"(A) the payment of awards to whistleblowers as provided in subsection (a); and

"(B) the funding of customer education initiatives designed to help customers protect themselves against fraud or other violations of this Act, or the rules and regulations thereunder.

"(3) DEPOSITS AND CREDITS.—There shall be deposited into or credited to the Fund:

"(A) MONETARY SANCTIONS.—Any monetary sanctions collected by the Commission in any covered judicial or administrative action that is not otherwise distributed to victims of a violation of this Act or the rules and regulations thereunder underlying such action, unless the balance of the Fund at the time the monetary judgment is collected exceeds $100,000,000.

"(B) ADDITIONAL AMOUNTS.—If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under this Act that is based on information provided by a whistleblower.

"(C) INVESTMENT INCOME.—All income from investments made under paragraph (4).

"(4) INVESTMENTS.—

"(A) AMOUNTS IN FUND MAY BE INVESTED.—The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the Commission's judgment, required to meet the current needs of the Fund.

"(B) ELIGIBLE INVESTMENTS.—Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission.

"(C) INTEREST AND PROCEEDS CREDITED.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to, and form a part of, the Fund.

"(5) REPORTS TO CONGRESS.—Not later than October 30 of each year, the Commission shall transmit to the Committee on Agriculture, Nutrition, and Forestry of the Senate, and the Committee on Agriculture of the House of Representatives a report on—

"(A) the Commission's whistleblower award program under this section, including a description of the number of awards granted and the types of cases in which awards were granted during the preceding fiscal year;

"(B) customer education initiatives described in paragraph (2)(B) that were funded by the Fund during the preceding fiscal year;

"(C) the balance of the Fund at the beginning of the preceding fiscal year;

"(D) the amounts deposited into or credited to the Fund during the preceding fiscal year;

"(E) the amount of earnings on investments of amounts in the Fund during the preceding fiscal year;

"(F) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

"(G) the amount paid from the Fund during the preceding fiscal year for customer education initiatives described in paragraph (2)(B);

"(H) the balance of the Fund at the end of the preceding fiscal year; and

"(I) a complete set of audited financial statements, including a balance sheet, income statement, and cash flow analysis.

"(h) PROTECTION OF WHISTLEBLOWERS.—

"(1) PROHIBITION AGAINST RETALIATION.—

"(A) IN GENERAL.—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

"(i) in providing information to the Commission in accordance with subsection (b); or

"(ii) in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.

"(B) ENFORCEMENT.—

"(i) CAUSE OF ACTION.—An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C), unless the individual who is alleging discharge or other discrimination in violation of subparagraph (A) is an employee of the Federal Government, in which case the individual shall only bring an action under section 1221 of title 5, United States Code.

"(ii) SUBPOENAS.—A subpoena requiring the attendance of a witness at a trial or hearing conducted under this subsection may be served at any place in the United States.

"(iii) STATUTE OF LIMITATIONS.—An action under this subsection may not be brought more than 2 years after the date on which the violation reported in subparagraph (A) is committed.

"(C) RELIEF.—Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

"(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

"(ii) the amount of back pay otherwise owed to the individual, with interest; and

"(iii) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

"(2) CONFIDENTIALITY.—

"(A) IN GENERAL.—Except as provided in subparagraphs (B) and (C), the Commission, and any officer or employee of the Commission, shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

"(B) EFFECT.—Nothing in this paragraph is intended to limit the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

"(C) AVAILABILITY TO GOVERNMENT AGENCIES.—

"(i) IN GENERAL.—Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary or appropriate to accomplish the purposes of this Act and protect customers and in accordance with clause (ii), be made available to—

"(I) the Department of Justice;

"(II) an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction;

"(III) a registered entity, registered futures association, or self-regulatory organization as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a));

"(IV) a State attorney general in connection with any criminal investigation;

"(V) an appropriate department or agency of any State, acting within the scope of its jurisdiction; and

"(VI) a foreign futures authority.

"(ii) MAINTENANCE OF INFORMATION.—Each of the entities, agencies, or persons described in clause (i) shall maintain information described in that clause as confidential, in accordance with the requirements in subparagraph (A).

"(iii) STUDY ON IMPACT OF FOIA EXEMPTION ON COMMODITY FUTURES TRADING COMMISSION.—

"(I) STUDY.—The Inspector General of the Commission shall conduct a study—

"(aa) on whether the exemption under section 552(b)(3) of title 5, United States Code (known as the Freedom of Information Act) established in paragraph (2)(A) aids whistleblowers in disclosing information to the Commission;

"(bb) on what impact the exemption has had on the public's ability to access information about the Commission's regulation of commodity futures and option markets; and

"(cc) to make any recommendations on whether the Commission should continue to use the exemption.

"(II) REPORT.—Not later than 30 months after the date of enactment of this clause, the Inspector General shall—

"(aa) submit a report on the findings of the study required under this clause to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on

Financial Services of the House of Representatives; and

"(bb) make the report available to the public through publication of a report on the website of the Commission.

"(3) RIGHTS RETAINED.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

"(i) RULEMAKING AUTHORITY.—The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

"(j) IMPLEMENTING RULES.—The Commission shall issue final rules or regulations implementing the provisions of this section not later than 270 days after the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

"(k) ORIGINAL INFORMATION.—Information submitted to the Commission by a whistleblower in accordance with rules or regulations implementing this section shall not lose its status as original information solely because the whistleblower submitted such information prior to the effective date of such rules or regulations, provided such information was submitted after the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

"(l) AWARDS.—A whistleblower may receive an award pursuant to this section regardless of whether any violation of a provision of this Act, or a rule or regulation thereunder, underlying the judicial or administrative action upon which the award is based occurred prior to the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

"(m) PROVISION OF FALSE INFORMATION.—A whistleblower who knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or who makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall not be entitled to an award under this section and shall be subject to prosecution under section 1001 of title 18, United States Code.

"(n) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

"(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement.

"(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.".

Appendix E

LIST OF TOPICS FROM *FALSE CLAIMS ACT & QUI TAM QUARTERLY REVIEW*
by TAF Education Fund

TAF Quarterly Review

Edited by Cleveland Lawrence III
Taxpayers Against Fraud
TAF Education Fund

Recent False Claims Act & Qui Tam Decisions

FALSE CLAIMS ACT LIABILITY

Violations of the Anti-Kickback Statute and/or Stark Law

What Constitutes a False Claim?

JURISDICTIONAL ISSUES

- **Section 3730(b)(5) First-to-File Bar**
- **Section 3730(e)(4) Public Disclosure Bar and Original Source Exception**

FALSE CLAIMS ACT RETALIATION CLAIMS

COMMON DEFENSES TO FCA ALLEGATIONS

- **Arbitration**
- **Breach of Contract**
- **Government-Employee Relator**
- **Not Knowingly False**
- **Primary Jurisdiction**
- ***Pro Se* Relators**
- **Relator Release Defendant from FCA Claims**
- ***Res Judicata* and Collateral Estoppel**
- **Sovereign Immunity**
- **Statute of Limitations**

FEDERAL RULES OF CIVIL PROCEDURE

- **Rule 9(b) Failure to Plead Fraud with Particularity**
- **Rule 12(b)(6) Failure to State a Claim upon which Relief Can Be Granted**

LITIGATION DEVELOPMENTS

- **Applicability of Fraud Enforcement and Recovery Act of 2009 (FERA)**
- **Bankruptcy Proceedings**
- **Calculating Damages and Civil Penalties**

- **Civil Investigative Demands**

- **Default Judgment**
- **False Certification of Compliance**
- **FCA Seak/Service Issues**
- **Government's Dismissal of *Qui Tam* Complaint**
- **Leave to Amend *Qui Tam* Complaint**
- **Relators' Share Issues**
- **Settlement Issues**
- **Vicarious Liability**

JUDGMENTS & SETTLEMENTS

Appendix F.1

100 LARGEST SETTLEMENTS TO DATE

100 Largest Settlements To-Date

Company	Civil Fine ($)
GlaxoSmithKline*	2,000,000,000
Johnson & Johnson*	1,720,000,000
Pfizer*	1,000,000,000
Bank of America	1,000,000,000
Tenet	900,000,000
Abbott*	800,000,000
HCA*	731,400,000
Merck	650,000,000
HCA*	631,000,000
Merck*	628,000,000
GlaxoSmithKilne*	600,000,000
Serono Group*	567,000,000
TAP Pharmaceuticals	559,483,560
New York State and NYC	540,000,000
Astra Zeneca	520,000,000
Ranbaxy Laboratories*	500,000,000
Pfizer*	491,000,000
Schering Plough	435,000,000
Eli Lilly	438,000,000
Abbott Labs*	400,000,000
Fresenius Medical Care of N. America*	385,000,000
Cephalon	375,000,000
Bristol-Myers Squibb	328,000,000
Northrop-Grumman	325,000,000
SmithKline Beecham Clinical Labs	325,000,000
HealthSouth*	325,000,000
National Medical Enterprises*	324,200,000
Gambro Healthcare	310,000,000
Schering-Plough*	292,969,482
Mylan	280,000,000
Roxanne	280,000,000
AstraZeneca*	266,127,844
St. Barnabas Hospitals	265,000,000
Bayer Corp.*	257,200,000
Schering Plough	250,000,000
Quest Diagnostics♦	241,000,000
First American Health Care Of Georgia (only fractional payment actually made after bankrupcy)	225,000,000

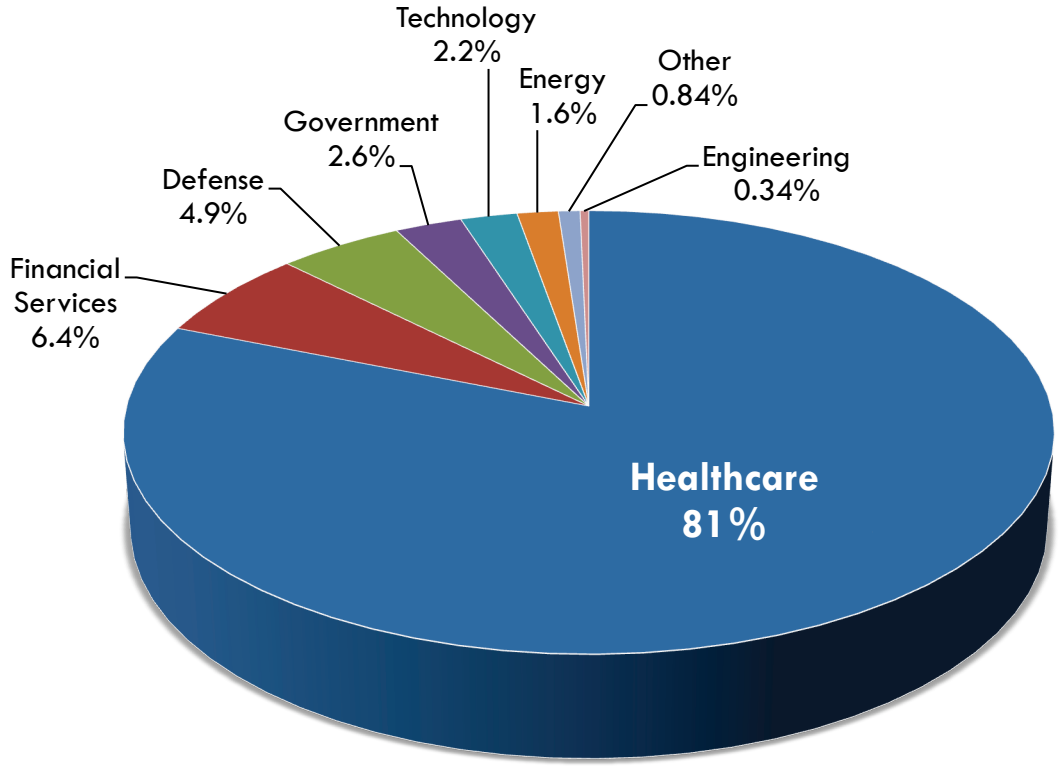
Amerigroup	225,000,000
Deutsche Bank	202,000,000
Actavis (global settlement after verdict)	202,000,000
Oracle	200,000,000
McKesson	190,000,000
BankAmerica*	187,000,000
Laboratory Corp. of America*	182,000,000
Aventis Pharmaceuticals	180,000,000
Beverly Enterprises Inc.*	170,000,000
Zimmer Inc.	169,500,000
Purdue Frederick Co	160,000,000
Citigroup	158,000,000
Johnson & Johnson♦ (verdict)	158,000,000
Par Pharmaceutical	154,000,000
Pfizer/Warner-Lambert*	152,000,000
Medco	150,000,000
Sandoz	150,000,000
United Technologies	150,000,000
Maxim	150,000,000
GlaxoSmithKline	150,000,000
Blue Cross Blue Shield Illinois*	140,000,000
Wellcare	137,500,000
Caremark	137,500,000
Mario Gabelli et. al	130,000,000
NetApp	128,000,000
King Pharmaceutical	124,000,000
Northrop Grumman	111,200,000
Shell Oil Company	110,000,000
Vencor Inc./Ventas Inc.	104,500,000
National Health Labs	100,000,000
Oracle / PeopleSoft	98,500,000
Burlington Resources/ ConocoPhillips	97,500,000
Quorum Health Group Inc.	95,500,000
Boehringer Ingelheim Pharmaceuticals	95,000,000
Chevron	95,000,000
Staten Island University Hospital	88,000,000
Lucas Industries*	88,000,000
GlaxoSmithKline	87,600,922
PacifiCare Health Systems	87,300,000
Teledyne	85,000,000
Depuy Orthopaedics	84,700,000
Damon Clinical Laboratories*	83,700,000

Litton Settlement Amount	82,000,000
Northrop Grumman	80,000,000
FMC	80,000,000
Watson Pharmaceuticals	79,000,000
Staten Island Community Hosp.	76,500,000
General American Life Insurance	76,000,000
Kyphon/Medtronics	75,000,000
Boeing Company	75,000,000
State of California & Los Angeles County	73,300,000
Beth Israel Hospital	72,000,000
New York City	70,000,000
Novartis / Sandoz	66,000,000
Philips Electronics*	65,300,000
Peter Rogan / Edgewater Medical Center (verdict)	64,200,000
Tenet Healthcare (Redding, CA)	62,550,000
Northrop Grumman	62,000,000
Tremco and RPM International Inc.	61,000,000
Cox Health	60,000,000
General Electric*	59,500,000
Mylan	57,000,000
Nine Miami-based companies owned by Luis Soto	56,500,000
Shell Oil Company	56,000,000
Singer	55,500,000
Hercules	55,000,000
DaVita	55,000,000
Tenet Healthcare Corporation	54,000,000
Boeing Company	54,000,000
Gambro Healthcare Inc.	53,100,000
Omnicare / Specialized Pharmacy Services	52,500,000

Appendix F.2

TOP 100 CASES BY INDUSTRY PIE CHART

Top 100 FCA Cases By Industry

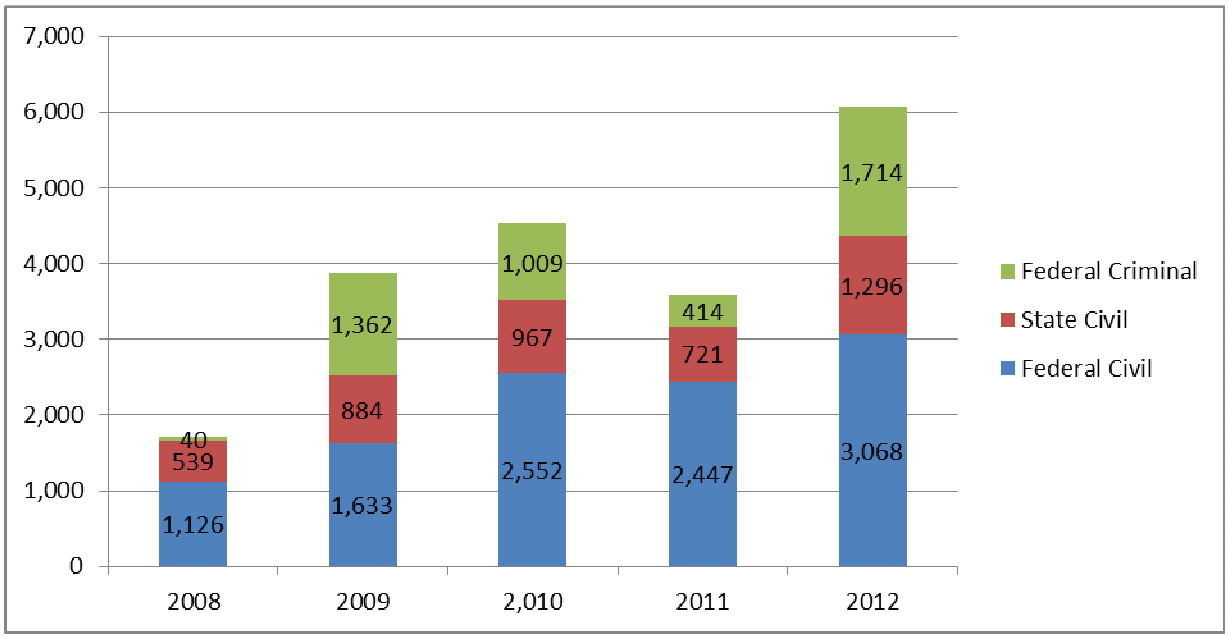


Appendix G

FIGHTING MEDICARE & MEDICAID FRAUD
Prepared for TAF by Jack A. Meyer

Fighting Medicare & Medicaid Fraud

The Return on Investment from False Claims Act Partnerships



prepared for

Taxpayers Against Fraud Education Fund

By

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October 2013

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Statement of Purpose Summary of Findings

The purpose of this report is to provide an estimate of the benefits and costs to the federal government of fighting fraud in the nation's Medicare and Medicaid programs.

This report updates earlier published studies conducted by the author for Taxpayers Against Fraud Education Fund.

Since the last study was published in 2006, several new factors have emerged in this field.

- We have seen an increase in the number of cases filed, as well as a major increase in the size of the largest settlements and judgments.
- In recent years, states and the federal government have become much more involved in investigating and prosecuting Medicaid fraud.
- There has been a substantial rise in criminal penalties.
- The major cases now include more investigations of pharmaceutical companies.

Summary of Findings

Based on an analysis of data for the five-year period FY 2008–FY 2012, we conclude that the federal government is getting a return on investment in civil health care fraud enforcement that is more than double the rate of return identified in our first study, published in 2001.

"If all costs and benefits are accounted for, the benefit to cost ratio of False Claims Act law enforcement now exceeds 20:1."

The benefit-to-cost ratio of federal civil recoveries noted in this report, however, dramatically underestimates the real return taxpayers are receiving on outlays for False Claims Act law enforcement in the health care arena. This is because civil fraud recoveries now represent only a portion of all False Claims Act recoveries in the health care arena, as increasingly large settlements are now associated with large criminal fines and state Medicaid recoveries that not accounted for in federal FCA statistics keeping.

While it is difficult to quantify federal and state costs associated with recovering these federal criminal and state civil dollars, we are confident that if all costs and benefits are accounted for, the benefit to cost ratio of False Claims Act law enforcement now exceeds 20:1.

Even this number is too low, however, as in does not account for the deterrent effect of False Claims Act law enforcement. Major settlements with large recoveries have a ripple effect that reduces the likelihood of similar fraud against federal and state health care programs. Though these deterrent effects cannot be measured accurately at this time, they may be a substantial multiple of the direct, measurable benefits in the form of actual monetary recoveries.

Introduction and Background

The US spends $2.8 trillion annually on health care. Our system funds innovative research and technology, provides world leadership in cancer care, but also demands improvement in areas such as providing care to millions of uninsured and treating chronic illnesses. But, with nearly $3 trillion flowing through the system and insufficient accountability, there has been widespread fraud in both public programs and private insurance. This fraud erodes our ability to improve and extend care to the needy and corrodes support for such assistance.

Fraud is a major concern in the Medicare and Medicaid programs. Nearly 50 million Americans are enrolled in Medicare. In any given month, an estimated 62 million are enrolled in Medicaid, with some 75 million people enrolled at some point during a year's time.[1] Medicare spent $555 billion in 2012.[2] Medicaid spending totaled $459 billion in 2012.[3] This poses a tempting target for fraud.

Since 1987, the federal government has brought in $24 billion in settlements and judgments in health care fraud. Another $15 billion in criminal fines and civil settlements returned to the states brings the total amount recovered to nearly $40 billion. To put that figure in perspective, it is enough money to fund the entire Children's Health Insurance Program (CHIP), serving over 5 million people, for approximately four years.[4]

In 2012 alone, the Federal Government won or negotiated $3.1 billion in health care fraud judgments and settlements. As a result of efforts by the Federal Government to investigate and prosecute health care fraud in 2012 and preceding years, approximately $4.2 billion was deposited with the U.S. Department of the Treasury and the Centers for Medicare & Medicaid Services (CMS), transferred to other federal agencies administering health care programs, or paid to private persons during fiscal year 2012. The Health Care Fraud and Abuse Control Program (HCFAC), set up under the HIPAA legislation of 1996, has returned over $24 billion to the Medicare Trust Funds since the inception of the program in 1997.[5]

In recent years, the health care fraud caseload has grown significantly. In the first six years after the False Claims Act Amendments were enacted (1987-1992), a total of 62 health care qui tam cases were "newly received referrals, investigations, and qui tam actions," called "new matters." In 2011 and 2012, respectively, there were 417 and 412 of these "new matters" in the health care arena alone. In

[1] Some nine million people are enrolled in both programs, and they are referred to as "dual eligibles."
[2] http://www.cbo.gov/topics/health-care/medicare
[3] Vernon K. Smith, Kathleen D. Gifford, and Jack Meyer, "The Economics of Medicaid Expansion: A Look at the Direct and Indirect Fiscal Considerations for States, Stakeholders, and Policy Makers." *Health Management Associates*, November 30, 2012.
[4] "CHIP Enrollment: June 2011 Data Snapshot," last modified June 1, 2012, http://www.kff.org/medicaid/upload/7642-07.pdf.
[5] The Department of Health and Human Services and Department of Justice Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2012," OIG (February 2013): 1. https://oig.hhs.gov/publications/docs/hcfac/hcfacreport2012.pdf.

contrast, the number of non-qui tam new health care matters has been relatively stable over the past two decades.

"The combination of whistle-blower initiation of a case of suspected health care fraud, and assistance from the U.S. government, forms a very powerful tool in returning money to the US Treasury."

Relators (also called *whistleblowers*) received a total of $284.3 million out of the total of $2.5 billion in health care qui tam settlements and judgments in 2012. This represents 11.3 percent of the total federal civil recovery, but as we shall show, less than 6 percent of the total federal recovery (federal civil plus federal criminal).

The bottom line here is that the combination of whistleblower initiation of a case of suspected health care fraud, and assistance from the US government, forms a very powerful tool for returning money to the US Treasury that was obtained fraudulently by actors in the health care system.

Legislative History

The False Claims Act (FCA) was first enacted under President Abraham Lincoln. The intent was to deter people from fraudulently billing the U.S. government for supplies for the Union Army fighting in the Civil War. In 1986, Congress realized that the penalties under the so-called "Lincoln Law" needed to be strengthened. Under the False Claims Act Amendments enacted that year, people who submit, or cause another person to submit, false claims for payment of government funds are liable for up to three times the government's damages plus civil penalties of $5,500 to $11,000 *for each false claim.*

The False Claims Act contains "*qui tam*" provisions, which allow people with evidence of fraud against the government to sue on behalf of the government. People who sue under the FCA are called "relators" or "whistleblowers," and are eligible for 15 to 30 percent of the civil recovery attributable to the information they provided, as original sources, to the government.[6] Of the $24 billion in settlements and judgments for civil health care matters recovered by the federal government, $18.4 billion, or 76 percent, were cases involving whistleblowers. Further, of the $18.4 billion in health care settlements and judgments involving whistleblowers, $18.0 billion involved cases in which the U.S. government intervened or otherwise pursued the case.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) established the Health Care Fraud and Abuse Control program, known as HCFAC. In 2012, The Secretary of HHS and the Attorney General certified $294.8 million in mandatory funding as necessary for the HCFAC program and Congress appropriated $309.7 million in discretionary funding. Of this total of $604.6 million, $513.7 million was provided to HHS and $90.9 million to Department of Justice (DOJ). From the DOJ funding, U.S. attorneys

[6] "False Claims Act Story," Taxpayer's Against Fraud, accessed September 3, 2013 http://www.taf.org/false-claims-act-story.

received $35.5 million and the Civil Division received $24.2 million, while the Criminal Division obtained $8.5 million and the FBI got $3.4 million.[7]

"Large FCA cases are now increasingly associated with criminal judgments and settlements."

Under the joint control of the US Secretary of Health and Human Services (HHS) and the US Attorney General, the HCFAC program goals include:

- Coordinating Federal, state, and local law enforcement efforts relating to health care fraud and abuse;
- Conducting investigations, audits, inspections, and evaluations relating to the delivery of and payment for health care;
- Facilitating enforcement of all applicable remedies for fraud;
- Providing guidance to the health care industry on fraudulent practices;
- Establishing a national data bank to receive support and report final adverse actions against health care providers and suppliers.

Money paid to Medicare in restitution or for compensatory damages must be deposited in the Medicare Trust Funds. Recoveries from health care investigations—civil settlements and judgments, criminal fines, forfeitures, etc.—must also be deposited in these Funds.

The law requires the Attorney General and the HHS Secretary to submit a joint annual report to Congress identifying the amounts deposited to the Trust Funds for the previous fiscal year and the amounts appropriated from the Trust Funds and the justification for the expenditures.[8]

Criminal Investigations

Large FCA cases are now increasingly associated with criminal judgments and settlements. These actions are a significant element of the overall benefit of FCA litigation. Not only do they bring in additional recoveries, but also they create the possibility of criminal conviction, which serves as a deterrent to committing fraud against the government. *Thus, criminal investigations of health care fraud are now a significant element of the benefit of FCA litigation to the government.*

Further, civil and criminal investigations are frequently related. A matter that begins as a civil fraud investigation may uncover evidence of criminal behavior, and federal health care law enforcement increasingly involves close cooperation between diverse federal and state agencies at both the civil and criminal level.

[7] The Department of Health and Human Services and Department of Justice Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2012," OIG (February 2013): 7.
[8] The Department of Health and Human Services and Department of Justice Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2012," OIG (February 2013): 1.

The HEAT Initiative and the Medicare Fraud Strike Force

An important objective in the federal government's anti-fraud activity in health care is the closer collaboration between key federal agencies — particularly HHS and DOJ. The federal government decided this relationship was particularly important to investigate and prosecute fraud related to pharmaceuticals and medical devices.

To foster this objective, the Health Care Fraud Prevention & Enforcement Action Team (HEAT) was initiated in May 2009 to initiate and coordinate collaborative action between DOJ and HHS in preventing and prosecuting health care fraud. HEAT is jointly led by the Deputy Secretaries of the two cabinet-level agencies. Data sharing across agencies permits the federal government to track patterns of fraud and increases the efficiency of investigating and prosecuting complex fraud schemes.[9]

Strike Force teams have used advanced data analysis techniques to identify high-billing levels in health care fraud hot spots, to target emerging or migrating schemes, and identify chronic fraud by criminals masquerading as health care providers or suppliers. Based on the success of the first Strike Force team, in South Florida in 2007, the Strike Force concept was expanded to nine cities.

In the five and a half years since the beginning of the Strike Force effort, prosecutors filed more than 724 cases charging more than 1,476 defendants who collectively billed Medicare over $4.6 billion.[10]

It should be noted that while a great deal of fraud has been stopped by the HEAT Initiative and the Medicare Fraud Strike Forces, these new programs may be given more credit in False Claims Act recoveries than is warranted. Cases filed by whistleblowers and developed by private lawyers years before the HEAT initiative started are sometimes credited to HEAT in DOJ press releases.[11]

In addition, while HEAT and Strike Force press releases and progress reports detail how much was billed to the U.S. Government, they are not as forthcoming in detailing how much was recovered due to law enforcement action. While the Strike Force initiative has no doubt prevented and deterred a great deal of fraud, it cannot yet be credited with returning to the U.S. Treasury the very large sums that we see coming in from whistleblower-initiated cases under the False Claims Act. For example, a February 2013 press release issued by HHS notes that "government teams" of all kinds recovered $4.2 Billion in FY 2012.[12] Buried at the bottom of the press release is the fact that more than $3 billion of this sum was

[9]The Department of Health and Human Services and Department of Justice Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2012," OIG (February 2013): 8-10.
[10] The Department of Health and Human Services and Department of Justice Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2012," OIG (February 2013): 11.
[11]"Medicare Fraud Strike Force Charges 89 Individuals for Approximately $223 Million in False Billing," last modified May 14, 2013, http://www.justice.gov/opa/pr/2013/May/13-crm-553.html.
[12]"Departments of Justice and Health and Human Services announce record-breaking recoveries resulting from joint efforts to combat health care fraud," last modified February 11, 2013, http://www.hhs.gov/news/press/2013pres/02/20130211a.html.

recovered due to False Claims Act cases, almost all of which were initiated and developed by whistleblowers and their private attorneys. [13] [14]

The Benefits and Costs of Federal FCA Activities

This section of the report presents the findings of the cost-benefit analysis of the federal government's activities to investigate and civilly prosecute health care fraud under the federal False Claims Act.

It is important to note that the federal government also recovers large sums of money from criminal fines associated with federal False Claims Act cases, and that the states also recover large sums associated with these same cases. We will quantify the size of these returns in an additional section of this report. In all instances, our analysis covers the period from fiscal year 2008 through fiscal year 2012.

Civil Recoveries Under the Federal False Claims Act

As shown in Table 1, from 2008 through 2012, the federal government recovered a total of $10.8 billion from matters related to civil health care fraud enforcement under the Federal False Claims Act. Relators received a total of $1.4 billion over the same five-year period. When those payments to relators are subtracted from the total recoveries, we get an estimate of the federal government's civil "net recoveries" under the federal False Claims Act. Over the 2008-2012 period, civil net recoveries amounted to $9.4 billion (Table 1).

Table 1: Recoveries to the Federal Government, FY 2008-FY2012 (millions of dollars)

	2008	2009	2010	2011	2012	Total
Total recoveries	1,126	1,633	2,552	2,447	3,068	10,826
Relators share	186.1	164.0	338.4	470.2	284.3	1,443
Net recoveries	939.9	1,469.0	2,213.6	1,977.8	2783.7	9,384

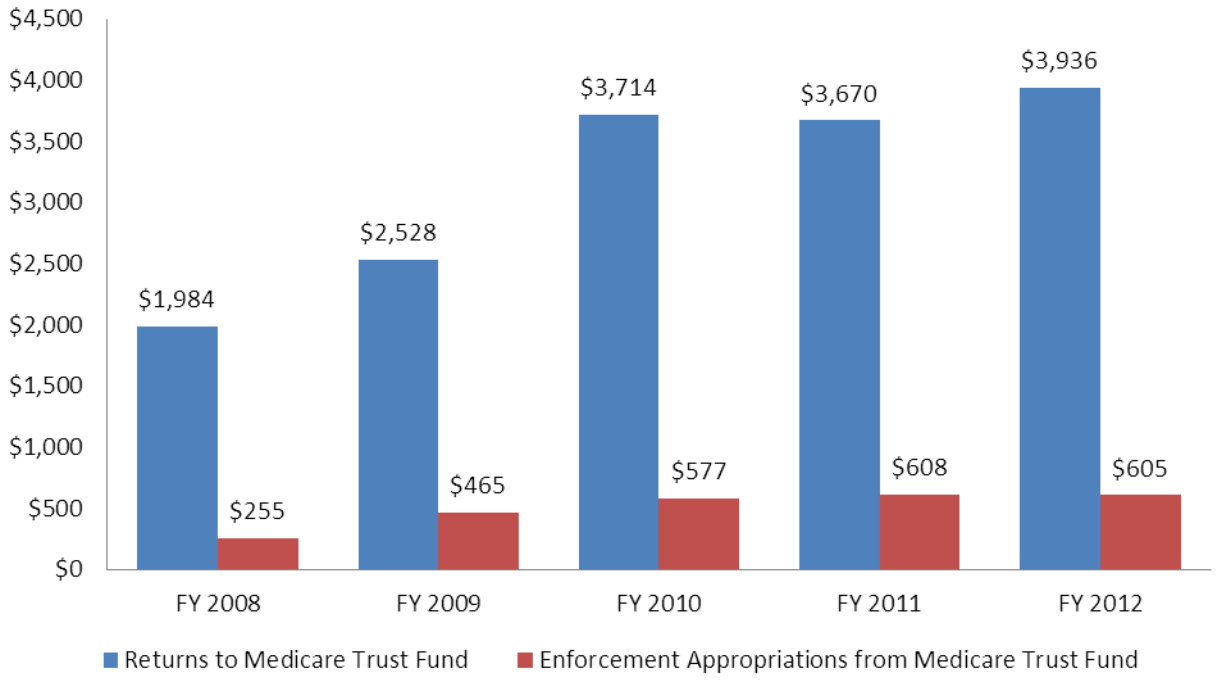
Source: HCFAC reports, FY 2008-FY 2012.

[13] "DOJ FCA Statistics," Taxpayer's Against Fraud, accessed September 3, 20123, http://www.taf.org/DoJ-FCA-statistics-2012.pdf.
[14] "FY 2012 Is Record Year for FCA Recoveries," Taxpayer's Against Fraud, http://www.taf.org/blog/fy-2012-record-year-fca-recoveries.

"The amount of funds deposited in the Trust Fund was six and a half times as great as the FY 2012 HCFAC allocation."

The next step in the analysis is to determine the relationship between the money coming into the Medicare Trust Fund versus the money appropriated from the Fund for health care fraud enforcement. Recoveries in any given year are not the same as the money going into the Funds, because some of the money that is collected during any given year was actually won or negotiated in a prior year. The chart on the following page shows the flow of funds into and out of the Funds over the five-year period examined in this study. The striking feature of this chart is that the amount of money flowing into the Medicare Trust Fund greatly exceeds the allocations to the various agencies that are fighting fraud. For example, in FY 2012, the amount of funds deposited in the Trust Fund was six and a half times as great as the FY 2012 HCFAC allocation. Moreover, most of the allocations went to CMS and OIG ($265 million and $226 million, respectively). In contrast, the Civil Division and the Criminal Division at DOJ were each allocated $24 million. These are relatively small sums in light of the billions of dollars recovered and deposited into the Fund (see Chart).

Total Funds Returned to the Medicare Trust Fund (MTF) versus Total Funds Appropriated from the MTF for Health Care Fraud Enforcement, FYs 2008-2012 (in millions)



Outlays

We estimated federal outlays to investigate and prosecute health care fraud for three federal agencies—U.S. Attorneys, the Office of the Inspector General (OIG) in the US Department of Health and Human Services, and the Civil Division of the U.S. Department of Justice. These agencies are the key participants in the federal government's anti-fraud activities.

U.S. Attorneys

To estimate the cost of U.S. Attorneys, we begin with the total USAO budget from 2008 through 2012. Using government budget documents, we determined that this was $9.413 billion. We estimate that 22 percent of the total USAO budget went to Civil Litigation over this period. This produces a figure of $2.071 billion over the five-year period.

The next step is to estimate the proportion of this civil litigation outlay that was devoted to civil fraud litigation. Based on input from USAOs, we estimated that 26 percent of the staff and related costs for civil litigation were devoted to civil fraud litigation. This translates into $538.5 million in outlays for US attorneys' civil fraud investigations and prosecutions from 2008 through 2012.

The final step is to estimate the proportion of civil fraud litigation that is devoted to health care fraud. We estimate this, based on interviews with key DOJ personnel, to be 70 percent. Thus, the five-year cost for the efforts of US attorneys related to health care fraud is $377 million (see Table 2).

Table 2: Health Care Fraud-related Outlays for US Attorneys, FY 2008-FY 2012 (millions of dollars)

2008	2009	2010	2011	2012	Total
70.5	73.5	77.1	77.4	78.5	377

Source: US Department of Justice

Office of the Inspector General

The mission of the Office of the Inspector General (OIG) is to "protect the integrity of HHS programs as well as the health and welfare of beneficiaries by detecting and preventing fraud, waste, and abuse; identifying opportunities to improve program economy, efficiency, and effectiveness; providing industry guidance; and holding accountable those who do not meet program requirements or who violate Federal laws."[15]

[15] Department of Health and Human Services. Office of the Inspector General. "Justification of Estimates for Appropriations Committees: Fiscal Year 2013." 3.

To estimate the outlays for OIG, we obtained data from OIG. We received information on the number of people (full-time equivalent workers, or FTEs) who worked at OIG, and then a breakdown that showed how many of these employees were involved in work related to CMS (OIG staff work on many other HHS programs including those in the Public Health Service). We excluded senior managers and focused on staff in three areas—the Office of Audit Services, the Office of Investigations; and the Office of Evaluation and Inspections. We then obtained information on the full cost of each FTE.

Table 3: Health Care Fraud-related Outlays for OIG, FY 2008-FY 2012 (millions of dollars)

2008	2009	2010	2011	2012	Total
17.6	19.7	20.1	21.0	24.8	103.2

Source: Department of Health and Human Services, Office of the Inspector General. Justification of Estimates for Appropriations Committees. FY 2009 and FY 2013.

US Department of Justice, Civil Division

The Fraud Section of the Civil Division of the Justice Department works with US attorneys to investigate and litigate matters involving fraud against the US government. Since 2009, the Fraud Section has obtained settlements and judgments that exceed $6.2 billion. This includes health care fraud, but also fraud involving federal mortgage lenders, defense contractors, government research grants, student loans, firms constructing federal buildings and prisons, information technology organizations, and the receipt of foreign aid. In FY 2011, the total recovered from all of these sources was greater than $3.3 billion. The Civil Division took actions against manufacturers filing false and inflated prices, fraud promoting harmful drugs and devices, violations of the Anti-Kickback and Stark laws, online drug companies selling counterfeit drugs, and home health organizations that inflate or invent claims.[16]

Table 4: Health Care Fraud-related Outlays for DOJ, Civil Division, FY 2008-FY 2012 (millions of dollars)

2008	2009	2010	2011	2012	Total
16.8	18.1	19.6	19.5	20.4	94.4

Source: U.S. Department of Justice, Civil Division

Total Health Care Fraud-related Outlays

We now sum the outlays for the three agencies over the period from FY 2008 through FY 2012.

[16] "Civil Division FY 2013 Budget and Performance Plans," last modified February 2012, http://www.justice.gov/jmd/2013justification/pdf/fy13-civ-justification.pdf

Table 5: Total Health Care Fraud-related Outlays for Three Agencies, FY 2008-FY 2012 (millions of dollars)

USAO	377.0
OIG	103.2
DOJ, Civil Division	94.4
Total	574.6

Sources: US Government agencies

Benefit to Cost Ratio

The bottom line is the relationship between total benefits, as measured by net recoveries, and total outlays, both over the five-year period. The results are shown in Table 6.

Table 6: Benefit-to-Cost Ratio (millions of dollars and benefits to costs), FY 2008-FY 2012

Benefits	Costs	Benefit/Cost Ratio
9,384	574.6	16.33 to 1

Source: HMA Calculations

These results indicate that for each dollar spent by the federal government in investigating and prosecuting civil health care fraud against the federal government, $16.33 was recovered to the federal government, after allowing for the amounts paid to whistleblowers.

The Missing Numbers in DOJ's Presentation

The benefit to cost ratio of 16.33 to 1 is an understatement of the full "rate of return" from the federal government's anti-fraud activities.

First, as noted above, there are many criminal cases involving heath care fraud. In fact, from 2008 through 2012, criminal fines associated with federal False Claims Act cases totaled over $4.5 billion, but these fines are not counted in official Department of Justice False Claims Act settlements.

Why not?

Simple enough; when the U.S. Department of Justice first started compiling FCA statistics more than 25 years ago, criminal fines associated with FCA cases were nonexistent, and there were almost no Medicaid recoveries. DOJ False Claims Act statistics record-keeping remains an artifact of that era. The

result is that criminal penalties and state recoveries associated with False Claims Act cases do not appear in the official FCA statistics sheet. This results in an incomplete picture of how effective the partnership between whistleblowers, DOJ, HHS, and private lawyers is when they work together to recover America's stolen billions.

"DOJ civil False Claims Act data dramatically underestimates the amount of money recovered to government – the real number of interest to voters and policy makers alike. "

Federal Criminal Recoveries
Associated with federal False Claims Act Cases, 2008-2012 (in millions of dollars)

2008	2009	2010	2011	2012	Total
40.0	$1,362.2	$1,009.2	$414.2	$1,713.5	$4,539.0

State Civil Recoveries
Associated with federal False Claims Act Cases, 2008-2012 (in millions of dollars)

2008	2009	2010	2011	2012	Total
$539.4	$883.9	$967.4	$721.2	$1,295.7	$4,407.7

When the two numbers above are added we find that official DOJ False Claims Act data dramatically underestimates the amount of money recovered to government – the real number of interest to voters and policy makers alike. Does it matter if the money recovered is "criminal" money or "civil" money or if the money is "federal" money or "state"? Not to most taxpayers. As far as they are concerned, it's all one set of pants, and whether it's coming out of, or going into, the left pocket or the right is largely a technical abstraction.

Total Recoveries (Civil, Criminal and State Penalties)
Associated with Federal False Claims Act Cases, 2008-2012 (millions of dollars)

	2008	2009	2010	2011	2012
Federal civil healthcare recoveries reported by DOJ [17]	1,126	1,633	2,552	2,447	3,068
Federal criminal recoveries associated with FCA cases (in millions)	40	1362	1009	414	1714
State recoveries associated with federal FCA cases (in millions)	539	884	967	721	1296
Totals	1705	3879	4528	3582	6078

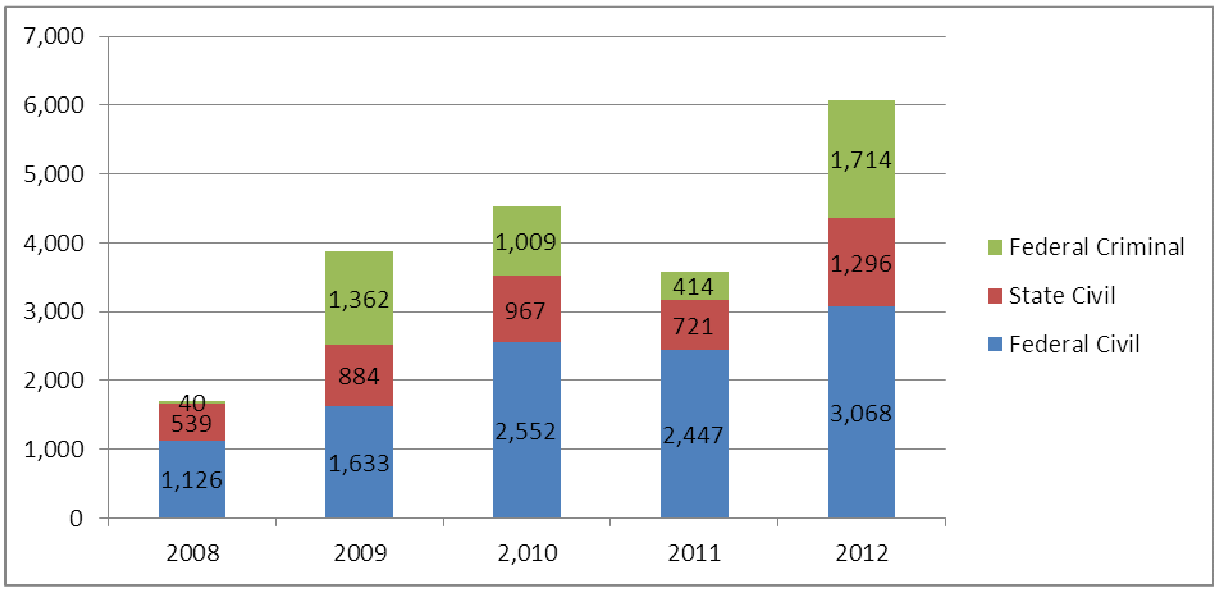
When a $3 billion whistleblower-initiated case was announced by GlaxoSmithKline in July 2012, the Department of Justice's press release stated that $3 billion was recovered.[18] Of this sum, the press release notes, $1 billion was ascribed to a criminal penalty and of the remaining $2 billion, $1.043 billion was paid for off-label promotion of various drugs, and of this sum the federal share was $832 million, and the state share was $210 million. Additionally, GSK agreed to pay $657 million related to false claims arising from misrepresentations about Avandia. The federal share of this settlement was $508 million, and the state share was $149 million. Finally, GSK agreed to pay $300 million to resolve allegations of price-gouging, including about $161 million that went to the federal government as part of a civil settlement, about $119 million that went to the states, and about $20 million that went to Public Health Service entities.

The bottom line: Of the $3 billion recovered to government solely due to whistleblower-initiated False Claims Act cases first filed by private attorneys, the federal government only booked $1.5 billion under the Federal False Claims Act, and DOJ end-of-year statistics did not include the other $1.5 billion.

If we look at total recoveries attributed to health care False Claims Act cases, we see that a very large percentage of recent recoveries involve non-civil or non-federal dollars.

[17] "DOJ FCA Statistics," Taxpayer's Against Fraud, accessed September 3, 20123, http://www.taf.org/DoJ-FCA-statistics-2012.pdf.
[18] "GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data," last modified July 2, 2012, http://www.justice.gov/opa/pr/2012/July/12-civ-842.html.

Total Funds Returned to Federal and State Governments as a Result of FCA-Initiated Cases, FYs 2008-2012 (in millions)



We do not have adequate information on the cost to the federal government and the states of investigating and prosecuting activities that result in criminal judgments and settlements and state Medicaid recoveries. Thus, we cannot calculate what the benefit-to-cost ratio would be if we had the full set of information on costs.

The chart above, however, makes it clear that the additional recoveries are quite substantial, and it is very likely that the added cost of collecting these funds is not proportionally as great as the added recoveries. One reason is that the same investigation frequently leads to both civil monetary recoveries and criminal fines collected. As a result, it is almost certain that if all costs and benefits were accounted for, the taxpayer benefit-to-cost ratio of False Claims Act law enforcement exceeds 20:1.

Conclusion

There is no doubt that the federal government's initiatives to fight health care fraud have returned large sums of money to US taxpayers. These initiatives also improve the integrity of federal health care programs and make a substantial contribution to their solvency. In times of constrained government budgets, we can ill afford to have federal money wasted or stolen. It is clear that the federal

government is getting a tremendous “bang for the buck” in its anti-fraud activities in health care. There are various ways of calculating that bang for the buck, but this report makes clear that accounting for only federal civil returns associated with FCA cases still shows a better than 16:1 return on investment, while a more robust calculation of the federal return that factors in both civil and criminal fines and recoveries show a far greater return. It is our estimate that a total taxpayer benefit-to-cost return from False Claims Act law enforcement exceeds 20:1.

Appendix H.1

ADVOCATE FOR THE LEGISLATION: TESTIMONY OF PATRICK BURNS
HEARING ON HB 4001

Testimony of Patrick Burns

Co-Executive Director

Taxpayers Against Fraud

Hearing on HB 4001, the West Virginia False Claims Act

Tuesday, January 28, 2014

Summary of Testimony

The State of West Virginia spends billions of dollars to fund various governmental programs, and it is essential that these funds are not lost to fraud, but are spent on their intended purposes. Federal and state false claims acts have proved to be critical tools for exposing fraud and helping to recover taxpayer money.

We applaud this effort to pass a West Virginia False Claims Act, and urge this committee to reject weakening amendments which would result in the state not receiving millions of dollars back from the federal government under the Deficit Reduction Act of 2005.

Introduction

Taxpayers Against Fraud and its sister organization, Taxpayers Against Fraud Education Fund, are nonprofit organizations dedicated to combating fraud against the federal government and state governments through the promotion of the whistleblower provisions of false claims acts ("FCA's").

I am pleased to be invited to submit testimony concerning HR 4001, the West Virginia False Claims Act.

Enactment of strong anti-fraud laws should be an integral part of any debate over addressing budget challenges. As states struggle with rising deficits and looming budget shortfalls, programs that assist children, the elderly, and the infirm, as well as programs that strengthen infrastructure, such as roads, bridges and schools, are often put on the chopping block even as anti-fraud tools remain weak or unused. At a time when citizens may be asked to pay more, or get less, it's critical to send a clear signal that fraudsters will be pursued with vigor.

The False Claims Act Model

The False Claims Act contains "*qui tam*" provisions, which allow people with evidence of fraud against the government to sue on behalf of the Government. People who sue under the FCA are called "relators" or "whistleblowers," and are eligible for 15 to 30 percent of the amount recovered. Whistleblower awards are paid out of the treble damages levied on fraudster companies. If there is no recovery, there is no award.

Historically, *qui tam* provisions were created as a way of keeping government small by empowering citizens to come to the aid of law enforcement and bring civil actions on behalf of the government against those who violate our laws.

The core idea behind the False Claims Act is simple and straightforward: if federal and state governments incentivize integrity, they will get more of it.

For more than 25 years, this idea has worked remarkably well. The Federal False Claims Act has returned over $45 billion to the U.S. Treasury, and nearly $10 billion back to the states.

The reason False Claims Act laws work is that whistleblower incentives serve as a counterbalance to the fear of job loss, unemployment, and bankruptcy which otherwise prevents good, honest people from coming forward to report wrong doing.

This point cannot be overstated.

We all know what companies do to employees who report lying, stealing and cheating to federal and state governments; they move to isolate, humiliate, and terminate those employees as quickly as they can.

The False Claims Act is designed to encourage whistleblowers to come forward, but it is also cleverly crafted to discourage frivolous lawsuits and to relieve litigation burdens from innocent companies.

Whistleblower lawsuits are filed under seal. The procedural and evidence burdens of filing a False Claims Act lawsuit generally require a whistleblower to hire an attorney, most of whom work on contingency.

Because False Claims Act cases generally take 2-4 years or more to resolve themselves, experienced false claims act attorneys are difficult to retain, as they only get paid if they are successful at recovering money back to the federal government and the states.

What this means is that private attorneys not only screen cases for federal and state governments, they also organize, investigate and develop whistleblower claims so that the defrauded agencies understand how they were ripped off, and the extent to which they were defrauded.

Because so much of the work is done on the front end by the whistleblower and his or her attorney, the government generally saves years of effort and millions of dollars in investigation costs. Just as importantly, the government can read the complaint before investigating in order to rather quickly determine if a case meets evidence burdens that must be met under state and federal false claims acts.

Among other reasons *qui tam* cases may be dismissed is if:

- The whistleblower bases his complaint on public information available from the news media, the courts, or the government;
- The whistleblower cannot plead clear and specific evidence of fraud;
- Another *qui tam* complaint alleging the same fraud is already pending;
- The whistleblower cannot show that the defendant knowingly submitted a false claim to the government or did so with reckless disregard or indifference to the truth;
- The case is filed outside of the statute of limitations, or;
- The whistleblower engaged in criminal activity in connection with the fraud.

Because whistleblowers and their lawyers only get paid if a case is successful, they are dis-incentivized to bring frivolous cases; in fact, FCAs contain a fee-shifting provision that requires relators to pay defendants' costs and attorneys' fees if they bring a *qui tam* suit that is clearly frivolous. The result is a tremendous bang for the buck. A recent study done by Taxpayers Against Fraud Education Fund concluded that the federal government recovers $20 back for every $1 invested in False Claims Act prosecutions and investigations.

Replicating Success at the State Level

Cash incentives have worked so well to get whistleblowers to come forward to help in the war on fraud, that the federal government has extended the cash incentive idea to the states.

Under the Deficit Reduction Act of 2005, if a state passes a state False Claims Act that is at least as strong as the federal version of the law, the Federal Government will increase the state's share of a Medicaid False Claims Act award by 10 percentage points.

This is actually a far larger percentage share than it first appears. For example, if a Federal-State Medicaid split is 72-28, as it was for West Virginia in 2013, then the

State share would rise from 28 percent to 38 percent – a 35% increase in the State's award in a settled or positively litigated case.

In order to win this increased incentive, however, the West Virginia False Claims Act has to be at least as strong as the federal act. Weakening amendments will result in the U.S. Department of Health and Human Services disqualifying West Virginia from the Deficit Reduction Act incentives, and the result will be millions of dollars lost to West Virginia.

Today, 29 states, and the District of Columbia have enacted their own state False Claims Act laws.

If West Virginia is looking for a state model of success in the war on fraud, it need look no farther than neighboring Virginia.

The key to Virginia's success has been the one-two punch of a Virginia False Claims Act, combined with a proactive Medicaid Fraud Control Unit.

Since the Virginia General Assembly passed the Virginia Fraud Against Taxpayers Act in 2002, the Commonwealth's Medicaid Fraud Control Unit has returned an average of $228 million per year, or more than $3.1 million per fraud unit employee per year.

Two big cases stand to illustrate the power of a state law.

The first was a civil prosecution against Purdue Frederick, the maker of Oxycontin, a painkilling drug which is one of the most addictive drugs ever legally sold in this country, and one which has devastated Appalachia as a consequence.

Not only was Purdue Frederick forced to pay the federal government and the states over $634 million to settle off-label marketing charges, but the president, general counsel, and chief medical officer of the company also pled guilty to criminal charges, were forced to pay millions out of their own pockets, and were then excluded from doing business with the U.S. Government.

As part of the Purdue Frederick settlement, the Virginia Medicaid Fraud Control Unit was paid $5.3 million to fund future health care fraud investigations, and an additional $20 million was paid to fund a Virginia Prescription Monitoring Program to help curtail the misuse, abuse, and diversion of prescription drugs.

With money in hand to fight forward in the war against fraud, Virginia was able to take the lead in the civil prosecution of Abbott Laboratories for the off-label marketing of the mood-control drug Depakote. This whistleblower-initiated case was settled for $1.5 billion, and remains the largest Medicaid fraud case ever led by a state.

Virginia's aggressive Medicaid Fraud Control Unit has been so successful that the state portion of its budget is now funded solely by recoveries made in criminal and civil settlements.

In short, the bad guys are now paying for their own investigations and prosecutions, not Virginia taxpayers.

Clearly, Virginia's Medicaid Fraud Control Unit is a winning program.

But health care is only part of Virginia's budget, and Virginia is moving to recover funds across the board. For example, in the construction arena, a jury recently found pipe manufacturer JM Eagle guilty of knowingly selling defective plastic water pipes to municipalities across the nation, including those in Virginia. The damages part of this litigation lies ahead, but it's clear Virginia is likely to recover millions of taxpayer dollars in this case.

Virginia is not alone in fighting fraud at the state level. Texas has also suited up to join whistleblower lawsuits.

From 2006 through fiscal year 2012, Texas recovered over $821 million for state and federal taxpayers after subtracting for relators' shares and Texas State attorney fees and costs. Over $348 million of this amount was allocated to Texas taxpayers and over $473 million was allocated to federal taxpayers under the Medicaid state and federal costing sharing system. It should be noted that nearly half of these recoveries – over $394 million – resulted from fraud cases in which Texas led the investigation and prosecution of the case under the Texas Medicaid Fraud Prevention Act.

New York is also moving aggressively to fight fraud using its state False Claims Act. New York Attorney General Eric Schneiderman has created a special "Taxpayer Protection Bureau" in his state to encourage and work with whistleblowers to expose corruption and to target firms that rip-off government pension funds and contractors that over-bill on taxpayer-funded construction.

Florida and California have likewise moved to recover hundreds of millions of dollars of taxpayer money stolen in Medicaid scams, pension scams, and construction scams. Florida's Attorney General, for example, just announced a $28 million recovery from Bank of New York Mellon in a False Claims Act case dealing with Florida's pension fund, which was short-changed on international currency transactions.

Myth Busting

In reviewing the rather loose discussion that has been voiced about the proposed West Virginia bill in the press, let me correct a few basic inaccuracies:

- Less than 200 cases a year are settled or adjudicated to conclusion at either the federal or state level. In recent years, however, this small number of cases has returned between $3 and $9 billion a year back to federal and state governments. Clearly, federal and state false claims acts are not being used recklessly.

- The FCA offers reduced punishments to violators who self-disclose their misconduct.

- Whistleblower cases cannot be based on publicly disclosed information.

- Companies typically settle False Claims Act cases and pay millions or even billions of dollars, not because they are innocent, but because they believe that if they took their case before a jury, they would lose and their civil liabilities would be greater.

- The proposed West Virginia False Claims Act does not allow whistleblowers to sue the state. The law is a tool used by the state to sue cheating corporations and individuals on behalf of West Virginia taxpayers.

- This is not controversial legislation, but legislation that is a proven success at the federal level and in 29 states and the District of Columbia. Over the course of the last 25 years, over $55 billion has been recovered using false claims act laws, and over 80% of this money has been returned thanks to whistleblower-initiated cases.

- President Bush signed into law legislation that will now give West Virginia a 35% increase in federal Medicaid settlement awards, provided West Virginia has a state False Claims Act at least as strong as the federal law. West Virginia will lose scores of millions of dollars if it embraces a law that is weaker, in any way, than the federal law.

- Whistleblower awards do not cost taxpayers a dime; they are paid for by the fraudsters who are often hit with treble damages which are levied in order to recover the cost of the government's investigations and prosecution (including whistleblower awards) and lost interest.

- Simple mistakes are not actionable. False Claims Act laws require a company to knowingly commit fraud.

- False Claims Act cases are not made on rumor, and cases are always evidence-based. Whistleblower complaints based on mere suspicions of fraud will be dismissed under heightened pleading rules that apply to FCA cases. To win a False Claims Act case, the evidence of fraud has to be specific, identifying the "who, what, when, and where" of the fraud.

- Whistleblower awards flow to those who are first to file, so there is never an incentive to wait for a fraud to grow before a whistleblower files a case. On the other hand, whistleblower cases demand evidence and without that evidence, they will be dismissed.

Conclusion:

Taxpayers Against Fraud Education Fund applauds this body for taking a step in the right direction to recapture West Virginia's stolen billions.

If only 3 percent of the state's $11.2 billion budget is lost to fraud every year, that sum totals to over $330 million dollars – or more than $600 per person per year.

While we will never get rid of all fraud against the government, state or federal, the West Virginia False Claims Act is clearly a strong step in the right direction.

In moving this legislation forward, however, it is critical that weakening amendments be rejected in order to preserve the Deficit Reduction Act of 2005 incentives from the federal government, which will bring scores of millions of dollars back to the people of West Virginia.

Appendix H.2

OPPOSITION TO THE LEGISLATION: LETTER FROM WEST VIRGINIA CHAMBER AND WEST VIRGINIA BUSINESS & INDUSTRY COUNCIL AND CRITICAL FAILURES OF HB4001

The Hon. Tim Miley
Speaker, WV House of Delegates
[redacted]

January 13, 2014

Dear Speaker Miley,

Thank you for giving West Virginia's business community the opportunity to present our concerns about HB4001. Fighting fraudulent misrepresentations made to state government is a laudable goal--no one disagrees on that point. But the proponents of HB4001 have not identified how this iteration of the federal False Claims Act law would prevent or redress fraud to a greater extent than existing law. As such, the WV Chamber of Commerce and WV Business and Industry Council join together in opposing HB4001.

While this legislation resembles the federal False Claims Act in many ways, the true purpose of HB4001 becomes apparent when examining the differences between it and the federal False Claims Act law. Those differences expose HB4001 for its true purposes – as a windfall for plaintiffs' trial lawyers – legislation that will allow high-priced lawyers to benefit without a demonstrated law enforcement benefit for the state.

Combating fraud against the state is and should be a serious undertaking, but this legislation as approved by the House Judiciary Committee after mere hours of deliberation on the second day of the legislative session is not the appropriate vehicle to accomplish that goal. The Chamber and BIC have outlined 15 critical failures in HB4001 that immediately became apparent in the short time this legislation has been available for public consideration. Given more time, the list likely would be longer. We are eager to know more about stopping fraud and are looking forward to an in-depth discussion about this issue.

Kind regards,

Steve Roberts
President, WV Chamber
[redacted]

Chris Hamilton
Chairman, WVBIC
[redacted]

WEST VIRGINIA CHAMBER

WVBIC BUSINESS & INDUSTRY COUNCIL

CRITICAL FAILURES of HB4001 (as of 1/13/2014)

1. Retroactivity extends statute of limitations to 10 years; violates due process.

Section 14-4-10(b) includes a dangerous retroactivity provision that will allow causes of action to be brought prior to the effective date of the statute as long as the statute of limitations has not lapsed. The bill has a six-year statute of limitations period or three years "after the date when facts material to the right of action are known or reasonably should have been known by the official charged to act in the circumstances" but not more than 10 years after the violation has been committed, whatever occurs last. With the inclusion of this provision, the statute essentially has a 10-year look back provision from the passage of this statute, far longer than almost all other federal limitations periods. Extending this time period not only would encourage the proliferation of stale claims but also could create additional liability by allowing *qui tam* plaintiffs to delay filing a claim to increase their own recovery at the government's expense.

In addition, this bill inappropriately authorizes retroactive application of many of the proposed amendments to pending and past cases**.** Applying the legislation retroactively, including applying it to actions that occurred prior to the effective date of the legislation, raises serious due process concerns. For example, the provisions eliminating public disclosure as a jurisdictional defense would unconstitutionally attach a new disability for prior conduct and the extension of the statute of limitations would impermissibly revive time-barred claims if applied retroactively.

2. HB4001 extends "sue and settle" litigation that has proliferated under the Obama Administration.

Private industry has suffered since 2009 under a proliferation of "sue and settle" litigation that has been blessed by the Obama Administration and Attorney General Eric Holder. For example, from 2009 to 2012, the U.S. Environmental Protection Agency settled with interest groups at least 60 times, creating some 100 new regulations and awarding millions in legal fees to special interest groups. The same trend holds true with False Claims Act litigation. More than 640 of the 782 new FCA matters filed in 2012 were initiated by "whistleblowers" filing suit under the federal FCA's *qui tam* provisions, which provide for generous rewards of up 30 percent of the total recovery for those who file FCA suits on the government's behalf.

Record-breaking FCA settlements in a variety of industries, including health care, financial industries, aerospace and education have become virtually a daily occurrence, and courts continue to adopt theories of FCA liability that push it to the absolute outer bounds − if not far beyond − the original intent of what was once called "Lincoln's Law," meant to halt and punish traditional fraud against the government. HB4001 would bring this disturbing trend to the front steps of the WV State Capitol.

3. Standard of proof is not clear and convincing; do not need to prove intent.

Shockingly, liability under HB4001 does not require actual knowledge of the false claim against the state. Rather, knowledge is defined as "actual" knowledge or reckless disregard of the information without requiring a specific intent to defraud. This is contrary to longstanding West Virginia law and American jurisprudence in general, which requires stringent levels of proof for fraud claims and requires a showing of intent to defraud. Under HB4001, only a preponderance of evidence is required and the element of intent is completely eliminated. Preponderance is based on probable truth or accuracy instead of the standard of "clear and convincing" evidence. Simply put, while the supporters of the legislation allege that they are attempting to prevent fraud, the statute also would apply to mistakes, sloppiness and minor errors. HB4001 should be revised to require at least proof by clear and convincing evidence before potentially subjecting defendant companies to ruinous damages and penalties and serious reputational consequences.

4. HB4001 has no threshold on fraud amount; no limit on attorneys' fees and recovery.

Fraud should be significant in nature. HB4001 does not recognize that simple errors occur in business transactions which are not fraudulent in nature nor intended to be fraudulent. Some state laws set forth a level of financial fraud. Virginia, for example, requires the amount of fraud has to exceed $75,000 in damages. To correct this deficiency, HB4001 needs to be amended to add a level of significance to subject both government and businesses to extended lawsuit costs.

Additionally, HB4001 allows for the recovery of "damages" even where the state suffered no loss. The bill unfairly eliminates "loss" or "damages" as the basis for recovery under the False Claims Act and dramatically expands the way recoveries are calculated. The bedrock principle in measuring damages under the FCA has been to ensure that the government recovers the actual damages it sustains because of the violation. Instead, HB4001 entitles the state to recover amounts in excess of any losses actually suffered and potentially benefit from enormous windfalls because it would be entitled to recover treble the amount of a contract or claim even where it suffered no loss at all. HB4001 should be revised to expressly limit the state's damages (before trebling) to the actual out-of-pocket loss to the state *after considering the value of goods and services the State did receive*. Clarifying the legislation in this way would prevent *qui tam* plaintiffs from winning jackpot recoveries from unsuspecting companies whose goods and services largely conformed to the state's requirements and expectations and provided real benefit to the state.

5. Proposed FCA for West Virginia is likely to decrease competition in the bid process.

The legislation will raise companies' cost of doing business, increase the government's cost of contracts, discourage large and small businesses from doing business with the government and cause irreparable damage to the government contracting process. While preventing fraud is a laudable goal, HB4001 as it has been proposed is not the appropriate vehicle. None of the proposed changes in HB4001 are in the interests of the West Virginia, its citizens and taxpayers, or the many companies that are partners with government.

6. Existing remedies are adequate to pursue frauds; whistleblowers already protected.

The state of West Virginia should fight fraud and the submission of false claims through the multiple existing statutes and regulations that protect West Virginia taxpayers from fraud. The West Virginia Legislature has enacted a myriad of statutes designed to detect and prevent fraud and to enable state law enforcement authorities to pursue wrongdoers in court criminally and civilly. Those effective programs should not be discounted or overlooked particularly when there is no suggestion that they are ineffective or deficient or that fraud is rampant in this state. Without a legitimate law enforcement need for legislation like this, it becomes political posturing instead of effective policymaking.

West Virginia has multiple provisions in existing law to deal with fraud, including Medicaid, Unemployment Compensation, Workers Compensation, Retirement, Contract, Tax, Insurance, Education, Motor Vehicles, Purchasing and criminal statutes. Additionally, West Virginia's common law already provides protection for whistleblowers reprimanded because of public policy claims, making the additional protections of HB4001 duplicative and unnecessary and creating the further potential for unjust enrichment at the expense of employers. Thus, employees who report fraud already are protected from adverse employment actions from their employers. In fact, these common law claims already provide employees with damages for back pay, front pay, emotional distress damages and punitive damages.

7. HB4001 puts West Virginia out of step with neighbors; runs counter to national trends; lacks federal parity.

The federal government has been incentivizing states for the last 10-15 years, particularly since 2009, by tying the receipt of federal funds to the enactment of state Federal Claims Act laws. But lately, states

surrounding West Virginia have chosen not to enact FCA laws, and in other parts of the country, the trend is not to include *qui tam* provisions. Lawmakers in Ohio, Kentucky and Pennsylvania have defeated efforts to enact a False Claims Act in their states. Fifteen states have adopted an FCA statute since 2009, but a majority of those states did not include a *qui tam* provision, so national trends run counter to what HB4001 proposes.

In Virginia, the Fraud Against Tax Payers Act is very similar to the federal False Claims Act, but Virginia's statute differs from HB4001 most notably by requiring the whistleblower employee to have in good faith exhausted all internal procedures prior to bringing a claim. During the WV House Judiciary Committee's one-day deliberation of this complex issue, the state of Texas' FCA statute was used as an example of a state we should mirror because of its high job growth group. The comparison between HB4001 and the Texas law fails, however, because the Texas law narrowly applies to Medicaid fraud prevention, not all state contracts. The only real similarity is that the Texas law utilizes the broad definition of "knowingly" present in HB4001.

Further, HB4001 not only runs counter to national trends, it lacks federal parity in a number of ways that run afoul of established legal principles. In addition to the retroactivity provisions already discussed, HB4001 contains an estoppel provision (§ 14-4-10(d)) that appears nowhere in the federal False Claims Act. The courts should be left to determine, as they routinely do under ordinary principles of estoppel, the effect that any criminal plea or factual admission has on subsequent false claims act litigation without having legislation that puts a thumb on the scale in favor of plaintiffs' trial lawyers.

8. **HB4001 will bring significant cost to health care, universities, all government entities, anyone doing business with West Virginia.**

As written, HB4001 makes any state-affiliated employer a target for FCA litigation, including our health care and higher education providers. Lawsuits are expensive undertakings, and the destructive effect of proposals like HB4001 that supercharge the incentives for plaintiffs' trial lawyers to drum up lawsuits against all employers should not be discounted.

9. **State FCA, as proposed, will make it difficult, if not impossible for small companies to do business with the state.**

Leveling an allegation of fraud against a company is a serious matter, and a verdict against a company under a civil anti-fraud statute can have significant collateral and reputational consequences, but as stated elsewhere, even an accidental bookkeeping error could be pursued as fraud under HB4001. Small and nonprofit entities are the most likely targets of state FCA, which keeps them from advancing their core missions. Adding the provisions of HB4001 to the West Virginia Code would create a hostile business climate and discourage the expansion of employment opportunities in this State.

10. **Fraud is not insurable.**

Many general liability or employer practice liability insurance policies exclude fraud and/or intentional acts. Since HB4001 sets such a low bar for proving fraud and intent, insurance most likely will not cover False Claims Act actions, so business would have to pay to defend these actions (and as discussed below, nothing in HB4001 discourages meritless FCA litigation).

11. **The accuser does not need to exhaust administrative remedies first; state control is limited; HB4001 does not discourage meritless suits.**

As written, HB4001 makes it easier and more profitable to bring private lawsuit at the state level than under the federal act, as the whistleblower qualifications are weakened and circumvent, rather than encourage compliance by sending whistleblowers to lawyers instead of participating in internal investigations and self-reporting. If one knows of fraud, then should not there be a positive duty to report to the proper investigatory

authorities such as law enforcement or prosecuting attorneys? HB4001 does not contain requirements to exhaust existing remedies to report or manage fraud. Many states' FCA laws require that all avenues to stop fraud quickly are utilized as provided by existing law. HB4001 implies that these laws are ineffective and remedies should not be pursued except through lawsuits. Protracted litigation will permit fraud to continue for longer periods of time.

Additionally, HB4001 threatens control of litigation on the state's behalf by state officials and contains no provisions to discourage qui tam plaintiffs from persisting with meritless suits. At a minimum, HB4001 should be revised to include a loser-pays provision that forces qui tam plaintiffs to take financial responsibility for their decisions to continue racking up attorneys' fees fighting cases that the state would dismiss.

12. **Proponents offer no compelling reason to create a new cause of action; should not legislate because of extremes.**

There is no reason to believe we have rampant, un-redressed fraud in West Virginia, and there is no indication current laws are ineffective in deterring fraud and holding wrongdoers accountable. Despite that, the proponents of HB4001 seek to create a new breed of class-action lawsuit allowing private individuals to file *qui tam* lawsuits against any person submitting claims to a grantee or other recipient of federal funds, even if no government interest is involved, if the recipient has commingled these funds with its own. The FCA effectively would displace state tort laws, imposing treble damages and penalties on fraud claims between private entities that currently are addressed by state fraud laws. The legislation would remove a defendant's ability to seek dismissal of "parasitic" *qui tam* suits by eliminating the current Act's "public disclosure" provision. This provision safeguards against parasitic *qui tam* suits, which are based on information already known to the government or reported in the news media.

13. Enacting HB4001 would reverse West Virginia's progress on civil justice modernization.

West Virginia lawmakers have worked hard to make progress in bringing the state's civil justice system into more alignment with the rest of the nation. Without question much work remains, and HB4001 as passed out of committee would be a giant step backwards. Enacting a fraud statute that does not require proof of intent and carries with it significant bounty has the potential to turn any employee into a workplace spy who will seek litigation instead of facilitating true fraud prevention and correction.

14. HB4001 will encourage protracted litigation, costing government more.

Lawsuits are expensive undertakings, and this bill will require significant government resources to investigate claims and requires the government to share recoveries with whistleblowers. Government will have increased costs as businesses will have to incorporate in their prices the unavoidable costs of defending claims.

Plaintiffs' trial lawyers representing *qui tam* plaintiffs have an obvious financial incentive to resist any effort by the state to dismiss a *qui tam* plaintiff's lawsuit, no matter how frivolous the suit. Those lawyers stand to profit handsomely from a suit that goes forward, as the prospects of coercing a settlement from a defendant company increase as costly litigation drags on.

15. Jobs impact of HB4001 would be negative.

The dean of West Virginia University's School of Business has said several times publicly that West Virginia should not pass any legislation that does not provide a measurably positive impact on job creation, and his advice is worth heeding. Without question, HB4001 does nothing to create jobs, attract new business or in any way make West Virginia more competitive.

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