111TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
111–97

FALSE CLAIMS ACT CORRECTION ACT OF 2009

MAY 5, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1788]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1788) to amend the provisions of title 31, United States Code, relating to false claims to clarify and make technical amendments to those provisions, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

79–006

PURPOSE AND SUMMARY

H.R. 1788 amends title 31, United States Code, to remove judicially-created limitations and qualifications which have undermined the effectiveness of the False Claims Act. The central purpose of the False Claims Act is to enlist private citizens in combating fraud against the United States. The Act's *qui tam* provisions were crafted to provide clear procedures and appropriate incentives for private citizens to report fraudulent schemes and participate in the resulting investigations and prosecutions.

Since the False Claims Act was amended in 1986, recoveries under the Act have totaled nearly $22 billion,[1] with *qui tam* lawsuits responsible for about $14 billion of that amount.[2] However, over the two decades since legislation last addressed the False Claims Act, court decisions have created a complex patchwork of procedural and jurisdictional hurdles that have often derailed meritorious actions and discouraged private citizens from filing *qui tam* actions.

An Arkansas Federal court recently invited Congress to take legislative action to clarify misinterpretations of the False Claims Act, stating: "The Court sympathizes with anyone litigating under the False Claims Act. Perhaps Congress will elect at some point to give legislative attention to the FCA to resolve some of the still unresolved questions about the Act's application."[3] The False Claims Act Correction Act of 2009 responds to that request by clarifying the reach of the Act's liability provisions, preventing dismissals of certain *qui tam* actions, strengthening anti-retaliation protections, setting a uniform statute of limitations, and modifying the requirements for plaintiffs to bring *qui tam* actions.

This legislation is particularly relevant during this period of increased reliance on private contractors to perform what have traditionally been viewed as governmental functions. These amendments to the False Claims Act will strengthen the tools available to combat those who seek to pilfer Government funds, resulting in a recovery of losses from fraud, as well as deterring those who otherwise might consider defrauding the Government.

BACKGROUND AND NEED FOR THE LEGISLATION

A HISTORY OF THE FALSE CLAIMS ACT

The False Claims Act, often called "Lincoln's Law," was first enacted in 1863, as a means to remedy "the frauds and corruptions practiced in obtaining pay from the Government during the [Civil] War."[4] During the Civil War, fraud by Government contractors had become so prevalent that the United States Army was often delivered decrepit horses, or sold the same horse twice, and packages of gunpowder often arrived filled with sawdust.[5] President Lincoln

---

[1] See Department of Justice Fraud Statistics 1986–2008, available at http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm.

[2] Id.

[3] United States ex rel. Montgomery v. St. Edward Mercy Medical Center, 2008 WL 110858 (E.D. Ark. Jan. 8, 2008).

[4] Cong. Globe, 37th Cong., 3d Sess. 952 (1863).

[5] See T.J. Halstead, Constitutional Aspects of Qui Tam Actions: Background and Analysis of Issues in Vermont Agency of Natural Resources v. United States ex rel. Stevens, CRS Report for Congress RL30463 (Mar. 8, 2000).

implored Congress to pass legislation to address these and other incidences of fraud.

The False Claims Act offered "a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class."[6] Pursuant to the Act, private individuals, called *qui tam* relators, were authorized to bring lawsuits on behalf of the United States to prosecute fraud against the Government and to recover funds that were wrongfully obtained.[7] The Act provided for double damages and a $2,000 civil penalty per false claim. Private individuals who successfully pursued claims under the Act were entitled to half of the Government's recovery, as an incentive to expose fraud against the Federal Government.[8] The Act did not authorize the Government to intervene in the private individual's case, nor did it preclude *qui tam* actions based upon the source of the relator's information.[9]

Nearly eighty years later, in the midst of World War II, Attorney General Francis Biddle requested that Congress amend the False Claims Act to repeal the authorization for *qui tam* lawsuits. Attorney General Biddle expressed concerns that *qui tam* complaints were being filed based solely on information contained in criminal indictments.[10] He argued that such cases did not contribute anything new, and could interfere with the Government's criminal prosecutions.[11]

Both the House of Representatives and the Senate considered Attorney General Biddle's request. The House passed legislation to repeal the *qui tam* provisions.[12] The Senate took a different approach, and passed legislation providing that jurisdiction would only be barred on *qui tam* suits based on information in the possession of the Government, if the relator was not an original source of that information. The final 1943 amendments to the False Claims Act included a "government knowledge bar" which deprived courts of jurisdiction over *qui tam* actions that were "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[13]

The 1943 amendments also impacted suits under the False Claims Act by authorizing the Department of Justice to take over cases initiated by relators. The amendments required relators to submit all of their supporting evidence to the Department of Justice at the time they filed a complaint, and gave the Department sixty days to decide whether or not to intervene and take exclusive

---

[6] Cong. Globe, 37th Cong., 3d Sess. 955 (1863).

[7] Qui tam lawsuits date back to medieval England. The term comes from a longer Latin expression meaning "he who sues in this matter for the King as well as for himself." Black's Law Dictionary. The qui tam procedure was brought to the colonies by English settlers, and included in a number of colonial and early American laws, before being enacted in the False Claims Act in 1863. See Department of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, available at www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf; Whistleblower Qui Tam Law Center, available at www.whistleblower-qui-tam.com/pages/qui-tam-history.html.

[8] See Erickson ex rel. United States v. Amer. Inst. of Biological Scis., 716 F.Supp. 908, 915 (E.D. Va. 1989).

[9] Act of March 2, 1863, 12 Stat. 696.

[10] S. Rep. No. 1708, 77th Cong., 2d Sess. (1942) (reprinting Biddle's letter to Congress).

[11] S. Rep. No. 1708, 77th Cong., 2d Sess. (1942) (reprinting Biddle's letter to Congress).

[12] 89 Cong. Rec. 2801 (1943).

[13] Act of December 23, 1943, ch. 377, 57 Stat. 608, codified as amended at 31 U.S.C. §§ 232–235 (1976); U.S. v. Pittman, 151 F.2d 851, 853–54 (5th Cir. 1945) (discussing the history of the 1943 amendments).

control of the suit. If the Government elected to intervene, then the relator would have no role in the case, and no voice in its resolution.

The 1943 amendments also reduced the amount of the relator's share of any recovery: if the Government prosecuted the suit, then the court could award the informer "fair and reasonable compensation" not to exceed 10 percent of the proceeds; if the Government did not intervene, then the informer's award could not exceed twenty-five percent of the proceeds.[14] In neither case was there any assurance that the relators would obtain even a minimum amount.

As a result of the 1943 amendments, relators were far less likely to come forward and expose fraud against the Government. Indeed, from 1943 to 1986, only about six to ten False Claims Act cases were brought each year.[15] Notably, as the number of *qui tam* suits decreased, fraud against the Government was again rampant by the 1980's. In 1981, the General Accounting Office reported that such fraud was "widespread" and was resulting in monetary loss, diminished confidence in Government programs, Government benefits diverted from intended recipients, and harm to public health and safety.[16] Additionally, the effectiveness of the False Claims Act was weakened by some court decisions in which judges interpreted the government-knowledge bar broadly, holding that the bar precluded all *qui tam* cases involving information already known to the Government, even when the *qui tam* relator had been the source of that information.[17]

Congress responded to the decrease in False Claims Act suits. In 1985, the Senate conducted hearings on legislation to reform the False Claims Act.[18] The next year, the House Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary held hearings on similar legislation.[19] These bills sought to empower private citizens with knowledge of fraud or false claims to come forward and bring the resources of private counsel to bear on the Government's behalf under the Act.[20]

Following the hearings, the legislation was refined to take into account concerns raised by the Department of Justice and potential defendants, and the False Claims Amendments Act of 1986 was enacted on October 27, 1986.[21] The 1986 amendments made a number of changes to the False Claims Act.

The 1986 amendments increased the penalties from double damages to treble damages. They also provided that *qui tam* actions would be filed under seal for sixty days, and served on the United States, but not the defendant, to provide the Government time to determine whether to intervene in the action. The amendments

---

[14] Act of December 23, 1943, ch. 377, 57 Stat. 608.

[15] Elleta Sangrey Callahan & Terry Morehead Dworkin, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Will. L. Rev. 273, 318 (1992).

[16] General Accounting Office, Fraud in Government Programs: How Extensive is It?—How Can It Be Controlled, ii (1981).

[17] E.g., United States ex rel. State of Wis. (Dep't of Health and Soc. Servs.) v. Dean, 729 F.2d 1100 (7th Cir. 1984).

[18] False Claims Reform Act: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (Sept. 17, 1985).

[19] Hearing Before the Subcomm. on Admin. Law and Gov't Rel. of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (Feb. 5, 1986).

[20] 126 Cong. Rec. 4580 (1980); S. Rep. No. 615, 96th Cong. 2d Sess. (1981).

[21] False Claims Amendments Act of 1986, Pub. L. No. 99–562, 100 Stat. 3153, codified as amended at 31 U.S.C. §§3729–3733 (1994); 22 Weekly Comp. Pres. Doc. 1499 (Nov. 3, 1986).

further provided the Government, upon a showing of "good cause," the option of intervening later in a case that it had initially declined to join. They provided that a *qui tam* relator could fully participate in cases in which the Government intervened, but authorized courts to restrict the role of relators, under specified circumstances. The amendments eliminated purely discretionary awards to relators, and based the relator's share on his or her contributions to the case, such that, in most cases, relators would be guaranteed at least a fifteen percent share of the Government's recovery.

The 1986 amendments also replaced the government-knowledge bar with a "public disclosure" bar, barring *qui tam* actions that were based on allegations or transactions in a Government proceeding or investigation, or from the news media—but not where the relator was an original source of the information.[22] The amendments created a new right of action for any employee who was retaliated against for engaging in lawful conduct in furtherance of False Claims Act proceedings. Employees who suffered retaliation would be entitled to all relief necessary to make them whole, including double back pay and attorneys' fees. The amendments authorized the award of attorneys' fees to a defendant prevailing in a False Claims Act suit that "the court finds . . . was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[23] Finally, the amendments authorized the Department of Justice to use civil investigative demands as an investigative tool to obtain documents and testimony.

COURT DECISIONS SINCE 1986 HAVE DIMINISHED THE EFFECTIVENESS OF THE FALSE CLAIMS ACT

Unfortunately, since the 1986 amendments were enacted, several court decisions have limited the reach of the False Claims Act, jeopardizing billions in Federal funds. For example, in 2005, the D.C. Circuit ruled that the False Claims Act does not reach false claims that are (i) presented to Government grantees or contractors, and (ii) paid with Government grant or contract funds.[24] The Court indicated that Congress's intent to include those claims under the law was unclear. Several other courts have held similarly, which has lead to widespread confusion regarding the scope of the law.[25]

More recently, in 2008, the Supreme Court held that plaintiffs must prove that the defendant intended for its false statements to cause the Federal Government itself to rely on the false statements

---

[22] In order to address the Department's concern about politically-motivated suits, Congress retained the prior broader ban on information in the possession of the Government for suits against top Government officials. 31 U.S.C. § 3730(e)(2)(A).

[23] 31 U.S.C. § 3730(d)(4).

[24] United States ex rel. Totten v. Bombardier Corp., 380 F. 3d 488 (D.C. Cir. 2005) (where a former Amtrak employee who filed suit against two Amtrak contractors alleged that the contractors violated the False Claims Act by supplying Amtrak with non-compliant goods).

[25] E.g., United States ex rel. Atkins v. McInteer, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), aff'd on other grounds, 470 F.3d 1350 (11th Cir. 2006); United States ex rel. Rutz v. Village of River Forest, 2007 LEXIS 80506 (N.D. Ill. Oct. 25, 2007); United States ex rel. Arnold v. CMC Engineering, 2007 WL 442237 (W.D. Pa. Feb. 7, 2007); United States ex rel. Rafizadeh v. Continental Common, Inc., 2006 WL 980676 (E.D. La. April 10, 2006); United States v. City of Houston, 2006 WL 2382327 (S.D. Tex. Aug. 16, 2006).

as a condition for payment.[26] With the Federal Government increasingly relying on private entities to disburse Federal funds, this situation would presumably become increasingly rare.

In 2006, another Federal court ruled that the False Claims Act does not cover false claims for funds that are administered by, but not owned by, the Government.[27] Even though false claims made against Government-administered funds harm Government interests and frustrate Government programs and purposes, the Act was read not to cover those claims—removing protection of funds intended for the Iraq War, for example. Similarly, although the Act prohibits conspiring to defraud the Government, several courts have read the conspiracy provision narrowly, applying it to some violations of the Act, but not others.[28]

In 1998, the Tenth Circuit decided a case involving a provision of the False Claims Act that imposes liability upon those who wrongfully possess more Government money or property than the amount for which they have a certificate or receipt.[29] In its decision, the court focused on the technical element of whether the defendant had a receipt or certificate for the property, not on whether the defendant actually wrongfully possessed or converted the property. As a result, a seemingly meritorious case was dismissed.

Similarly, several cases have greatly limited the "reverse false claims" provision of the Act, which imposes liability on those who make or use false records or statements to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.[30] Indeed, the provision has been read so narrowly that the Government is presently able to prosecute only those rare fraudfeasors who submit reports concealing their wrongful retention of Government funds. Without adequate prosecutorial tools, the "finders, keepers" mentality continues to infect Government contracting.

When the 1986 amendments were enacted, Congress expressly stated that the public disclosure bar was intended to bar only truly parasitic *qui tam* lawsuits; the provision was not intended to bar suits solely because the Government already knew of the fraud or could have learned of the fraud from information in the public domain, such as from a media report.[31] Congress drafted the public disclosure bar to provide a balance between "encouraging people to come forward with information and preventing parasitic lawsuits."[32] Yet, despite this clear congressional intent and Department of Justice recommendations, courts have used the public dis-

---

[26] Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008). For an analysis of the case, see Jennifer Staman, The False Claims Act, the Allison Engine Decision, and Health Care Fraud Enforcement, CRS Report for Congress RS22982 (Apr. 16, 2009).

[27] United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 636–641 (E.D. Va. 2006) (holding that while the False Claims Act protects funds "presented to" the Government, a $10 million verdict for fraud against a defense contractor in Iraq was invalid on the ground that the money lost was not taxpayer money, but rather Iraqi money under the control of the United States, and thus not covered by the False Claims Act).

[28] See, e.g., United States ex rel. Huangyan Imp. & Exp. Corp. v. Nature's Farm Prod., Inc., 370 F.Supp.2d 993 (N.D. Cal. 2005) (holding that section 3729(a)(3) does not extend to conspiracies to violate section 3729(a)(7)).

[29] United States ex rel. Aakhus v. Dyncorp, Inc., 136 F.3d 676 (10th Cir. 1998)

[30] E.g., United States ex rel. Prawer & Co. v. Verrill & Dana, 946 F. Supp. 87 (D. Me. 1996); Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999).

[31] 132 Cong. Rec. H9382–03 (daily edition Oct. 7, 1986).

[32] False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov't Rel. of the H. Comm. on the Judiciary, 101st Cong., 2d Sess. 3, (1990) (statement of Sen. Grassley).

closure bar to dismiss relators who provided important information in cases still being pursued by the Government.

For example, in 2007 the Supreme Court upheld the granting of a defendant's motion to dismiss a relator from a lawsuit after judgment against the defendant was entered, and despite strong objections from the Department of Justice who had filed a brief with the Court in support of the relator.[33] Many other courts have misapplied the public disclosure bar, resulting in decisions that Congress never intended.[34] The confusing patchwork of public disclosure case law has not only frustrated meritorious suits; it has discouraged relators from even filing *qui tam* suits, removing a critical source of assistance to Government investigations.

Since the 1986 amendments, courts have also limited the scope of the False Claims Act's anti-retaliation provisions. For instance, several courts have read new limits into the Act by holding that the protections of the Act's anti-retaliation provisions apply only to "employees," and not to independent contractors, subcontractors, or agents.[35]

A 2005 Supreme Court decision has also complicated statute of limitations questions even though the 1986 amendments extended the False Claims Act's statute of limitations. In interpreting the False Claims Act, the Supreme Court held that the law's statute of limitations did not apply to retaliation claims brought under the False Claims Act; rather, relators must conform their claims to the most similar type of action available under State law.[36] Because many State false claims statutes of limitations are short, the Court's decision created a significant obstacle to recovery for legitimate retaliation claims. Consequently, many whistleblowers who encounter retaliatory tactics from their employers are now forced to file their false claims actions within a narrow window in order to obtain relief, or be limited to less attractive legal avenues for relief.

Finally, many courts have overly strictly applied Rule 9(b) of the Federal Rules of Civil Procedure to False Claims Act suits. Rule 9(b) requires claims to be pled with particularity, to ensure that defendants are given proper notice of any claims that are being lev-

---

[33] Rockwell Int'l Corp. v. U.S., 127 S. Ct. 1397 (2007).

[34] E.g., United States ex rel. Bly-Magee v. Premo, 470 F.3d 914 (9th Cir. 2006), cert. denied, 128 S.Ct. 1119 (2008); United States ex rel. Fowler v. Caremark RX, LLC, 496 F.3d 730, 736 (7th Cir. 2007), cert denied, 128 S.Ct. 1246 (2008); United States ex rel. Gear v. Emergency Med. Assocs. of Illinois, Inc., 436 F.3d 726 (7th Cir. 2006); United States ex rel. Paranich v. Sorgnard, 396 F.3d 326 (3d Cir. 2005); United States ex rel. Mathews v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999); United States ex rel. Mistick PBT v. Hous. Auth. of City of Pittsburgh, 186 F.3d 376 (3d Cir. 1999); United States ex rel. McKenzie v. BellSouth Telecomm., Inc., 123 F.3d 935 (6th Cir. 1997); United States ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992); United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3d Cir. 1991); United States ex rel. Maxwell v. Kerr McGee Oil & Gas Corp., 486 F. Supp. 2d 1217 (D. Colo. 2007); United States ex rel. Montgomery v. St. Edwards Mercy Med. Ctr., 2007 U.S. Dist. LEXIS 73376 (E.D. Ark. Sep. 28, 2007).

[35] E.g., United States, ex rel., Watson v. Connecticut Gen. Life Ins., 2004 U.S. App. LEXIS 1736 (3d Cir. Jan. 16, 2004) (independent contractor held not protected); Vessell v. DPS Assocs. of Charleston, Inc., 148 F.3d 407 (4th Cir. 1998) (landscaper of real estate agency deemed not protected); cf. United States, ex rel., Conner v. Salina Reg'l Health Ctr., 459 F. Supp. 2d 1981 (D. Kan. 2006) (concluding that doctor adequately alleged that he was an "employee" of the hospital even though the hospital did not pay him a salary).

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

eled against them so they can formulate a vigorous defense.[37] In False Claims Act suits, however, many courts have required a degree of specificity that is not only beyond what is necessary to give defendants notice of the charges against them but goes far beyond the information readily available at the pleading stage to many *qui tam* relators with meritorious allegations.

A relator may have knowledge of the method of fraud employed, for example, but not be in possession of detailed records documenting precisely how the fraud was executed. Courts have nevertheless ruled against relators who could not provide the false invoices or phoney billing records, even though they are not generally available to anyone outside a company's billing department—often without even providing an opportunity for discovery.[38]

HEARINGS

The Committee held a hearing on proposals to fight fraud and to protect taxpayers on April 1, 2009. The Committee heard testimony on H.R. 1788, among several other bills. Testimony on H.R. 1788 was received from two witnesses—Joseph E. B. White, President and CEO of Taxpayers Against Fraud; and Marcia Madsen, an attorney with Mayer Brown LLP, who appeared on behalf of the United States Chamber of Commerce and the United States Chamber Institute for Legal Reform.

During the 110th Congress, the Committee's Subcommittee on Commercial and Administrative Law and the Subcommittee on Courts, the Internet, and Intellectual Property held a joint hearing on substantially identical legislation, H.R. 4854, the "False Claims Act Correction Act of 2007." Testimony was received from Albert Campbell, a small business owner from Florida; Shelley Slade, an attorney with Vogel, Slade, & Goldstein, LLP; Peter B. Hutt, II, an attorney with Akin Gump Strauss Hauer & Feld, LLP, who appeared on behalf of the United States Chamber of Commerce and the United States Chamber Institute for Legal Reform; and James B. Helmer, Jr., President of the law firm Helmer, Martins, Rice & Popham Co., L.P.A.

COMMITTEE CONSIDERATION

On April 28, 2009, the Committee met in open session and ordered the bill H.R. 1788 favorably reported without amendment, by a rollcall vote of 20 to 6, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 1788.

---

[37] Rule 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be state with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

[38] E.g., United States ex rel. Bledsoe v. Community Health Sys., Inc., 501 F.3d 493 (6th Cir. 2007); United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 559 (8th Cir. 2006); United States ex rel. Sikkenga v. Bluecross, 472 F.3d 702 (10th Cir. 2006) (10th Cir., Dec. 5, 2006); Sanderson v. HCA, 447 F.3d 873, 877 (6th Cir. 2006); United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004); In re Genesis Health Ventures, Inc., 112 Fed. Appx. 140, 144 (3rd Cir. 2004); United States ex rel. Clausen v. Lab Corp. of America, 290 F.3d 1301 (11th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).

1. An amendment offered by Mr. Issa to explicitly require the court to consider, in determining whether to reduce the share of recovered proceeds that a relator receives, the value to the relator of avoiding prosecution. Defeated 18 to 10.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Gutierrez			
Mr. Sherman			
Ms. Baldwin			
Mr. Gonzalez		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Ms. Wasserman Schultz			
Mr. Maffei		X	
[Vacant]			
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.		X	
Mr. Coble	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Lungren		X	
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz	X		
Mr. Rooney		X	
Mr. Harper	X		
Total	10	18	

2. An amendment offered by Mr. Issa to bar an employee from bringing a *qui tam* suit against his or her employer without first notifying the employer, and to bar anyone from bringing a qui tam suit against any entity other than his or her employer without first notifying the applicable agency's Inspector General, and unless the employer or Inspector General fails to take action within 90 days. Defeated 18 to 8.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Gutierrez		X	
Mr. Sherman			
Ms. Baldwin			
Mr. Gonzalez		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Ms. Wasserman Schultz			
Mr. Maffei		X	
[Vacant]			
Mr. Smith, Ranking Member			
Mr. Sensenbrenner, Jr.		X	
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Issa	X		
Mr. Forbes			
Mr. King			
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz	X		
Mr. Rooney			
Mr. Harper	X		
Total	8	18	

3. The motion to report H.R. 1788 favorably, without amendment, was approved 20 to 6.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Gutierrez	X		
Mr. Sherman			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. Baldwin			
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz			
Mr. Maffei	X		
[Vacant]			
Mr. Smith, Ranking Member			
Mr. Sensenbrenner, Jr.	X		
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren	X		
Mr. Issa		X	
Mr. Forbes			
Mr. King			
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Rooney			
Mr. Harper		X	
Total	20	6	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1788, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 5, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1788, the False Claims Act Correction Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 1788—False Claims Act Correction Act of 2009.

H.R. 1788 would amend certain provisions of the False Claims Act (FCA), which generally provides that a person who knowingly submits a false or fraudulent claim for overpayments to the U.S. Government may be subject to a civil action in a federal court. The FCA also allows for private individuals with knowledge of past or present fraud committed against the Government to file qui tam claims against federal contractors. In qui tam claims, such individuals (known as relators or whistleblowers) receive a share of any amounts recovered as a result of such claims. The amendments in the bill would take effect on the date of enactment and most would apply to cases pending or filed on or after such date. Among other changes, the bill would:

- Stipulate that individuals who present false claims to contractors, grantees, and others can be held liable under the FCA (under current law, that liability exists only for false claims presented to Government employees);
- Clarify that only actions where all the essential parts of a case are derived from public disclosure can be dismissed; and
- Set a uniform statute of limitations of eight years for any claim brought under the FCA.

Each year, the Department of Justice's (DOJ's) docket includes several hundred cases filed under the FCA. In 2008, the Government recovered more than $1.3 billion from settlements and judgments in such cases. Under H.R. 1788, the Government would be able to initiate additional FCA cases that it otherwise would not be able to pursue. Accordingly, additional litigation activities could require more resources. Funding needed for such activities would depend on the complexity and number of cases DOJ chooses to pursue and would be subject to the availability of appropriated funds.

More prosecutions also would result in the collection of civil fines, which are recorded in the budget as revenues, and additional recoveries, which are recorded as offsetting receipts and collections to the Government. CBO cannot estimate the magnitude of such amounts because the outcome of any new FCA cases pursued as a result of this legislation is uncertain. Furthermore, the outcome of cases that might be prosecuted under other authorities if H.R. 1788 were not enacted is unknown.

H.R. 1788 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Leigh Angres. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1788 amends title 31, United States Code, to correct the effect of unduly restrictive judicial opinions by clarifying that Congress intends the law to reach all types of fraud concerning Federal funds, regardless of the form of the transaction, and to restore the intended incentives for whistleblowers to act when they discover fraud against the United States Government.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1788 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "False Claims Act Correction Act of 2009."

Sec. 2. Liability for False Claims. Section 2 clarifies liability under the False Claims Act. It clarifies that liability attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government, without regard to whether the wrongdoer deals directly with the Government, with an agent acting on the Government's behalf, or with a third party contractor, grantee, or other recipient of such money or property. Section 2 amends the False Claims Act to apply to all instances where there is unlawful conversion of Government money to unauthorized uses or the knowing retention of Government overpayments.

Section 2 specifies that conspiracy under the False Claims Act arises whenever a person conspires to violate any of the provisions of 31 U.S.C. § 3729. Section 2 defines the term "government money or property" broadly, and redefines the term "claim" to cover all requests or demands for Government money or property, without regard to whether the United States holds title to the money or property or is merely managing it. Finally, section 2 also provides that all elements necessary to state a claim under the False Claims Act are set forth in § 3729, and that no additional elements should be implied or required.

Sec. 3. Civil Actions for False Claims. Subsection 3(a)(1) streamlines the procedures under which a court may dismiss a *qui tam*

action on the plaintiff's motion. Subsection 3(a)(2) provides that—absent a showing of extraordinary need—the written disclosure of any material evidence and information and any other attorney work product that the plaintiff provides to the Department of Justice in anticipation of the Government joining the case is not subject to discovery. Subsection 3(a)(3) crafts a uniform timetable for relators to decide to either dismiss the case or move forward alone where the Government declines to take up a case. Subsection 3(a)(4) provides that the joinder of *qui tam* plaintiffs in similar False Claims Act actions is permissible, and it bars an individual from bringing a case that is based on the facts underlying a similar pending action.

Subsection 3(c)(1) requires that awards withheld from successful *qui tam* plaintiffs by the Government would accrue interest at the Internal Revenue Service underpayment rate, beginning 30 days after the Government obtains an award until it is fully paid to the plaintiff. Subsection 3(c)(2) allows successful relators to recover reasonable incurred expenses from defendants, and subsection 3(c)(3) gives courts wide discretion to reduce a relator's award in those instances where the relator's case is derived primarily from public disclosures.

Subsection 3(d) clarifies that the public disclosure bar precludes only actions where all the essential elements of a relator's case are derived from a public disclosure that has been made on the public record or broadly disseminated to the general public, and provides that only the Government, and not a defendant, may move to dismiss an action based on the public disclosure bar. This clarifying language should return the meaning of the public disclosure bar to what Congress intended in the 1986 amendments, while still preventing truly parasitic suits.[39]

Subsection 3(e) would broaden protections for whistleblowers by expanding the False Claims Act's anti-retaliation provision to cover any retaliation against those who planned to file an action (but did not), people related to or associated with relators, and contract workers and others who are not technically "employees."

Sec. 4. False Claims Procedures. Subsection 4(a) sets a uniform statute of limitations of 8 years for any claim brought under the False Claims Act, and clarifies that in cases where the Government intervenes, its amended complaint relates back to the date the initial action was filed. The uniform standard addresses the divergence among the Federal circuits in interpreting the statute of limitations, and takes into consideration concerns expressed by potential defendants regarding a 10-year statute of limitations period. Subsection 4(b) makes the standard of proof required under the statute the same whether an action is pursued by the Government or by a relator.

Subsection 4(c) specifies that a plaintiff need not identify specific claims on alleged misconduct so long as the facts alleged provide a reasonable indication that a False Claims Act violation occurred and that the allegations proffered by the relator provide adequate notice to the Government and the defendant. Subsection 4(c) will not encourage baseless suits, but instead still place defendants on adequate notice of the claims against them. Subsection 4(c) voids

[39] See fn 32.

any contract, private agreement, or private term or condition of employment intended to limit or circumvent the ability of any individual to take part in a False Claims Act action. Subsection 4(c) will ensure that *qui tam* relators will not be prevented from bringing actions under the False Claims Act.

Sec. 5. False Claims Jurisdiction. Section 5 adds a new subsection to § 3732 to clarify that, with respect to any State or local government that is named as a co-plaintiff with the United States in an action, a seal imposed by a Federal court does not preclude the Government or a *qui tam* relator from complying with State requirements to serve a complaint, other pleadings, or the written disclosure of all material evidence and information possessed by the person bringing the action on the State or local authorities.

Sec. 6. Civil Investigative Demands. Section 6 amends § 3733 to permit the Attorney General to delegate his authority to issue a civil investigative demand to a designee and allows the Department of Justice to share any information obtained through a civil investigative demand with a relator in any case where the Attorney General or a designee deems it necessary to a False Claims Act investigation.

Sec. 7. Effective Date. This section provides that the amendments made by this bill take effect on the date of the bill's enactment, and that they apply to both pending and future cases, with the exception of the provisions dealing with overpayments in Section 2, retaliation against associates in Section 3(e), and the statute of limitations, which will apply only to cases filed on or after the date of enactment.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 31, UNITED STATES CODE

* * * * * * *

SUBTITLE III—FINANCIAL MANAGEMENT

* * * * * * *

CHAPTER 37—CLAIMS

* * * * * * *

SUBCHAPTER III—CLAIMS AGAINST THE UNITED STATES GOVERNMENT

* * * * * * *

[§ 3729. False claims

[(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—

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.

[(d) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

[(e) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.]

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Any person who—

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

(B) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim for Government money or property paid or approved,

(C) has possession, custody, or control of Government money or property and either—

(i) fails to comply with a statutory or contractual obligation to disclose an overpayment about which the person is on actual notice, or

(ii) intending to—

(I) defraud the Government, or

(II) knowingly convert the money or property, permanently or temporarily, to an unauthorized use,

fails to deliver or return, or fails to cause the return or delivery of, the money or property, or delivers, returns, or causes to be delivered or returned less money or property than the amount due or owed,

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

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

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

(G) conspires to commit any violation set forth in any of subparagraphs (A) through (F),

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages that the Government or its administrative beneficiary sustains because of the act of that person, subject to paragraphs (2) and (3).

(2) LESSER PENALTY IF DEFENDANT COOPERATES WITH INVESTIGATION.—In an action brought for a violation under paragraph (1), the court may assess not less than 2 times the amount of damages that the Government or its administrative

beneficiary sustains because of the act of the person committing the violation if the court finds that—

(A) such person provided to those officials of the United States who are responsible for investigating false claims violations, all information known to the person about the violation within 30 days after the date on which the person first obtained the information;

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

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

(3) ASSESSMENT OF COSTS.—A person violating paragraph (1) shall, in addition to a penalty or damages assessed under paragraph (1) or (2), be liable to the United States Government for the costs of a civil action brought to recover such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "known", "knowing", and "knowingly" mean that a person, with respect to information—

(A) has actual knowledge of the information,

(B) acts in deliberate ignorance of the truth or falsity of the information, or

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

and no proof of specific intent to defraud is required;

(2) the term "Government money or property" means—

(A) money or property belonging to the United States Government;

(B) money or property that—

(i) the United States Government provides or has provided to a contractor, grantee, agent, or other recipient, or for which the United States Government will reimburse a contractor, grantee, agent, or other recipient; and

(ii) is to be spent or used on the Government's behalf or to advance a Government program; and

(C) money or property that the United States holds in trust or administers for any administrative beneficiary;

(3) the term "claim" includes any request or demand, whether under a contract or otherwise, for Government money or property; and

(4) the term "administrative beneficiary" means any entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, serves as custodian or trustee of money or property owned by that entity.

(c) STATUTORY CAUSE OF ACTION.—Liability under this section is a statutory cause of action all elements of which are set forth in this section. No proof of any additional element of common law fraud or other cause of action is implied or required for liability to exist for a violation of subsection (a).

(d) EXEMPTION FROM DISCLOSURE.—Any information that a person provides pursuant to subparagraphs (A) through (C) of subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§ 3730. Civil actions for false claims

(a) * * *

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. **[**The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.**]** *The action may be dismissed only with the consent of the court and the Attorney General.*

(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. *In the absence of a showing of extraordinary need, the written disclosure of any material evidence and information, and any other attorney work product, that the person bringing the action provides to the Government shall not be subject to discovery.* 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.

* * * * * * *

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

(A) * * *

[(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.**]**

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action, and, within 45 days after the Government provides such notice, shall either—

(i) move to dismiss the action without prejudice; or

(ii) notify the court of the person's intention to proceed with the action and move the court to unseal the complaint, and any amendments thereto, so as to permit service on the defendant and litigation of the action in a public forum.

A person who elects to proceed with the action under subparagraph (B)(ii) shall serve the complaint within 120 days after the person's complaint is unsealed under such subparagraph.

[*(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.****]***

(5) When a person brings an action under this subsection, no person other than the Government may join or intervene in the action, except with the consent of the person who brought the action. In addition, when a person brings an action that is pled in accordance

with this subsection and section 3731(e), no other person may bring a separate action under this subsection based on the facts underlying a cause of action in the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) * * *

* * * * * * *

(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.**]** *An alternate remedy includes—*

(A) anything of value received by the Government from the defendant, whether funds, credits, or in-kind goods or services, in exchange for an agreement by the Government either to release claims brought in, or to decline to intervene in or investigate, the action initiated under subsection (b); and

(B) anything of value received by the Government based on the claims alleged by the person initiating the action, if that person subsequently prevails on the claims.

If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section, except that the person initiating the action may not obtain an award calculated on more than the total amount of damages, plus any fines or penalties, that could be recovered by the United States under section 3729(a). 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 *an award of* 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 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 payment to a person under this paragraph or under paragraph (2) or (3) shall be made from the proceeds, and shall accrue interest, at*

the underpayment rate under section 6621 of the Internal Revenue Code of 1986, beginning 30 days after the date the proceeds are paid to the United States, and continuing until payment is made to the person by the United States. Any such person shall also receive an amount for reasonable expenses which the court finds to have been [necessarily] incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

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

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

(3)(A) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who either—

(i) planned and initiated the violation of section 3729 upon which the action was brought, or

(ii) derived his or her knowledge of the action primarily from specific information relating to allegations or transactions (other than information provided by the person bringing the action) that the Government publicly disclosed, within the meaning of subsection (e)(4)(A), or that it disclosed privately to the person bringing the action in the course of its investigation into potential violations of section 3729,

then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. The court shall direct the defendant to pay any such person an amount for reasonable expenses that the court finds to have been incurred, plus reasonable attorneys' fees and costs.

(B) If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall

not prejudice the right of the United States to continue the action, represented by the Department of Justice.

* * * * * * *

(e) CERTAIN ACTIONS BARRED.—(1) * * *

* * * * * * *

[(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.]

(4)(A) Upon timely motion of the Attorney General of the United States, a court shall dismiss an action or claim brought by a person under subsection (b) if the allegations relating to all essential elements of liability of the action or claim are based exclusively on the public disclosure of allegations or transactions in a Federal criminal, civil, or administrative hearing, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit, or investigation, or from the news media.

(B) For purposes of this paragraph, a "public disclosure" includes only disclosures that are made on the public record or have otherwise been disseminated broadly to the general public. An action or claim is "based on" a public disclosure only if the person bringing the action derived the person's knowledge of all essential elements of liability of the action or claim alleged in the complaint from the public disclosure. The person bringing the action does not create a public disclosure by obtaining information from a request for information made under section 552 of title 5 or from exchanges of information with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed under this paragraph.

* * * * * * *

[(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.]

(h) RELIEF FROM RETALIATORY ACTION.—Any person who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of employment, or is materially hindered in obtaining new employment or other business opportunities, by any other person because of lawful acts done by the person discriminated against or others associated with that person—

(1) in furtherance of an actual or potential action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, or

(2) in furtherance of other efforts to stop one or more violations of section 3729,

shall be entitled to all relief, from the person who has engaged in the discrimination, that is necessary to make the person whole. Such relief shall include reinstatement with the same seniority status such person would have had but for the discrimination, 2 times the amount of back pay or business loss, interest on the back pay or business loss, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(i) DAMAGES COLLECTED FOR FINANCIAL LOSSES SUFFERED BY ADMINISTRATIVE BENEFICIARIES.—

(1) IN GENERAL.—After paying any awards due one or more persons who brought an action under subsection (b), the Government shall pay from the proceeds of the action to any administrative beneficiary, as defined in section 3729(b), all amounts that the Government has collected in the action for financial losses suffered by such administrative beneficiary. Any remaining proceeds collected by the Government shall be treated in the same manner as proceeds collected by the Government for direct losses the Government suffers because of violations of section 3729.

(2) ALTERNATIVE REMEDIES.—Nothing in section 3729 or this section precludes administrative beneficiaries from pursuing any alternate remedies available to them for losses or other harm suffered by them that are not pursued or recovered in an action under this section, except that if proceedings for such alternate remedies are initiated after a person has initiated an action under subsection (b), such person shall be entitled to have such alternative remedies considered in determining any award in the action under subsection (b) to the same extent that such person would be entitled under subsection (c)(5) with respect to any alternate remedy pursued by the Government.

§ 3731. False claims procedure

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

[(b) A civil action under section 3730 may not be brought—

[(1) more than 6 years after the date on which the violation of section 3729 is committed, or

[(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.]

(b) STATUTE OF LIMITATIONS; INTERVENTION BY THE GOVERNMENT.—

(1) STATUTE OF LIMITATIONS.—A civil action under section 3730 (a), (b), or (h) may not be brought more than 8 years after the date on which the violation of section 3729 or 3730(h) (as the case may be) is committed.

(2) INTERVENTION.—If the Government elects to intervene and proceed with an action brought under section 3730(b), the Government may file its own complaint, or amend the complaint of the person who brought the action under section 3730(b), to clarify or add detail to the claims in which it is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For purposes of paragraph (1), any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action to the extent that the Government's claim arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the person's prior complaint.

[(c) In] *(c) STANDARD OF PROOF.—In* any action brought under section 3730, the [United States] *plaintiff* shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

[(d) Notwithstanding] *(d) ESTOPPEL.—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.

(e) NOTICE OF CLAIMS.—In pleading an action brought under section 3730(b), a person shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made.

(f) VOID CONTRACT, AGREEMENTS, AND CONDITIONS OF EMPLOYMENT.—

(1) IN GENERAL.—Any contract, private agreement, or private term or condition of employment that has the purpose or effect of limiting or circumventing the rights of a person to take otherwise lawful steps to initiate, prosecute, or support an action under section 3730, or to limit or circumvent the rights or remedies provided to persons bringing actions under section 3730(b)

and other cooperating persons under section 3729 shall be void to the full extent of such purpose or effect.

(2) EXCEPTION.—Paragraph (1) shall not preclude a contract or private agreement that is entered into—

(A) with the United States and a person bringing an action under section 3730(b) who would be affected by such contract or agreement specifically to settle claims of the United States and the person under section 3730; or

(B) specifically to settle any discrimination claim under section 3730(h) of a person affected by such contract or agreement.

§ 3732. False claims jurisdiction

(a) * * *

* * * * * * *

(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments.

§ 3733. Civil investigative demands

(a) IN GENERAL.—

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

(A) * * *

* * * * * * *

(D) to furnish any combination of such material, answers, or testimony.

[The Attorney General may not delegate the authority to issue civil investigative demands under this subsection.**]** Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General**[**, the Deputy Attorney General, or an Assistant Attorney General**]** shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. *Any information obtained by the Attorney General under this section may be shared with any a person bringing an action under section 3730(b) if the Attorney General determines that it is necessary as part of any false claims law investigation.*

(2) CONTENTS AND DEADLINES.—
(A) * * *

* * * * * * *

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General [or an Assistant Attorney General designated by the Attorney General] determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. [The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.]

* * * * * * *

(h) ORAL EXAMINATIONS.—
(1) * * *

* * * * * * *

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General[, the Deputy Attorney General, or an Assistant Attorney General] may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

* * * * * * *

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—
(1) * * *

* * * * * * *

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

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN FALSE CLAIMS ACTIONS AND OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to handle any false claims law investigation or proceeding, or any other administrative, civil, or criminal investigation, case, or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such investigation, case, or proceeding as such attorney determines to be required. Upon the completion of any such investigation, case, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered that have not passed into the control of a court, grand jury, or agency through introduction into the record of such case or proceeding.

* * * * * * *

(l) DEFINITIONS.—For purposes of this section—

(1) * * *

* * * * * * *

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); **[**and**]**

(7) the term "product of discovery" includes—

(A) * * *

* * * * * * *

(C) any index or other manner of access to any item listed in subparagraph (A)**[**.**]***; and*

(8) the term "official use" means all lawful, reasonable uses in furtherance of an investigation, case, or proceeding, such as disclosures in connection with interviews of fact witnesses, settlement discussions, coordination of an investigation with a State Medicaid Fraud Control Unit or other government personnel, consultation with experts, and use in court pleadings and hearings.

(m) DELEGATION.—The Attorney General may delegate any authority that the Attorney General has under this section.

* * * * * * *

DISSENTING VIEWS

INTRODUCTION

Since the False Claims Act was last amended in 1986, it has become one of the Government's primary tools for recovering taxpayer dollars lost to waste, fraud, and abuse. As the Federal Government increases its spending through the stimulus bill and increased annual budgets, the importance of the FCA will increase as well. Congress thus has the responsibility to ensure that the FCA is functioning properly.

Some of what is in H.R. 1788 will work toward that end. In particular, section 2 of the bill, which strengthens the Act's liability provisions, will help the Government to root out fraud wherever the Federal Government commits taxpayer dollars. In the roughly

22 years since the 1986 amendments, cases have arisen in which liability under the FCA has been held not to exist even though false claims may have ultimately resulted in a loss to the Federal Government.

Although some of the provisions in this bill may be beneficial, other provisions are highly problematic. While section 2 may favorably address some issues that have arisen since the 1986 amendments related to liability, the remaining sections of the bill are generally aimed at helping private *qui tam* plaintiffs and the *qui tam* plaintiffs' bar without, in some instances, obvious benefits to the United States and the taxpayers.

Certainly, suits brought by whistleblowers have been invaluable to the Federal Government's efforts under the FCA. Whistleblower assistance has allowed the Government to uncover more fraud and pursue a larger number of cases than it otherwise would have been able to. That said, the *qui tam* provisions of this bill may lead to a greater number of lawsuits by *qui tam* plaintiffs with questionable motives who advance baseless claims, inadvertently make bad law, and distract limited federal resources from meritorious claims to frivolous ones. The amendments made by this bill will only serve to displace the reasoned regime that governs relationships between the Federal Government and recipients of federal funds.

What is more, it is entirely unclear that an increased number of *qui tam* cases will lead to increased recoveries under the FCA. The Federal Government investigates every *qui tam* filing and has consistently declined to intervene in about 80% of the cases filed by private plaintiffs. This selectivity is indicative of genuine discernment. Of the $21.5 billion in FCA recoveries since 1986, only three percent was recovered in *qui tam* cases in which the Department of Justice declined to intervene.

Put differently, it is suspect that the *qui tam* provisions in this bill will increase the Federal Government's ability to recover taxpayer dollars. Rather, it is possible that these provisions will encourage private plaintiffs to file unfounded and parasitic lawsuits that benefit no one but the plaintiffs and their attorneys.

By encouraging unfounded and parasitic *qui tam* suits, this bill will actually make it harder for the Government to recover funds under the FCA. These additional suits will add to the Justice Department's burden and detract from its ability to focus on meaningful cases. Simply put, the *qui tam* provisions in this bill may, in fact, be counterproductive.

The False Claims Act, like so many other laws, is about striking the proper balance between competing interests. The interests here are between allowing the United States to recover as much fraudulently obtained money as possible and ensuring that innocent recipients of federal funds are not hauled into court to defend lawsuits that are based on an overly broad law. We believe the FCA currently strikes that balance well. Although there may be room to improve the FCA, we must be mindful in seeking to make improvements to continue to strike the proper balance. Unfortunately, the changes proposed in H.R. 1788, if enacted, might well throw that balance off.

The costs of Government programs and Government contracts are already inflated by complex rules that are unknown in private business transactions. This legislation will likely generate addi-

tional costs for non-profits, hospitals, universities and businesses of all sizes; it will increase the burdens on the recipients of federal funds, remove safeguards against unfounded lawsuits brought by *qui tam* plaintiffs, and perhaps deter some from bidding on federal contracts, resulting in increased costs to the Government and the taxpayers. Thus, it appears that the benefits that its proponents argue H.R. 1788 may bring are outweighed by the costs that it will impose.

BACKGROUND

The FCA, 31 U.S.C. §§ 3729–3733, is one of the Government's primary tools for combating fraud on federally funded programs. The statute imposes liability on persons who (1) knowingly present false or fraudulent claims to the United States, (2) knowingly make false records or statements to get false or fraudulent claims paid, or (3) conspire to defraud the Government by getting a false or fraudulent claim paid.[1] The statute provides for treble damages plus penalties of $5,000 to $10,000 for each false claim.[2]

In addition to allowing the Government to bring its own lawsuits, the FCA also permits private citizens, known as *qui tam* plaintiffs or "relators," to hire attorneys and file actions asserting violations of the FCA on behalf of the United States. Actions brought by relators are filed under seal, giving the Department of Justice the opportunity to investigate the actions and decide whether to intervene in the lawsuits and take the lead in prosecuting them. If the Government declines to intervene, relators and their attorneys can proceed with their actions. The incentive for relators and their attorneys is financial—if their actions are successful, the relators receive up to 30 percent of the proceeds awarded, and the remainder goes to the U.S. Treasury.[3]

The FCA was enacted in 1863 to combat "the massive frauds perpetuated by large contractors during the Civil War."[4] It has since been amended several times, most recently in 1986. The 1986 amendments were intended in part "to encourage more private enforcement suits."[5] Thus, since the 1986 amendments, the FCA has sought to balance the twin goals of encouraging prompt whistleblowing while discouraging claims that do not help the Government protect the public fisc. So far these goals have been met: total recoveries under the FCA have exceeded $21.5 billion, $13.6 billion of which has come from suits initiated by *qui tam* plaintiffs.[6]

DISCUSSION

The tremendous success the FCA has had over the past 22 years calls into question the need for reform—especially reform as sweeping as that encompassed in H.R. 1788. As stated above, certain parts of this legislation, especially section 2, will be beneficial to the Federal Government's fight against fraud and wasteful spend-

---

[1] 131 U.S.C. §§ 3729(a)(1)N(3).
[2] 31 U.S.C. § 3729(a).
[3] *See* 31 U.S.C. § 3730.
[4] *United States v. Bornstein*, 423 U.S. 303, 309 (1976).
[5] S. Rep. No. 99N345, at 23N24 (1986).
[6] Of the $13.6 billion that has been recovered in lawsuits initiated by *qui tam* plaintiffs, only $432 million has come from cases in which the Government declined to intervene. Fraud Statistics 1986N2008, *available at* http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm.

ing in Government contracts and programs, and we support these proposals. On the other hand, much of what is in this legislation will unnecessarily impose significant burdens, for the benefit of *qui tam* plaintiffs, on entities that received federal funds with few, if any, countervailing benefits. Moreover, the legislation will strengthen the hand of *qui tam* plaintiffs at the expense of the Government and defendants to baseless actions. Therefore, it is our considered view that any benefits this bill will provide to the Federal Government's efforts to combat fraud and waste in Government programs are outweighed by the costs and burdens of this legislation.

A. More Qui Tam *Lawsuits May not Lead to More FCA Recoveries*

Despite supporters' claims that the FCA needs to be amended, there are several reasons to be skeptical of the need for amendment. First and foremost among those reasons is that the FCA has worked well in the 22 years since the 1986 amendments. According to the Department of Justice, "the FCA in its present form has worked well and we have seen no pressing need for major amendments." [7]

According to supporters of this legislation, reform is needed to ensure that relators can bring forth meritorious litigation. The amendments to the FCA contained in H.R. 1788 thus are intended to and certainly will encourage the filing of more cases under the FCA, especially by *qui tam* plaintiffs. It is not altogether clear, however, that more filings will lead to more recoveries.

This result may seem counterintuitive, but we are confident it is correct. We come to this conclusion because, as it stands, the Government investigates every *qui tam* filing and consistently over time has declined to intervene in about 80% of the cases filed by relators. As suggested above, this represents genuine discernment by the Government. More than 97% of the amounts received in settlements and judgments in *qui tam* cases have come in the 20% of the matters in which the Government has intervened. In other words, fewer than *3%* of recoveries have been derived from the 80% of the total investigative pool that the Justice Department has rejected. Indeed, last year (through September 30, 2008), the Government recovered about $1.043 billion in *qui tam* FCA cases; of that total roughly $1.037 billion came from *qui tam* cases in which the Justice Department intervened and only about $5.9 million came from relators litigating declined cases. As two experts on the FCA put it in a recent article, "when DOJ examines the case and decides not to intervene, the chances the relator actually has a meritorious case are very low." [8]

Accordingly, encouraging the filing of more FCA cases by relators and allowing these cases to avoid dismissal under traditional mechanisms, as this legislation would do, is unlikely to confer any sizeable benefit on the Government's fraud fighting activities. Maximizing the filings of *qui tam* lawsuits, no matter how negligible the benefits, might be acceptable in the name of rooting out all fraud against the United States, except for the fact that unfounded and

[7] Letter from Keith B. Nelson, Principal Deputy Attorney General, Office of Legislative Affairs, to John Conyers, Jr. (July 15, 2008) ("Justice Dept. Views Letter").

[8] Marcia G. Madsen & Cameron S. Hamrick, *Proposed FCA Amendments: A Recipe for Government Gridlock (Part II),* Federal Contracts Report (BNA) (April 21, 2009).

parasitic FCA suits impose burdens on the Government, increase the costs of Government programs and contracts, and negatively affect the recipients of federal funds.

B. Government Burden and Cost to Government

As was discussed above, outside of the liability provisions contained in section 2 of this legislation, many of the other provisions are aimed at assisting *qui tam* plaintiffs. But, as is discussed throughout these views, many of these provisions will make it easier for *qui tam* plaintiffs to bring unfounded or parasitic actions. Unfounded FCA actions drain Government resources in at least four ways. First, they place a burden on agencies whose contracts or grants are at issue. Agencies are forced to expend resources—that would otherwise be available for agency programs—on document discovery and production of witnesses for depositions and trial. Thus, increasing the number of unfounded and parasitic FCA cases and making it more difficult for these cases to be dismissed will result in greater burdens on the agencies.

Second, unfounded and parasitic *qui tam* cases take time and resources away from the Department of Justice, which has to review all *qui tam* filings regardless of their merit. One of the primary goals of the *qui tam* provisions is to help the Justice Department by supplementing its resources for recovering money fraudulently taken from the Federal Government. Accordingly, draining resources from the Department to deal with unfounded and parasitic *qui tam* cases runs counter to the purposes of the FCA.

Third, unfounded and parasitic cases needlessly cost defendants money to litigate. The defendants in turn must pass this cost back to the taxpayer the next time they bid on a Government contract, request funding under a Government grant, or provide services that are paid for by a Government program.

Fourth, unfounded and parasitic cases may have the effect of driving out of the market for federal services bidders that could do the work but fear the potential for litigation. This effect is most likely to be considered by small businesses, which are also disproportionately women- and minority-owned businesses.

C. FCA Liability for Temporary Accounting Overpayments Will Burden Non-profits, Hospitals, and Universities

H.R. 1788 will impose liability on recipients of federal funds for inadvertent retention of overpayments of Government funds, even if the recipients did not "knowingly" retain the overpayment. This change in the law will negatively impact non-profits, universities, and hospitals in particular.

According to the Greater New York Hospital Association, "due to the nature of hospital payment systems and the complexity of the Government reimbursement operations, hospitals are constantly identifying and reconciling over- and underpayments in the course of normal business."[9] Recipients of federal grants, such as universities, face similar problems with regard to over- and underpayments: "it is understood that during the term of a federally sponsored project there may at any given time be undercharges and overcharges, and university systems are designed to ensure that

[9] Memorandum from Kenneth E. Raske, President, Greater New York Hospital Association.

any incorrect charges are adjusted, through cost transfers or otherwise, when they are detected."[10] Put simply, non-profits, hospitals, and universities have processes in place to discover and to correct over- and underpayments.

However, H.R. 1788 will allow relators to disrupt these systems with *qui tam* lawsuits based on what amount to temporary overpayments. And, because H.R. 1788 does not have a specific knowledge requirement with regard to its overpayment provision, these entities will be liable under the FCA even if the overpayments were inadvertent rather than the result of a conscious attempt to retain Government funds fraudulently. Hospitals, universities, and non-profits should be subject to the FCA just like any other recipient of federal funds; they should not, though, be subject to liability for temporary overcharges that are subject to correction through a reconciliation process. Moreover, these entities should not face treble damages and civil penalties for conduct that was merely negligent rather than "knowingly" undertaken.

D. Evisceration of the Public Disclosure Bar Will Lead to Parasitic Lawsuits

The FCA bars *qui tam* actions that are "based upon the public disclosure of allegations or transactions . . ., unless . . . the person bringing the action is an original source of the information."[11] Congress designed the public disclosure bar to achieve the "golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own."[12] Thus, the public disclosure bar has ensured that the incentive given to *qui tam* plaintiffs (a share of any recovery) only goes to those plaintiffs that are truly deserving-whistleblowers who bring information regarding fraud to light.

Despite the fact that the public disclosure bar has worked well since the 1986 amendments were adopted, H.R. 1788 would eviscerate the bar. According to the Justice Department, the bill "severely restricts the circumstances where the bar would apply in a way that would reward relators with no first hand knowledge and who do not add information beyond what is in the public domain, as well as relators in a broad range of cases where the Government already is taking action."[13] Furthermore, the Department believes that "[i]f these changes were implemented, a relator could file suit and reduce the taxpayers' recovery even though he or she has not contributed anything new to the Government's case."[14]

The likely effect of the changes the legislation makes to the public disclosure bar will be to kill the bar. While it is true that the Justice Department would still theoretically be able to seek dismissal of parasitic *qui tam* actions, according to testimony before the committee "in practice it does not have the resources or inclination to do so, particularly in light of the far more restrictive lan-

---

[10] Letter from Robert M. Berdahl, President, Association of American Universities, to John Conyers, Jr., Chairman, U.S. House Committee on the Judiciary (July 15, 2008).
[11] 31 U.S.C. § 3730(e)(4)(A).
[12] *United States ex rel. Springfield Terminal Rwy. Co. v. Quinn,* 14 F.3d 645, 649 (D.C. Cir. 1994).
[13] Justice Dept. Views Letter Appendix at 9.
[14] *Id.*

guage in [H.R. 1788]."[15] Accordingly, "[r]elators and their attorneys will have no reason to fear dismissal, and, as the history of the *qui tam* provisions teaches, there will be a flood of cases asserting claims based largely, and sometimes exclusively, on information already known to the government."[16] As the D.C. Circuit has noted, "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers, as exemplified by the notorious plaintiff who copied the information on which his *qui tam* suit was based from the government's own criminal indictment."[17]

Compounding the problem, in addition to eviscerating the bar, the legislation goes a step further. The FCA currently caps a *qui tam* plaintiff's share of any recovery at 10% if the lawsuit is based on certain public disclosures. H.R. 1788, however, will remove this cap, permitting parasitic whistleblowers to recover more than a 10% share even where their case is based on public information.

In short, this legislation will defeat the purpose of the public disclosure bar—defending the U.S. Treasury against parasitic *qui tam* actions brought by whistleblowers with nothing new to offer.

E. Elimination of Pleading Requirements Under Rule 9(b) Will Lead to Unfounded Qui Tam *Lawsuits*

H.R. 1788 exempts *qui tam* plaintiffs—but not the Department of Justice—from the requirement of Rule 9(b) of the Federal Rules of Civil Procedure that all persons asserting fraud actions in federal court must plead the elements of fraud with particularity. There is no basis for holding *qui tam* plaintiffs in FCA actions to a lower pleading standard than every other federal litigant.

Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Rule 9(b) has four purposes:

> First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of. Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.[18]

In place of the Rule 9(b) standard, H.R. 1788 would allow *qui tam* plaintiffs to plead facts that merely demonstrate a "reasonable indication" that a violation of the FCA is "likely to have occurred." The Committee received testimony that eliminating the Rule 9(b) standard for *qui tam* actions will encourage relators "to plead shallow speculative claims, knowing that the potential exists to obtain more information if the case can survive the discovery stage."[19] In-

---

[15] *H.R. 4854, the "False Claims Act Correction Act": Hearing Before the H. Comm. on the Judiciary,* 110th Cong. (2008) (testimony of Peter B. Hutt, II, Partner, Akin Gump Strauss Hauer & Feld LLP).

[16] *Id.*

[17] *Quinn,* 14 F.3d at 649.

[18] *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 784 (4th Cir. 1999) (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield, Inc.,* 755 F. Supp. 1055, 1056N57 (S.D. Ga. 1990)).

[19] *Proposals to Fight Fraud and Protect Taxpayers: Hearing Before the H. Comm. on the Judiciary,* 111th Cong. (2009) (testimony of Marcia G. Madsen, Partner, Mayer Brown).

deed, as the Fifth Circuit has written, "[a] special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process."[20]

Thus, the result of the legislation's relaxation of the Rule 9(b) standard will be to unleash a flood of unfounded and speculative *qui tam* cases—cases that otherwise would be dismissed for failure to plead with particularity—in hopes that fraud will be uncovered during discovery. This is contrary to the purposes of the *qui tam* provisions of the FCA, which grant "a right of action to private citizens only if they have independently obtained knowledge of fraud."[21]

F. Alternative Remedy Provision Will Require U.S. Treasury to Fund Relators Even When the Recovery was not Based on the FCA

This legislation will also allow *qui tam* plaintiffs an expanded relator's share in "alternative remedies" the Government recovers from non-FCA actions, such as contract actions, other non-fraud actions, and even criminal proceedings—though the relator is not a party, and the proceeding does not involve liability for false claims. The Act's current alternative remedy provision provides the United States with the ability to pursue false claims against a recipient of federal funds administratively rather than under the FCA, while simultaneously ensuring that the relator is entitled to any recovery for the FCA claims. The Department of Justice is concerned, however, that this "legislation's proposed changes would unduly expand the scope of the alternative remedy provision, and permit a relator to recover in too many situations and in situations not contemplated by the FCA."[22]

The Department has opined that because a relator can continue his *qui tam* action even if the Government receives compensation on a non-fraud basis, "there is no need to pay a share of the Government's non-fraud recoveries as a means of furnishing relators with appropriate incentives to disclose allegations of fraud."[23] If the Government determines the conduct was not fraudulent and is repaid administratively, the purposes of the FCA are not furthered by requiring the Government to compensate the relator out of those administrative recoveries. As the Department has explained,

> The purpose of the FCA was to induce those with knowledge of fraud . . . to disclose that wrongdoing. Such an inducement is unnecessary where a company may owe money to the United States, but has done nothing to hide that fact (for example, the defendant has not knowingly submitted a false claim or knowingly retained an overpayment). The law should encourage employees of such a company to report the overpayment to their employer in the first instance, and should not encourage them to file a *qui tam* action against a company that has not engaged in fraud.[24]

The alternative remedy provision in H.R. 1788, however, will encourage employees to file *qui tam* actions even if they know their

---

[20] *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 309 (5th Cir. 1999).
[21] *Id.*
[22] Justice Dept. Views Letter Appendix at 6.
[23] *Id.*
[24] *Id.* (citations omitted).

company did nothing wrong, because they will be ensured a share of the administrative recovery. This backstop will, of course, encourage the filing of unfounded *qui tam* actions under the FCA. Simply put, the Government should not pay relators at taxpayer expense in situations where no violation of the FCA has occurred. Yet, that is precisely what the alternative remedy provision of H.R. 1788 would do for the benefit of relators over the taxpayers.

G. The Interests of the Broad Array of Entities that Receive Federal Funds

In considering the wisdom of the changes H.R. 1788 will make to the FCA, it is important to take into account the input this Committee has received from those entities that will incur the costs of any frivolous, unfounded and/or parasitic *qui tam* suits that result from this legislation. Opposition to this legislation has been raised by associations representing a diverse group of entities. Among other groups, the following have come out against H.R. 1788: Association of American Universities, American Counsel of Engineering Companies, American Hospital Association, American Tort Reform Association, Association of American Medical Colleges, Greater New York Hospital Association, National Association of Manufacturers, Property Casualty Insurers Association of America, and the U.S. Chamber of Commerce.

In a letter to members of the Judiciary Committee, the Association of American Universities, which represents 60 leading U.S. research universities that together perform 60 percent of all federally funded university-based research, expressed "strong reservations about the pending bill's unintended consequences."[25] The association further explained that "H.R. 1788, as currently drafted, will frustrate our members' efforts to monitor their financial relationships with the Government through strong internal controls and well-established and rigorous compliance, audit and reconciliation processes."[26]

Moreover, the Greater New York Hospital Association noted that "[a]s written, the bill would allow *qui tam* plaintiffs and their lawyers to profit at the expense of the Federal Treasury, the United States Department of Justice, and economically struggling hospitals in New York and around the country."[27] Additionally, organizations such as the American Hospital Association, the American Health Care Association, and the U.S. Chamber of Commerce informed members of the Committee that they believe that this legislation "would expand the scope of liability under the statute, increase its financial penalties, and remove safeguards against unfounded *qui tam* lawsuits."[28] These entities further explained that they "believe these amendments are unnecessary and will impose enormous burdens on non-profits, universities, hospitals, and small businesses."[29]

---

[25] Letter from Robert M. Berdahl, President, Association of American Universities, to John Conyers, Jr., Chairman, U.S. House Committee on the Judiciary (April 20, 2009).
[26] *Id.*
[27] Memorandum from Kenneth E. Raske, President, Greater New York Hospital Association.
[28] Letter from Multi-industry Coalition Opposed to H.R. 1788 to John Conyers, Jr. and Lamar Smith, U.S. House Committee on the Judiciary (April 21, 2009).
[29] *Id.*

REPUBLICAN AMENDMENTS

Mr. Issa offered three amendments to H.R. 1788 at mark up; none of Mr. Issa's amendments was adopted.

- Requiring employee disclosure. This amendment provided that employees had first to report suspected FCA violations to their employer's compliance officer before filing a *qui tam* action under the FCA. If the employer did not take corrective action within 90 days, the employee would be free to file an FCA lawsuit.
- Inevitable Discovery. This amendment provided that *qui tam* plaintiffs would not be entitled to a relator's share if the Attorney General determined that the United States would have inevitably discovered the false claims that were the basis for the *qui tam* suit. This amendment would have protected taxpayer dollars from unnecessary relator share payouts where the relator simply beat the Department of Justice to the courthouse.
- Avoidance of Prosecution. The amendment provided explicit guidance to the courts that in cases in which the relator had initiated or furthered the fraud that was the basis for the *qui tam* action, the court could reduce the relator's share of any recovery by the value of the avoidance of prosecution.

CONCLUSION

The proposed "corrections" to the False Claims Act contained in H.R. 1788 are a virtual rewrite of many provisions of the FCA. The result of this rewrite will be not only to extend the Act's liability provisions to allow the Government to ensure that the FCA covers all Government spending, a change we support, but to allow *qui tam* plaintiffs and their attorneys unnecessarily to attempt to recover more money at the expense of the federal Treasury and the taxpayers. The bill's *qui tam* provisions will needlessly divert resources from the Treasury and impose huge burdens on businesses of all sizes, hospitals, universities, and non-profits.

H.R. 1788 includes many provisions that would help relators to increase their recoveries under the FCA, even though there is no evidence that Congress needs to provide additional incentives for relators. Instead, these provisions simply provide more money to relators at the expense of U.S. taxpayers and strengthen the hand of relators at the expense of the Justice Department. In sum, the benefits this legislation would provide to the Federal Government's efforts at combating waste, fraud, and abuse by extending the Act's liability provisions, will be outweighed by the burdens and costs the *qui tam* provisions in this bill will impose on the Federal Government itself and entities such as non-profits, hospitals, universities, and small businesses that receive federal funds.

LAMAR SMITH.
DARRELL E. ISSA.
JIM JORDAN.

○