TESTIMONY OF SHELLEY R. SLADE
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Hearing on H.R. 4854
The "False Claims Act Correction Act of 2007"

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HOUSE COMMITTEE ON THE JUDICIARY

Subcommittee on Courts, the Internet and Intellectual Property and Commercial and Administrative Law

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Introduction

As an attorney who has represented both *qui tam* plaintiffs and the United States under the False Claims Act ("FCA"), I submit this testimony in support of H.R. 4854, the FCA Correction Act of 2007. My views on the merits of H.R. 4854 have been formed not only by my private practice, but also by the decade I spent at the Department of Justice enforcing the Act on behalf of the United States.

For the last eight years, as a member of Vogel, Slade & Goldstein, LLP, a Washington, D.C. firm with a nationwide *qui tam* practice, I have specialized in representing the private parties who bring cases under the federal and state false claims laws. The majority of my cases have involved false claims on the Medicare, Medicaid and TRICARE programs and agencies of the Department of Defense. At the present time, most of my cases involve confidential investigations of pharmaceutical companies and pharmacies for kickbacks, violations of Medicaid billing rules and off-label marketing of drugs.

Prior to joining the private sector, I handled FCA matters in the Civil Fraud Section of the Commercial Litigation Branch of the Department of Justice. The Civil Fraud Section is the office within Main Justice that handles the largest and most significant FCA cases in the country and coordinates the FCA enforcement activities of the U.S. Attorneys. For eight of my years in the Civil Fraud Section, I investigated and litigated FCA cases as a trial attorney. In 1998 and 1999, I served as the Senior Counsel for Health Care Fraud for the Civil Division, handling policy and legislative issues relating to the FCA, and coordinating the Civil Division's health care fraud work with other offices of the Department of Justice, with other government agencies and with the private sector.

I strongly support H.R. 4854. It is a bill that will significantly enhance the Government's ability to remedy and

deter fraud on U.S. Government programs. The Bill's proposed corrections are needed to ensure that the law remains fully effective in an era in which so many government functions have been outsourced to government contractors and grantees who, in turn, subcontract with others to deliver goods and services for the government. The Bill's amendments also are needed to overrule judicial opinions which have made it unreasonably difficult for *qui tam* plaintiffs to bring forward meritorious allegations that the Government could not or would not have uncovered and pursued on its own. Finally, the Bill contains important changes that update the law to address new types of fraudulent schemes, to clarify procedures in declined cases, to clarify the applicable statutes of limitations, and to turn the Government's Civil Investigative Demand authority into a viable tool.

In my testimony, I will address my reasons for supporting what I believe are the most important provisions of H. R. 4854. I strongly support each and every provision of the bill, however, not only those focused on herein.

I. PROVISIONS STRENGHTENING LIABILITY PROVISIONS

Section Two of H.R. 4854 amends various aspects of the liability provisions of Section 3729(a) of the Act. The most needed changes are those designed to:

a) Fully protect taxpayer funds from false claims even when expended by private entities performing work for the federal Government;

b) Impose liability on those who convert taxpayer funds to unauthorized uses or wrongfully retain overpayments; and,

c) Protect funds administered by the United States such as Tribal Funds and the Iraqi funds that were previously administered by the Coalition Provisional Authority.

A. Liability for False Claims for U.S. Government Money or Property

1. Federal Contractors have Assumed Many Government Functions, Including Procurement and Contract Management

It is vitally important that the FCA protect not only taxpayers' funds in the possession of the Government, but also taxpayers' funds that the Government pays a private party so it

can carry out government programs. Since 1993, when President Clinton initiated the "National Partnership for Reinventing Government," the federal Government has outsourced an increasing number of governmental functions to private entities, including the contracting process itself.[1] Under President Bush, this trend has accelerated, and the Government is now spending nearly 40 cents of every discretionary dollar on contracts with private companies, a record level.[2] According to 2008 testimony by the U.S. Comptroller General:

> The government is relying on contractors to fill roles previously held by government employees and to perform many functions that closely support inherently governmental functions, such as contracting support, intelligence analysis, program management, and engineering and technical support for program offices.[3]

For example, rather than using government personnel to perform contracting support services, the Army Contracting Agency's Contracting Center for Excellence (CCE) in fiscal year 2007 awarded 5,800 contracts and obligated almost $1.8 billion to provide contract specialists for 125 Department of Defense offices, including the Joint Chiefs of Staff, the TRICARE Management Activity, the Defense Information Systems Agency and the DOD Inspector General.[4]

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[1] Between 1993 and 2000, the size of the civilian workforce was reduced by 426,000 positions, reaching a level equal to that under President Eisenhower. Between 2000 and 2005, annual government procurement spending increased by 86%, or $175 billion dollars. H.R. Comm. Gov't Reform – Minority Staff Special Investigations Division, 109th Cong., 2d Sess., Dollars, Not Sense: Government Contracting Under the Bush Administration at i, 3 (Comm. Print 2006).

[2] H.R. Comm. Gov't Reform – Minority Staff Special Investigations Division, 109th Cong., 2d Sess. Dollars, Not Sense: Government Contracting Under the Bush Administration i, 3 (Comm. Print 2006). The Department of Energy spends approximately 98% of its budget on contractors, the Pentagon spends nearly half of its budget on contractors, and the National Air & Space Administration spends about 78% of its budget on contractors. Shane, Scott. "Uncle Sam keeps SAIC on Call for Top Tasks/Government Turns to California Company for Variety of Sensitive Jobs." The Baltimore Sun, 26 Oct. 2003.

[3] DOD's *Increased Reliance on Service Contractors Exacerbates Long-standing Challenges, 2008: Hearings on Defense Acquisitions before the Subcom. on Defense of the House of Representatives Comm. on Appropriations*, 110th Cong., 2d Sess. 10-12 (2008)(statement of David M. Walker, Comptroller General of the United States.)

[4] *Id.*

According to the Government Accounting Office, spending by the Department of Defense (DOD) on contractor services has more than doubled over the past decade, measured in constant 2006 do1lars, and, with this growth in spending:

> DOD has become increasingly reliant on contractors both overseas and in the United States. For example, the Department has relied extensively on contractors for services that include communication services, interpreters who accompany military patrols, base operations support (e.g., food and housing), weapon systems maintenance, and intelligence analysis to support military operations in Southwest Asia.[5]

The Government's procurement spending is highly concentrated on a few large contractors, with the 20 largest federal contractors receiving over 36% of the contract dollars awarded in 2005.[6] What this means is that a handful of large companies are now effectively serving as a "shadow government" that awards and oversees contracts, disburses federal funds, and attempts to detect fraud in government contracting.

When a person submits a claim for a government benefit, or for payment for services or goods provided as part of a government program, chances consequently are extremely high that the claim will not be presented to an official of the federal Government itself. For example, when seeking reimbursement from a federally-funded health insurance program such as Medicare or Medicaid, health care providers submit their claims to private health maintenance organizations or private insurance companies on contract with the federal or a state government. Likewise, most companies performing work for the Department of Defense find themselves billing another defense contractor who, in turn, bills another defense contractor, who may or may not be the one with the prime contract with the Department of Defense. In each of the foregoing examples, however, the person submitting the bill knows full well that he is being paid by the taxpayers to perform work in furtherance of governmental purposes.

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[5] *DOD Needs to Reexamine Its Extensive Reliance on Contractors and Continue to Improve Management and Oversight*, *2008: Hearings on Defense Management Before the Subcomm. On Readiness of the House of Representatives Comm. on Armed Services*, 110th Cong., 2d Sess. 3 (2008) (statement of David M. Walker, Comptroller General of the United States.)

[6] H.R. Comm. on Gov't Reform – Minority Staff Special Investigations Division, 109th Cong., 2d Sess., Dollars, Not Sense: Government Contracting Under the Bush Administration 6 (Comm. Print 2006).

2. In Enacting the 1986 Amendments to the FCA, Congress Intended to Cover the False Claims of those Billing Government Contractors and Grantees

When it amended the FCA in 1986, one of Congress' key goals was to impose liability on those who knowingly submitted false claims "although the claims were made to a party other than the Government, if the payment therefore would ultimately result in a loss to the United States." S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5275 (1986). Towards this end, Congress defined the term "claim" in the statute to include:

> [A]ny 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 provides any portion of the money or property which is requested or demanded,* or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (emphasis added). In adding this provision, Congress made clear that it intended to overrule a court decision, *U.S. v. Azzarelli Construction Co*., 647 F.2d 757 (7th Cir. 1981), that held that the FCA did not cover false claims submitted to the recipient of a federal block grant. S. Rep. No. 99-345, 99th Cong., 2d Sess. 22, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5287 (1986).

3. The Judiciary Has Refused to Apply the Act to Claims Against Government Contractors and Grantees

Notwithstanding the FCA's definition of "claim" quoted above, and the legislative history cited above, the U.S. Supreme Court and the D.C. Court of Appeals have rendered rulings that, together, make it doubtful whether the FCA, as currently drafted, protects government funds once they have left the federal Government's coffers. Relying exclusively on the statutory language of § 3729(a)(1), the D.C. Court of Appeals ruled in 2004 that liability for false claims will arise only if the false claims are "presented to" a U.S. Government official or employee; liability will not lie just because a contractor used federal money to pay the claims. *United States ex rel. Totten v. Bombardier Corp*., 380 F.3d 488, 492-93 (D.C. Cir.

2004), *cert. denied*, 544 U.S. 1032 (2005). Adopting the logic of the *Totten* case, the Supreme Court ruled just last week that liability under § 3729(a)(2) for false statements made to get false claims paid will arise only if the false claims are actually paid or approved by the federal Government itself; it is not sufficient that the claims are paid with federal funds. *Allison Engine Co. v. United States ex rel. Sanders*, 2008 U.S. LEXIS 4704 (U.S. June 9, 2008).

These court decisions threaten to insulate from liability misconduct by the many companies who submit claims to government contractors and other intermediaries who are then, in turn, reimbursed by the federal government through the submission of a facially accurate statement of the intermediary's "costs." In addition, these rulings threaten to create a "free fraud zone" for the numerous situations in which companies bill entities that have been paid in advance by the federal Government. In these situations, the false claims of subcontractors and subgrantees are not subsequently passed on to the Government for reimbursement.

As Judge Merrick Garland opined in his dissent in the *Totten* case, the Court of Appeals' interpretation of Section 3729(a)(2) was "inconsistent" with the plain text of the statute and "irreconcilable" with the legislative history. Moreover, as a practical matter:

> Under the Court's interpretation, the Government cannot recover against a contractor that obtains money by presenting a false claim to a federal grantee – even if every penny paid to the contractor comes out of an account comprised wholly of federal funds – unless the grantee 're-presents' that false claim to a federal employee.

380 F.3d 488 at 502-03.

Indeed, the *Totten* decision already has led a number of lower courts to rule that the FCA may not be used to remedy misconduct involving knowing false claims unless the defendant is dealing directly with a U.S. Government official. These decisions fly directly in the face of the expressed legislative intent in that they hold that the FCA is not available as a tool against Medicare and Medicaid fraud,[7] against defense

[7] See *United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2004), *aff'd*, 470 F.3d 1350 (11th Cir. 2006) (dismissing case involving nursing home claims on state Medicaid agency); *United States ex rel. Brunson v. Narrows Health & Wellness*, LLC, 469 F. Supp. 2d 1048, 1053

subcontractor fraud,[8] or against fraud on local and state programs, even those "funded in part by the United States where there is significant Federal regulation and involvement."[9] Sen. Rep. No. 99-345 at 19-20 (citing an area in which Congress intended the FCA to be applicable).

4. H.R. 4854 Reinstates Liability for False Claims Submitted to Government Contractors and Grantees

Consistent with the Congressional intent behind the 1986 amendments, H.R. 4854 would correct the Act to make clear that liability attaches whenever a person knowingly makes a false statement or a false claim to obtain "Government money or property," regardless of whether the Government funds are paid directly by the Federal Government or are disbursed by a third party. In new paragraph 3729(b)(2), the proposed amendments would define "Government money or property" to include not only money "belonging" to the United States, but also money that the United States provides a contractor, grantee, agent or other recipient "to be spent or used on the Government's behalf or to advance Government programs."

Importantly, H.R. 4854's definition of "Government money or property" is sufficiently narrow to ensure that the FCA would apply only in situations in which a person makes a claim for money that is still subject to government restrictions on its use. Accordingly, H.R. 4854 would not inject the FCA into purely private commercial transactions such as a federal government worker's spending of his *government* salary, or the Metropolitan Museum's purchases for its cafeteria.

(N.D. Ala. 2006), (dismissing Medicare claims submitted to an insurance company hired by the federal government to administer the Medicare program).

[8] *See, United States ex rel. Sanders v. Allison Engine Co.,* 364 F. Supp. 2d 710 (S.D. Ohio 2003*), rev'd by,* 471 F.3d 610 (6th Cir. 2006), *vacated and remanded by Allison Engine Co. v. United States ex rel. Sanders*, 2008 U.S. LEXIS 4704 (U.S. June 8, 2008).

[9] *See, e.g. United States ex rel. Rutz v. Village of River Forest,* 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007)(federal Bureau of Justice Assistance block grant to county)*; U.S DOT ex rel. Arnold v. CMS Eng'g*, 2007 U.S. Dist. LEXIS 9118 (W.D. Pa. Feb. 6, 2007) (U.S. Department of Transportation grant to Pennsylvania Department of Transportation); *U.S. v. City of Houston*, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. Aug. 16, 2006) (U.S. Department of Housing funding of City of Houston housing authority); *United States ex rel. Rafizadeh v. Cont'l Common*, *Inc*., 2006 U.S. Dist. LEXIS 18164 (E.D. La. April 10, 2006) (U.S. grants to state Department of Social Services and state Department of Health & Hospitals.)

Critics of this proposed amendment maintain that the appropriate remedy when a government subcontractor submits false claims to a government prime contractor is a lawsuit by the prime contractor against the subcontractor under the law of contract or the law of fraud. While in theory such a lawsuit is feasible, in practice this remedy would be nowhere near as effective as the FCA at uncovering, deterring or remedying fraud in government programs. First, the prime would be far less likely to obtain information about the fraud in the first place if the *qui tam* provisions were unavailable to bring forward whistle blowers. Second, in many instances, the prime will lack the incentive to pursue the fraud as it knows it can recover the overcharges through subsequent charges to the federal Government that are based on past cost history. Finally, the prime could not avail itself of the FCA's remedies of treble damages and civil penalties, a powerful deterrent to fraud, and remedies that provide full compensation not only for the overcharge, but also the time value of money, and the costs inherent in detecting, investigating and pursuing the fraud.

B. Protecting Funds Administered by the United States

The FCA currently does not expressly impose liability for false claims for money administered, but not owned by the United States. From the perspective of public policy, it is advisable for the Act to cover such situations. When the United States elects to invest its resources in administering the funds of another person, it does so only because the achievement of important foreign or domestic policy goals turns on proper management of the funds. The Department of Justice zealously has pursued cases of this nature, recovering millions of dollars from oil, gas and mining companies that have underreported the royalties owed under leases on Native American land.[10]

The United States' ability to pursue cases involving U.S.-administered funds is threatened by a recent district court decision. In 2006, the U.S. District Court for the Eastern District of Virginia held that the FCA does not reach false claims on money administered but not owned by the U.S. Government, such as Iraqi funds administered by U.S. officials at the Coalition Provisional Authority. *See United States ex*

[10] *See, e.g., Kennard v. Comstock Resources, Inc.,* 363 F.3d 1039 (10th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005)*; U.S. v. Chevron,* 186 F.3d 644 (5th Cir. 1999)*; United States ex rel. Wright v. Agip Petroleum Co.,* 2006 U.S. Dist. LEXIS 93415 (E.D. Tex. Dec. 27, 2006)*; United States ex rel. Koch v. Koch Indus.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999).

rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 636-641 (E.D. Va. 2006).

H. R. 4854 prudently amends the FCA so that it covers fraud on U.S.-administered funds. The Bill adds new paragraph 3729(b)(2)(C) that would define "Government money or property" to include funds managed by the United States for an administrative beneficiary, as that term is defined in new paragraph (b)(4).

C. Imposing Liability for Unauthorized Diversion of Government Funds and Retention of Government Overpayments

A gaping hole in the FCA is the lack of liability for wrongful retention of overpayments and diversion of funds to unauthorized purposes. In these situations, there frequently is no false statement or false claim to trigger liability under the current Act.

An example of the first situation is a health care provider that mistakenly overbills the federal Government for services, identifies its mistake, and then decides not to disclose the mistaken billing to the Government in order to fraudulently hold on to the overpayment. The company's mistake might be due to a misunderstanding of the billing rules, a computer glitch or a computational error, but, in each case, the FCA would not impose liability for the entity's original claims as they would not be "knowingly" false.[11] The provider's retention of the *known* overpayment would be illegal, however. It is a criminal offense to fail to disclose receipt of an overpayment from the federal Government "with an intent fraudulently to secure" such payment.[12] Unless the provider was without fault in billing for and accepting payment, the provider would be liable to repay the overpayment to Medicare (assuming the overpayment was discovered within three years of the year in which the overpayment was made.)[13] The Compliance Guidelines of the Office of Inspector

[11] In many situations of this nature, there also would no false statement to trigger liability. With the exception of long term health care providers that must submit quarterly statements to the Medicare program disclosing any known overpayment ("Credit Balance Reports" submitted by Medicare Part A providers), health care providers generally are not asked to submit statements disclosing known overpayments.

[12] 42 U.S.C. § 1320a-7b(a)(3).

[13] Centers for Medicare and Medicaid, U.S. Dept. of Health & Human Services, Pub. No. 100-06, Medicare Financial Management Manual, Ch. 3, Overpayments (2008).

General of the U.S. Department of Health & Human Services ("OIG") advise that failure to repay overpayments within a "reasonable period of time" following detection may be interpreted as an intentional attempt to conceal the overpayment from the Government.[14]

An example of the second scenario would be a government contractor's decision to spend an advance payment intended for Iraqi reconstruction work on his personal enrichment instead. When our country is at war or responding to natural disasters, funds are often disbursed on an emergency basis in advance of the work being performed, and without the usual required certifications of performance under the contract. When a government contractor diverts an advance payment to an improper purpose in these circumstances, there often will be no false claim or false statement submitted to the government that would serve as the hook on which to hang liability.

H.R. 4854 addresses these deficiencies in the current statute by amending paragraph 3729(a)(4) in the current Act (which would be renumbered as paragraph 3729(a)(1)(C)) so that it imposes liability on anyone who:

> has possession, custody, or control of Government money or property and, intending to . . . (ii) retain a known overpayment, or (iii) 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.

I fully support this amendment. Not only does it accord with the Supreme Court's admonition that Americans should "turn square corners" when doing business with the Government,[15] it also provides a means for the Government to recover what likely exceed hundreds of millions of dollars in wrongfully retained overpayments each year. In the mid-1990's, HHS-OIG looked into the level of overpayments in the Medicare program, and concluded

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[14] See, e.g., Hospital Compliance Guidelines, 63 Fed. Reg. 8987 (February 23, 1998); Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4858 (January 31, 2005); Compliance Program for Individual and Small Group Physician Practices, 65 Fed. Reg. 59,434 (October 5, 2000).

[15] *Rock Island, A & M RR v. United States*, 254 U.S. 141, 143 (1920).

that $23.2 billion, or 14% of total program costs, were lost each year due to fraud, waste and abuse.[16] This number undoubtedly has only grown larger with the aging of our population, the increased costs of health care, and the addition of Medicare Part D, the new pharmaceutical benefit for seniors. *In short, this provision will be a significant revenue generator for the federal Government*.

D. Conforming Changes to Damage Provision

To conform the damage provision to the changes in the liability provisions discussed above, H.R. 4854 amends the FCA to provide that a person who violates one of the liability provisions:

> 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 or its administrative beneficiary sustains because of the act of that person, subject to paragraphs (2) and (3).

H.R. 4854's amendment to the damage provision is an appropriate change to conform the provision to the changes in the liability provisions. In my opinion, it is vastly superior to the amended damage provision in current S. 2041. S. 2041's damage remedy on the one hand is too broad in that it permits the United States to recover treble the amount of a false claim even when the United States did not fund the entire claim, or, for other reasons, was not damaged in the full amount of the claim. On the other hand, it is too limited in that it does not provide for the recovery of reasonably foreseeable damages beyond the value of the false claim itself, such as the loss of a helicopter due to a contractor's knowing provision of a defective helicopter part. I urge the Committee to retain H. 4856's damage provision in the final bill.

II. PROVISIONS ENHANCING INCENTIVES AND PROTECTIONS FOR *QUI TAM* PLAINTIFFS

H.R. 4854 contains several important provisions that make it easier for *qui tam* plaintiffs to pursue meritorious cases. The Bill takes out of the defendants' hands the ability to delay or even preclude adjudication of the merits by challenging the

[16] *HCFA's FY 1996 Medicare Audit, 1997: Hearing before the Subcomm. On Health of the House Comm. On Ways and Means*, 105th Cong., 1st Sess. (1997) (statement by June Gibbs Brown, Inspector General, Dep't of Health & Human Services.)

relator's right to bring a case under the "public disclosure" jurisdictional provision -- a provision enacted to protect the interests of the Government, not the defendant. The bill also clarifies that *qui tam* plaintiffs with detailed knowledge of a fraudulent scheme may bring cases even when they lack access to the defendant's false billing documentation.

H.R. 4854 also includes several amendments that enhance the protections for whistle blowers subject to retaliation. These amendments provide a uniform ten year statute of limitations for anti-retaliation claims, and clarify that internal whistle blowing, including efforts to stop the wrongdoing, is protected activity.

These provisions in H.R. 4854 will vastly improve the workings of the *qui tam* provisions by increasing the incentives for insiders to come forward, and mitigating the costs of blowing the whistle.

A. Rewarding and Protecting *Qui Tam* Plaintiffs is Vital to the Government's Efforts to Fight Fraud

During the eighteen years that I have worked as a FCA practitioner, I have come to appreciate the tremendously important role that private citizens play in the Government's efforts to root out fraud and abuse. I have also learned how much they suffer for their unwillingness to go along with the defendants' fraudulent schemes and their decisions to step forward and become government informants.

Qui tam plaintiffs are key to the Government's efforts to fight fraud, mainly for two reasons. First, as inside witnesses, they produce evidence that can be absolutely critical to establishing liability. Fraudulent activity by its very nature is concealed. The individuals who are willing to cheat the Government often are willing to cover up the evidence of their dishonesty as well. They are willing to destroy or alter documents when audited or served with subpoenas. They are inclined to fabricate, omit or "forget" key information when subpoenaed for testimony. Without the help of insiders who brought the Government documents and other hard evidence of the fraud, it would have been extremely difficult for the Government to develop sufficient evidence to establish liability in many of the successful FCA cases.

Second, it is the relentless, zealous pursuit of *qui tam* litigation by *qui tam* plaintiffs and their counsel that has led

to many of the largest FCA cases in the last eighteen years. A close study of the largest recoveries will reveal that, in many instances, the *qui tam* plaintiff spent years either trying to persuade the government of the merits of the case before finally achieving an intervention decision, or litigating the case following a government declination.

For example, in 2006, the United States negotiated a $134 million FCA settlement with Northrop Grumman that would never have been achieved without the dedication, hard work and perseverance of two *qui tam* plaintiffs and their counsel. This recovery settled claims in a 1989 *qui tam* suit filed by two Northrop Grumman employees who believed that the defense contractor was overcharging the government for radar jamming devices installed on Air Force jets. After a three year investigation, the Department of Justice declined to intervene. Convinced of the fraud, the relators and their counsel litigated the case *for nine years* on their own, undertaking extensive document and deposition discovery, and risking their personal resources on the case. Finally, in 2002, the former Northrop Grumman employees were able to convince the United States of the merits of the case, and the Department of Justice intervened. In 2006, the case finally settled for $134 million. (See proceedings in *United States ex rel. Holzrichter v. Northrop Grumman*, Civil Action No. 89C 6111 (N.D. Ill.)).[17]

Another good example is the role of the relators and their counsel in pursuing claims of cost report fraud in the cases brought against the Columbia/HCA Healthcare Corp. chain of hospitals in the mid-1990's. In *United States ex rel. Alderson v. HCA-The Healthcare Company*[18] and *United States ex rel. Schilling v. HCA-The Healthcare Company*,[19] the *qui tam* plaintiffs alleged that the hospital chain and its corporate predecessors had cheated Medicare of hundreds of millions of dollars through

[17] These cases, and other like them, are ultimately included in the government's statistics as "intervened cases." Accordingly, when determining the contribution of *qui tam* relators towards litigation that leads to successful FCA recoveries, it is important to focus not only on the recoveries in the cases that the Department of Justice identifies as "declined cases," but also the recoveries in the cases identified as "intervened cases" that were pursued by the relator on his or her own prior to the government intervention, as well as the recoveries in the intervened cases in which the *qui tam* relator's counsel tried the case as co-counsel with the Government.

[18] Civ. A. No. 01-MS-50 (RCL) Case No. 99-3290 (D.D.C.).

[19] Civ. A. No. 01-MS-50 (RCL) Case No. 99-3289 (D.D.C.).

false entries on the cost reports submitted to Medicare to obtain reimbursement for the indirect costs of providing hospital care to Medicare beneficiaries. Although the United States originally intervened in all aspects of both cases in 1998, when it came time to litigate the consolidated cases following a lengthy stay of the proceedings, the United States declined to pursue a number of the relators' allegations regarding cost report fraud, instead restricting its efforts to the cost report allegations it felt were the strongest. The relators and their counsel pursued many of the declined cost report claims on their own, however, and ultimately recovered about $100 million for the Government through their independent efforts. Moreover, at the request of the Department of Justice, the relators and their counsel assumed almost all of the affirmative discovery work on the intervened parts of the case, with the Government's lawyers focusing on defending depositions of government witnesses and producing government documents. In 2003, the two cases settled for more than $600 million in cash and credits.

Yet another example involves the recent $334 million FCA judgment against Amerigroup - the largest jury verdict and judgment in the history of the FCA. Relator Cleveland Tyson sued HMO Amerigroup for discriminating against Medicaid recipients based on their health status and thereby overcharging the Illinois Medicaid program by tens of millions of dollars. Both the State of Illinois and the United States declined to intervene in the case soon after it was filed. The Relator brought on a Chicago law firm that put in more than 25,000 hours of time and $2 million in out-of-pocket expenses to bring the case to trial. After uncovering incriminating documents during discovery, the Relator and his counsel re-presented the case to the state and federal governments, each of which then intervened on the condition that the Relator's counsel continue to shoulder the laboring oar and fund 100 percent of the expenses. At trial, Relator's counsel presented the case arm-in-arm with the state and federal governments.

Unfortunately, however, while a few *qui tam* plaintiffs each year recover awards in the millions of dollars, the overwhelming majority of *qui tam* plaintiffs who bring successful cases make sacrifices that overwhelm the financial benefits at the end of the road. First, they suffer retaliation by their current or former employer. When a defendant learns the identity of the individual who assertively has objected to its wrongdoing, the screenplay is practically identical every time: if the individual is still employed, they are placed on paid or unpaid

leave, and ultimately fired. Their severance is often held back as leverage to foreclose their pursuit of a *qui tam* case. If the individual becomes a government informant, and sometimes even before, every effort is made to develop evidence of wrongdoing by the individual. By taking these steps, the defendant apparently hopes to be able to impeach the testimony of the *qui tam* plaintiff in the eyes of the Government and possibly at trial, and to punish the whistleblower, thereby chilling other potential whistleblowers in their midst.

Second, whistle blowers have difficulty finding new employment once word of their reporting surfaces. Potential employers are wary of taking a chance on someone they view as a potential trouble maker. Without employment, and, in some cases, having to fund the costs of the litigation process, some *qui tam* plaintiffs face personal bankruptcy

Third, this financial stress is heightened by the emotional stress and social cost of being under attack from the defendant and their former colleagues. Many *qui tam* plaintiffs end up going through divorce, ostracization within their families and communities, and psychological turmoil.

B. Extending Statute of Limitations for Anti-Retaliation Cause of Action

H.R. 4854 clarifies the statute of limitations for lawsuits brought under the FCA against those who retaliate against whistle blowers by discriminating against them in the terms of employment. Section 3730(h) of the FCA provides a remedy for whistle blowers suffering such retaliation. Although the Act by its terms permits any "civil action under Section 3730" to be brought within six years from the violation of Section 3729, the Supreme Court recently held that Congress, in fact, did not intend the FCA's six year statute of limitations to apply to anti-retaliation claims, since they arise under Section 3730 rather than under Section 3729. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005). Writing for the majority, Justice Thomas identified a number of state statutes of limitations as examples, and held that victims of retaliation must comply with the state statute of limitations applicable to the most "analogous" sort of action available under state law.

Unfortunately, however, the state statutes of limitations for comparable state causes of action identified by Justice Thomas are unreasonably short. For example, he pointed to 90-

day statutes of limitations in Connecticut, Michigan and Texas, and 180-day statutes of limitation in Florida and Ohio. 545 U.S. at 419, n. 3.

In my experience, a 90- or even 180-day statute of limitations severely undercuts the remedy provided by Section 3730(h), making it unavailable to many whistle blowers who have been fired or demoted for blowing the whistle. In the majority of cases, it is barely possible for a discharged employee to identify his or her cause of action, and then locate and retain experienced *qui tam* counsel within six months, let alone be in a position to file a well-drafted complaint.

Since attorneys generally take these cases on a "contingency" basis, and necessarily will incur the risk of no recovery, potential *qui tam* plaintiffs often find it necessary to present their information to a number of attorneys before finding counsel with both the experience and inclination to take the case. This process can take months. Moreover, since the retaliation claim is ordinarily accompanied by a *qui tam* claim, counsel ordinarily will not want to file the retaliation claim on its own, since that might foreclose a confidential government investigation of the alleged fraudulent activities underlying the *qui tam* claim; retaliation claims are not placed under seal unless they are in the same complaint as a *qui tam* claim. Accordingly, to be in a position to file the *qui tam* claim within the statute of limitations for the retaliation claim, counsel would have put aside all other matters to expend the considerable effort required to learn the applicable billing rules and assemble and analyze the evidence of the false claims before filing the Section 3730(h) claim.

H.R. 4854 amends Section 3731(b) to provide *expressly* that the statute of limitations for anti-retaliation claims brought under Section 3730(h) of the Act is the same as the statute of limitations for *qui tam* actions brought on behalf of the United States, which will be ten years pursuant to H.R. 4854. The proposed amendment is advisable to protect the viability of the anti-retaliation remedy in Section 3730(h). It is also advisable to alleviate the pressure on whistle blowers to file *qui tam* actions prematurely to comply with the extremely short statutes of limitations for wrongful discharge found in state law.

C. Protecting Efforts to Stop Violations of the FCA

Many of my clients actively confronted their employers about their false claims before deciding to file a *qui tam* case, taking brave steps to try to correct the conduct of their colleagues or supervisors. Unfortunately, however, the FCA does not expressly protect this activity from retaliation. It is not until an individual takes steps in furtherance of a potential FCA action that the anti-retaliation provision in the Act clearly provides protection. As a result, some courts have held that the anti-retaliation provision does not apply unless the person has actually indicated his intent to report fraud to law enforcement. *See, e.g., Robertson v. Bell Helicopter Textron*, 32 F.3d 948, 951-952 (5th Cir. 1994).

By failing to provide clear protection for internal whistle blowing, and only expressly protecting steps taken towards litigation, the FCA regrettably favors litigation over internal compliance efforts, and makes it harder for well-meaning corporations to monitor their workforce. This gap in protection also denies a remedy to the most courageous whistle blowers of all -- those who confront the wrongdoers and try to get them to change their ways.

I support the provision in H.R. 4854 that would provide a remedy for retaliation for lawful acts not only in furtherance of an action or potential *qui tam* action, but also "in furtherance of other efforts to stop one or more violations of this chapter." This provision is superior to S. 2041's amendment of the anti-retaliation provision as the latter, apparently through a transcription error, has dropped the language in the current statute that protects employees from retaliation for taking steps towards filing a *qui tam* action.

D. Amendments to the Public Disclosure Provision

The FCA provides that a court lacks jurisdiction over a *qui tam* claim that is based on the "public disclosure" of "allegations or transactions" in the news media, or in an administrative, congressional or judicial report, audit or proceeding, unless the *qui tam* plaintiff is an "original source" of the information and has disclosed it to the government before filing suit. 31 U.S.C. § 3730(e)(4).

Congress added the so-called "public disclosure" provision to the Act in 1986 as a replacement for an earlier provision

that deprived courts of jurisdiction over *qui tam* actions "based on evidence or information the Government had when the action was brought." This provision had caused the FCA to fall into virtual disuse as whistle blowers were unwilling to come forward and risk their livelihood without knowing whether their case might be jurisdictionally barred. By 1986, Congress had determined to eliminate this so-called "government knowledge bar" in light of its stated concern about cases in which "the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action." H. R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986). Congress wished to "encourage more private enforcement suits" and consequently amended the statute to eliminate the government knowledge bar in 1986. S. Rep. No. 99-345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89. Congress remained concerned, however, about "parasitic" relators such as those who filed complaints simply by copying information from a government indictment.

To address the continued concern about the parasitic relator, Congress' 1986 amendments created a jurisdictional bar that was intended to strike a balance between "encouraging people to come forward with information and . . . preventing parasitic lawsuits."[20] As stated by the Court of Appeals for the District of Columbia:

> Seeking 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, Congress has frequently altered its course in drafting and amending the *qui tam* provisions since initial passage of the FCA over a century ago.

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

Unfortunately, however, by depriving courts of jurisdiction over cases falling within the ambit of the public disclosure provision, Congress unwittingly handed defendants a powerful weapon to postpone and even prevent judgments on liability. The public disclosure provision is rarely invoked by the Government. Rather, it is the defendants who raise the scepter of this jurisdictional bar almost reflexively in every case by pointing

[20] *FCA Implementation, Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (Statement of Sen. Grassley).

to an arguable public disclosure of their fraud. As of 2007, courts had rendered nearly 200 published and unpublished rulings in 103 separate cases concerning the meaning of the "public disclosure" bar. The jurisdictional bar has led to a myriad of conflicting and confusing court decisions which have facilitated the ability of defendants to evade liability.

The defendants' aggressive use of this provision, combined with some courts' unreasonable interpretations of what constitutes a "public disclosure," has forced many *qui tam* counsel, including myself, to caution clients against undertaking investigative and other efforts that otherwise would be in the best interests of building a case on behalf of the United States. For example, counsel are reluctant to use the Freedom of Information Act (FOIA) to confirm their client's understanding of transactions between the potential defendant and the Government because some courts have barred *qui tams* based even in part on responses to a private party's FOIA request.[21]

Counsel are also concerned about disclosing newly acquired evidence of false claims to a government investigator prior to amending an existing *qui tam* complaint as a leak by the investigator could create a public disclosure that might bar the relator's new claim. Several Courts of Appeals have ruled that private exchanges of information, such as those between a government investigator and a potential fact witness, constitute "public disclosures" even when a relator is not part of the information exchange.[22]

Counsel are also wary of filing a wrongful termination or contract claim before a *qui tam* claim as at least one court has held that a relator can bar *himself* from filing a future *qui tam* by doing so. *See United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326 (6th Cir. 1998). This can lead counsel to prematurely file *qui tam* cases that are not fully developed, but that must be filed because of the pressure of

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[21] *See, e.g., United States ex rel. Grynberg v. Praxair, Inc.,* 389 F.3d 1038, 1051 (10th Cir. 2004)*, cert. denied*, 545 U.S. 1129 (2005*); United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.,* 384 F.3d 168, 175-176 (5th Cir. 2004); *United States ex rel. Mistick PBT v. Housing Auth.,* 186 F.3d 376, 383 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

[22] *See U.S. v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) (disclosure by defendant to public official with managerial responsibility for the allegedly false claims); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992)(disclosures by government investigators to employees of defendant.)

meeting statute of limitations deadlines applicable to wrongful termination claims.

Moreover, the Supreme Court's public disclosure jurisprudence poses a disincentive for *qui tam* plaintiffs to assist the Government during the investigation or litigation of a case in developing stronger legal theories or evidentiary bases to pursue a defendant. Under a recent Supreme Court decision, a court must look to the final articulation of the claim at the time of judgment to determine if the public disclosure provision bars a relator from receiving an award from the Government's recovery. *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397 (2007). Under *Rockwell*, a district court must deny an award to a relator -- even if the Department of Justice believes it would be fair and appropriate to pay the award -- if the defendant convinces the court that the relator's claim is barred by the public disclosure provision.

H.R. 4854 would remedy the problems discussed above by amending the FCA so that only the Government could seek the dismissal of parasitic actions. Moreover, H.R. 4854 would define the term "public disclosure" to make clear that it includes only disclosures on the public record and those that have been "disseminated broadly to the general public," with responses to FOIA requests and exchanges with law enforcement expressly excluded from the definition. Finally, to eliminate the circular analysis engaged in by many courts, an action would be deemed to be "based upon" a public disclosure only when all elements of liability are "derived exclusively from" the public disclosure. The much-litigated "original source" language would drop out of the provision, as the new definition of "based upon" would have the effect of carving out complaints by original sources. The House Bill would still protect the Government from situations where a relator derived most, but not all, of the information underlying the case from prior Government disclosures. The Court could take these circumstances into account and, where appropriate, reduce the relator's share of the proceeds below the minimum threshold.

I strongly support the proposed amendment for the reasons set forth above. This proposal is one of the most valuable sections of the Bill.

Moreover, I believe that this proposal is vastly preferable to S. 2041's amendment to the public disclosure provision, which would enable the United States to dismiss *qui tam* cases based on preexisting audits or investigations involving substantially the

same misconduct by the same entity. Given the ambiguity in the terms "investigation" and "audit," the proposal in the Senate Bill would effectively resurrect much of the "government knowledge bar" which caused the FCA to fall into virtual disuse for almost half a century. Program agencies and their contractors routinely conduct wide-ranging audits that examine a small sample of claims for compliance with numerous billing rules. Without the inside evidence that a relator might be capable of providing, most of these "audits" would simply lead to dead ends.

If S. 2041's provision becomes law, witnesses to fraud once again will be reluctant to risk their livelihood on a case that could easily be barred by an obscure entry in an auditor's report in the Government's vast files. Moreover, given the historic resistance of many program agencies to *qui tam* cases, which often shine the spotlight on inadequacies in executive branch oversight, program agencies can be expected to rely on this provision to seek dismissal of *qui tam* cases in these circumstances. Regrettably, however, the fact that misconduct of the same nature is arguably identified in a government audit or investigation does not mean that it will be diligently investigated or pursued on a fraud theory.

The defense bar objects to the fact that the Government is the only party that may file a motion to dismiss under H.R. 4854's public disclosure provision. The defense bar argues that a defendant's greater resources and self-interest in seeing the case dismissed increase the likelihood that someone will undertake the search to determine whether there has been a public disclosure. This is a red herring. The defendant remains free to meet with Government counsel and petition them to file a motion to dismiss based on any public disclosure it locates. Moreover, the Government frequently relies on outside parties for assistance in drafting pleadings and other documents. If the Government believes that it is appropriate to file a motion to dismiss, it can and will seek the defendant's assistance in preparing such a motion. Most importantly, if the Government declines to put its resources into filing such a motion, it is highly unlikely that the Government is proceeding with an overlapping fraud investigation based on the alleged public disclosure.

E. Bringing *Qui Tam* Cases Without Access to Billing Documentation

One of the most discouraging features of current FCA case law for those considering filing or pursuing a *qui tam* case is

the growing tendency of the courts to require *qui tam* plaintiffs to allege in their initial pleadings the specifics of the billing documentation submitted to the Government. Relying on court interpretations of F.R.C.P. Rule 9(b) in the context of common law fraud, the courts require *qui tam* plaintiffs to identify not only the "who, what, when and where" of the overarching scheme, but also the "who, what, when and where" of the claims made to the Government.[23]

Even in cases in which the qui tam plaintiffs have alleged significant details of the fraudulent schemes, the courts are refusing to allow cases to proceed on the sole basis that the qui tam plaintiffs lacked access to the billing documentation, and consequently could not allege details of the invoices sent to the government, such as which billing department employee submitted the false claims, on which date, and with regard to the care of which patient. Thus, both the 8th and 11th Circuits have dismissed cases under Rule 9(b) because the qui tam plaintiffs "did not work in the billing department."[24]

In the *Joshi* case, for example, the 8th Circuit acknowledged that it "fully recognize[d] Dr. Joshi alleges a systemic practice of St. Luke's and Dr. Bashiti submitting and conspiring to submit false claims over a sixteen year period." *Joshi* at 557. In particular, in the court's own words:

> Dr. Joshi, an anesthesiologist who practiced from 1989 to 1996 at St. Luke's, brought a qui tam action under the FCA against St. Luke's and Dr. Bashiti, alleging violations [of the FCA] . . . In Count I, Dr. Joshi alleges St. Luke's requested and received Medicare reimbursement from the government for anesthesia services performed by Dr. Bashiti at the reimbursement rate for medical direction of

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[23] *See, e.g., United States ex rel. Bledsoe v. Community Health Systems, et al.*, 501 F.3d 493, 504-05 (6th Cir. 2007); *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552, 559 (8th Cir.), *cert. denied,* 127 S. Ct. 189 (2006); *United States ex rel. Sikkenga v. Regence Bluecross BlueShield*, 472 F.3d 702, 727 (10th Cir. 2006); *Sanderson v. HCA-the Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 303 (2006); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013-14 (11th Cir. 2005), *cert. denied,* 127 S. Ct. 42 (2006); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir.), *cert. denied*, 543 U.S. 820 (2004); *In re Genesis Health Ventures, Inc.*, 112 Fed. Appx. 140, 144 (3rd Cir. 2004); *United States ex rel. Clausen v. Lab Corp. of Am.*, 290 F.3d 1301, 1308-09 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

[24] *See, e.g, United States ex rel. Joshi v. St. Luke's Hospital*, *supra*, 441 F.3d at 557; *Corsello v. Lincare, Inc.*, *supra*, 428 F.3d at 1013-14.

> anesthesia services, when St. Luke's was entitled only to the lower reimbursement rate for medical supervision or no reimbursement at all. Dr. Joshi alleged Dr. Bashiti failed both to perform pre-anesthetic evaluations and prescribe anesthesia plans, and Dr. Bashiti falsely certified he supervised or directed the work of several certified registered nurse anesthetists (CRNAs).

Joshi at 554.

In short, Dr. Joshi provided sufficient details of the fraudulent scheme for the defendants to know exactly the nature of the misconduct at issue. From his position as an anesthesiologist, Dr. Joshi witnessed Dr. Bashiti's failure to perform the work and the supervision required to bill Medicare for specified services, and he alleged the specifics of what he had observed. He then alleged how the services were being billed, and the fact that Medicare was being billed. Nonetheless, the Court of Appeals agreed with the trial court that Dr. Joshi's failure to identify specific billing documentation was fatal to his complaint, noting: "Dr. Joshi was an anesthesiologist at St. Luke's, not a member of the billing department." *Joshi* at 557.

Regrettably, the *Joshi* Court's analysis severely undercuts the Government's ability to learn about false claims on its programs. This is because knowledge within an organization is ordinarily compartmentalized: the billing department employees rarely know the details of what is happening on the operational side, and the reverse is true as well. In a hospital overbilling case, it would be unusual for the hospital billing department to be in a position to discern that a given doctor was misrepresenting to the billing department the nature of the medical services delivered to any particular patient. On the flip side, the doctors practicing alongside another doctor will see what medical work he is performing, and may overhear how the work is being billed, but will not have access to the actual billing documentation itself.

Unfortunately, the *Joshi* case is not an outlier. In the 11th Circuit *Corsello* case cited above, the relator alleged a scheme by his former employers -- suppliers of oxygen equipment and services -- to pay kickbacks to doctors to get them to prescribe the suppliers' products, even for patients with no medical need for oxygen, and to falsify the physician "Certificates of Medical Necessity" required as a condition of Medicare coverage of oxygen services. Even though Corsello

pointed out that he had "alleged many details of numerous schemes, employees and claims" and "provided the initials of patients whose Medicare forms were improperly completed and, eventually . . . resulted in the submission of fraudulent claims," *Corsello* at 1013, the 11th Circuit Court of Appeals refused to allow Corsello to bring his case, holding:

> Corsello is neither a "corporate outsider" nor an employee in the billing department . . . Corsello conceded that he "did not have access to company files outside his own office."

Corsello at 1013-14.

These court opinions may not pose a problem for the relator who happens to work in the defendant's billing department. They pose a serious problem, however, for almost every other potential insider to a fraudulent scam. Neither the engineers and quality assurance personnel who witness products deliberately manufactured in violation of government specifications, nor the pharmaceutical company salesmen pressured to sell off-label or pay kickbacks to doctors, nor the executives sitting in on high-level discussions of how to bilk the Government, will have ready access to the actual claims or invoices submitted to the Government.

The courts are misguided in applying this aspect of Rule 9(b) jurisprudence in the FCA context. In contrast to common law fraud cases, the *qui tam* plaintiff in a FCA lawsuit is not a party to the fraudulent transaction. It is the United States -- on whose behalf he sues - - that is the party to the transaction. It is consequently unreasonable to expect the *qui tam* plaintiff to have access to the transactional documents, which are almost always held exclusively by the wrongdoer on the one hand, and the Government itself on the other.

Moreover, the chief objective of Rule 9(b) -- putting the defendant sufficiently on notice of the allegations so that it can prepare its defense, is easily met by a complaint that provides details of other aspects of the fraudulent scheme, such as the category of claims alleged to be false, the perpetrators, time and location of the scheme, and the factual predicate for the relator's belief that the claims are false.

H.R. 4854 would add a new subsection 3731(e) to the FCA that would provide that "[i]n pleading an action brought under section 3730(b), a person shall not be required to identify

specific false 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."

For the reasons set forth above, I believe this amendment would play an important role in encouraging *qui tam* plaintiffs to pursue meritorious cases.

III. PROVISIONS CLARIFYING PROCEDURES AND REMEDIES

H.R. 4854 corrects and clarifies several aspects of *qui tam* procedure and remedies that have been the subject of confusion by the courts, the Government and the *qui tam* bar and that have impeded the Act from operating as smoothly as it could. I support each of these changes.

A. Procedural Clarifications

1. Proceeding with a Declined Case

With regard to procedure, through an amendment to subparagraph 3730(a)(4)(B), the Bill sets out a firm timetable for a *qui tam* plaintiff's proceeding with a declined case. It has been unclear as whether Federal Rule of Civil Procedure 4(m), which provides 120 days for service "after the filing of the complaint," governs service when a complaint has been pending under seal for sixty days or more.

2. Statute of Limitations

The bill also enacts a uniform ten year statute of limitations for all claims brought under Section 3730, again redressing confusion among the courts, the Government and the *qui tam* bar as to the operation of the current statute.[25]

[25] The FCA currently requires an FCA complaint to be filed by *the later of*: (i) six years from the date of the violation, or (ii) three years from the date "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," not to exceed ten years from the date of the violation. 31 U.S.C. § 3731(b). The chief source of confusion has been the three year tolling provision in 31 U.S.C. § 3731(b)(2). The courts have been unclear how to apply this provision when a relator files a case, or proceeds with a case declined by the United States. Some courts have held that the

3. Service on State Plaintiffs

H.R. 4854 clarifies the procedure for service of the complaint on the state plaintiffs when a *qui tam* suit is brought on behalf of states as well as the federal government. In light of the seal on the federal claim, the U.S. Attorneys and Main Justice have a confounding array of different policies as to whether the *qui tam* plaintiff should serve the states in this situation, and the states, likewise, have different views on whether they should be served simultaneously with the federal Government.

4. Delegating Civil Investigative Demand Authority, and Defining Appropriate Uses of CID Material

One of the most significant procedural amendments is the provision in H.R. 4854 that would permit the Attorney General to delegate the issuance of Civil Investigative Demands (CIDs), a form of administrative subpoena that may be used to obtain documents, testimony and interrogatory responses. In 1986, Congress enacted a new § 3733 of the Act that authorized the Department of Justice to issue CIDs. The Senate Judiciary Committee viewed this as an authority "supplementing the investigative powers of the IGs [Inspectors General]." S. Rep. No. 99-345, 99th Cong., 2d Sess. 33, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5298 (1986). The Committee noted that "perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies." S. Rep. No. 99-345 at 7. Having independent subpoena authority also fosters the independence of the Department of Justice in investigating some matters that program agencies might prefer to close down for reasons unrelated to the merits.

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relator does not get the benefit of the tolling provision at all. *See, e.g., United States ex rel. Sikkenga v. Regence Blue Cross Blue Shield of Utah*, 472 F.3d 702, 724-25 (10th Cir. 2006); *Neal v. Honeywell*, 33 F.3d 860, 865-66 (7th Cir. 1994); *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 171 (D.D.C. 1998). Other courts have held that the relator may file within three years of when he or she first knew or reasonably should have known the facts material to the rights of action. *See, e.g., United States ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996); *United States ex rel. Lowman v. Hilton Head Health Sys.*, L.P., 487 F. Supp. 2d 682, 697 (D.S.C. 2007). Yet other courts have ruled that the relator may file within three years of when the Government knew or reasonably should have known about the violation. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.,* 474 F. Supp. 2d 75, 88-89 (D.D.C. 2007).

Unfortunately, when Congress enacted § 3733, it did not make the CID power delegable. As a result, when an Attorney General is occupied with matters that he or she considers more important than FCA investigations, the line attorneys at the Department of Justice and in the Offices of U.S. Attorney are unable to utilize CIDs to investigate their cases. I recall learning from an attorney at Main Justice, an Assistant U.S. Attorney, and several *qui tam* counsel, that requests for the issuance of CIDs sat untouched on the Attorney General's desk for as long as a year during a period of time about four to five years ago.

The use of CIDs has been stymied by another flaw in the original CID provision – the failure to specify the permissible "official uses" of the subpoenaed material in FCA cases. Paradoxically, through an apparent drafting oversight, the Act expressly provides that only government attorneys handling "other proceedings" have the discretion to determine the nature of the "official uses" of CID material required by the proceeding. 31 U.S.C. § 3733(i)(3). While the statute provides that attorneys handling FCA matters may be provided CID material for "official use," not only is the term undefined in the statute, but paragraphs in the CID provision designate certain prohibited and certain allowable uses in FCA proceedings without expressly noting that DOJ attorneys have discretion to use CID material in other situations in which such use is necessary to investigate or litigate the FCA case. 31 U.S.C. § 3733(i)(2). This oversight has compounded the uncertainty as to how Congress intended the Department of Justice to use this potentially valuable investigative tool. As a result, most Department of Justice trial attorneys and Assistant U.S. Attorneys shy away from utilizing the CID authority.

Through amendments to Paragraphs 3733(a)(1) and (i)(3), H.R. 4854 permits the Attorney General to delegate the authority to issue CIDs, and clearly defines the term "official use" to include the normal, lawful uses of subpoenaed information during a Department of Justice investigation or litigation.

In his testimony before the Senate Judiciary Committee, Michael F. Hertz, the Deputy Assistant Attorney General for the Civil Division, testified that the provisions concerning CIDs in S. 2041 are the most valuable aspects of the legislation from

the perspective of the Department of Justice.[26] I agree with Mr. Hertz's testimony.

Approximately three years ago, an Assistant U.S. Attorney who supervises civil health care fraud cases informed me that the U.S. Department of Health & Human Services no longer assigned investigators to cases involving allegations of Medicaid fraud in her district. As a result, if neither the FBI nor the state had the resources to investigate a case alleging Medicaid fraud, her office would have to decline to intervene in the case.

Providing the U.S. Department of Justice with a viable tool to investigate FCA cases on its own means that the Government will be able to investigate many more cases and recover millions of additional dollars each year. Like the provision expanding liability for knowing retention of overpayments, this amendment should greatly increase the revenue brought in by the Department of Justice each year.

B. Clarification of Remedies

1. Alternative Remedies

With regard to remedies, the Bill amends Paragraph 3730(c)(5), the provision of the Act that allows *qui tam* plaintiffs to recover if the Government pursues an "alternative remedy," to clarify the meaning of that term. The proper interpretation of this term has been subject to debate in discussions between qui tam plaintiffs and the Government. H.R. 4854 appropriately defines the term to include, among other things, recoveries obtained in exchange for a release of, or agreement not to pursue the claims asserted by the *qui tam* plaintiff.

2. Interest on *Qui Tam* Award

The bill also amends paragraph 3730(d)(1) to provide that the Government will pay the *qui tam* plaintiff interest on his or her award whenever the Government takes more than thirty days to pay the relator after collecting the proceeds from the defendant. This amendment is necessary because, due to the slow

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[26] *The False Claims Act Correction Act: Strengthening Government's Most Effective Tool Against Fraud for the 21st Century, 2008: Hearings on S. 2041 Before the Senate Comm. on the Judiciary*, 110th Cong., 2d Sess. (2008) (Testimony by Michael F. Hertz, Deputy Assistant Attorney General for the Civil Division).

workings of government bureaucracy, the Department of Justice from time to time does not pay the relator until many months after collecting the recovery. In a case I handled several years ago, our client received his share approximately six months after the United States received its recovery from the defendant.

This amendment is also necessary because the Government sometimes declines to pay a relator any money at all during the period of time that two relators are attempting to resolve their dispute over whom is entitled to the share, and during the period of time that the Government and the relator are disputing a proper share. Resolving these disputes can take years, and it is unjust for the relator, who has often been left with no means of earning a living as a result of his whistle blowing, to be denied the time value of money determined to be rightfully his. It is also inappropriate for the United States to be able to use the time value of money as a form of leverage to force the relator to accept a lower amount than that to which he is rightfully entitled.

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Each of these clarifications to the Act’s procedures and remedies are badly needed, and should be part of the final bill.