Exhibit B

Bill Tracking Report

111th Congress, 1st Session

S 386

2009 Bill Tracking S. 386; 111 Bill Tracking S. 386

BILL TITLE: FERA

LEGISLATIVE CHAMBER: U.S. Senate

SPONSOR: Senator Patrick J. Leahy, D-VT

SYNOPSIS:

A bill to improve enforcement of mortgage fraud, securities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes

PROPOSED DATE: February 5, 2009

LAST ACTION DATE: June 3, 2009

STATUS:
Introduced in the Senate, February 5, 2009
Reported in the Senate, as amended, March 5, 2009
Considered in the Senate, April 22, 2009
Passed in the House, April 28, 2009
Considered in the House, May 6, 2009
Passed in the House, as amended, May 6, 2009
House amendments considered in the Senate, May 14, 2009
House amendments agreed to in the Senate, May 14, 2009
Senate amendment considered in the House, May 18, 2009
Senate amendment agreed to in the House, May 18, 2009
Presented to the President, May 19, 2009
Became Public Law (*P.L. 111-21*), May 20, 2009

TOTAL COSPONSORS: 27
24 Democrats / 2 Republicans

Display Major Actions Only

ACTIONS:

Committee Referrals:

February 5, 2009	Senate Committee on the Judiciary

Legislative Chronology:

1st Session Activity:

February 5, 2009	*155 Cong Rec S 1677* Referred to the Senate Committee on the Judiciary.
February 5, 2009	*155 Cong Rec S 1681* Remarks by Sen. Leahy (D-VT)
February 5, 2009	*155 Cong Rec S 1684* Remarks by Sen. Kaufman (D-DE)
March 5, 2009	*155 Cong Rec S 2827* Reported, as amended, by Senate Committee on the Judiciary
March 5, 2009	*155 Cong Rec D 215* Ordered reported, as amended, by Senate Committee on the Judiciary
April 2, 2009	*155 Cong Rec S 4399* Senate considered motion to proceed to consideration of the measure
April 2, 2009	*155 Cong Rec S 4399* Motion for Cloture on motion to proceed to consideration of the measure made with vote to occur on Tuesday, April 21, 2009
April 20, 2009	*155 Cong Rec S 4408* Senate resumed consideration of motion to proceed to consideration of the measure
April 21, 2009	*155 Cong Rec S 4524* Senate agreed to proceed to consideration of the measure (by unanimous consent), thus the Cloture Motion on the motion to proceed to consideration of the measure was withdrawn
April 22, 2009	*155 Cong Rec S 4531* Senate considered
April 22, 2009	*155 Cong Rec S 4538* Amendment No. 984 offered by Sen. Reid (D-NV) to increase funding for certain HUD programs to assist individuals to better withstand the current mortgage crisis
April 22, 2009	*155 Cong Rec S 4539* Amendment No. 985 offered by Sen. Kyl (R-AZ) to modify the definition of the term "obligation"
April 22, 2009	*155 Cong Rec S 4540* Amendment No. 993 offered by Sen. Leahy (D-VT) and Sen. Grassley (R-IA) to clarify the amendments relating to major fraud
April 22, 2009	*155 Cong Rec S 4542* Senate agreed to modify Leahy/Grassley Amendment No. 993 (by unanimous consent0
April 22, 2009	*155 Cong Rec S 4543* Senate agreed to Leahy/Grassley Modified Amendment No.

	993 (by unanimous consent)
April 22, 2009	*155 Cong Rec S 4543* Senate agreed to Kyl Amendment No. 985, by 94 yeas to 1 nay (*Vote No. 160*)
April 22, 2009	*155 Cong Rec S 4543* Amendment No. 995 offered by Sen. Isakson (R-GA) to establish the Financial Markets Commission
April 22, 2009	*155 Cong Rec S 4552* Senate agreed to Isakson Amendment No. 995, by 92 yeas to 4 nays (*Vote No. 161*)
April 22, 2009	*155 Cong Rec S 4552* Amendment No. 999 offered by Sen. Dorgan (D-ND) and Sen. McCain (R-AZ) to establish a select committee of the Senate to make a thorough and complete study and investigation of the facts and circumstances giving rise to the economic crisis facing the United States and to make recommendations to prevent a future recurrence of such a crisis
April 22, 2009	*155 Cong Rec S 4554* Amendment No. 996 (to Amendment No. 984) offered by Sen. Inhofe (R-OK) to amend title 4, U.S. Code, to declare English as the national language of the Government of the United States
April 22, 2009	*155 Cong Rec S 4555* Amendment No. 991 offered by Sen. Vitter (R-LA) to authorize and remove impediments to the repayment of funds received under the Troubled Asset Relief Program
April 22, 2009	*155 Cong Rec S 4556* Amendment No. 1000 offered by Sen. Boxer (D-CA) to authorize monies for the Special Inspector General for the Troubled Asset Relief Program to audit and investigate recipients of non-recourse Federal loans under the Public Private Investment Program and the Term Asset Loan Facility
April 22, 2009	*155 Cong Rec S 4558* Amendment No. 986 offered by Sen. Kyl (R-AZ) to limit the amount that may be deducted from proceeds due to the United States under the False Claims Act for purposes of compensating private intervenors to the greater of $50,000,000 or 300 percent of the expenses and cost of the intervenor
April 22, 2009	*155 Cong Rec S 4559* Amendment No. 982 offered by Sen. Coburn (R-OK) to authorize the use of TARP funds to cover the costs of the bill
April 22, 2009	*155 Cong Rec S 4561* Senate agreed to Dorgan/McCain Amendment No. 999 (by unanimous consent)
April 23, 2009	*155 Cong Rec S 4604* Senate resumed consideration
April 23, 2009	*155 Cong Rec S 4605* Amendment No. 1002 offered by Sen. Thune (R-SD) to require the Secretary of the Treasury to use any amounts repaid by a financial institution that is a recipient of assistance under the Troubled Assets Relief Program for debt reduction

April 23, 2009	*155 Cong Rec S 4607* Amendment No. 994 offered by Sen. DeMint (R-SC) to prohibit the use of Troubled Asset Relief Program funds for the purchase of common stock
April 23, 2009	*155 Cong Rec S 4608* Amendment No. 983 offered by Sen. Coburn (R-OK) to require the Inspector General of the Federal Housing Finance Agency to investigate and report on the activities of Fannie Mae and Freddie Mac that may have contributed to the current mortgage crisis
April 23, 2009	*155 Cong Rec S 4611* Amendment No. 990 offered by Sen. Kohl (D-WI) to protect older Americans from misleading and fraudulent marketing practices, with the goal of increasing retirement security
April 23, 2009	*155 Cong Rec S 4614* Amendment No. 1006 offered by Sen. Schumer (D-NY) to provide additional funding to the SEC to use in enforcement proceedings
April 23, 2009	*155 Cong Rec S 4615* Amendment No. 1004 offered by Sen. Ensign (R-NV) to impose certain requirements on public-private investment fund programs
April 23, 2009	*155 Cong Rec S 4616* Amendment No. 1003 (to Amendment No. 1000) offered by Sen. Ensign (R-NV) to impose certain requirements on public-private investment fund programs
April 23, 2009	*155 Cong Rec S 4617* Senate rejected Kyl Amendment No. 986, by 31 yeas to 61 nays (*Vote No. 162*)
April 23, 2009	*155 Cong Rec S 4620* Amendment No. 1007 offered by Sen. Hatch (R-UT) to prohibit the Department of Labor from expending Federal funds to withdraw a rule pertaining to the filing by labor organizations of an annual financial report required by the Labor-Management Reporting and Disclosure Act of 1959
April 23, 2009	*155 Cong Rec S 4621* Senate agreed to Schumer Amendment No. 1006 (by unanimous consent)
April 23, 2009	*155 Cong Rec S 4657* Motion for Cloture on amendment in the nature of a substitute recommended by the Senate Committee on the Judiciary made with vote to occur on Monday, April 27, 2009
April 27, 2009	*155 Cong Rec S 4735* Senate resumed consideration
April 27, 2009	*155 Cong Rec S 4740* Senate agreed to Cloture Motion on amendment in the nature of a substitute recommended by the Senate Committee on the Judiciary, by 84 yeas to 4 nays (*Vote No. 170*)
April 27, 2009	*155 Cong Rec S 4740* Point of order raised by Sen. Leahy (D-VT) against the pending amendments on the grounds that they are not germane to the bill postcloture

April 27, 2009	*155 Cong Rec S 4740* Leahy point of order against the pending amendments sustained
April 27, 2009	*155 Cong Rec S 4740* Reid Amendment No. 984 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Inhofe Amendment No. 996 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Vitter Amendment No. 991 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Boxer Modified Amendment No. 1000 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Coburn Amendment No. 982 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Thune Amendment No. 1002 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* DeMint Amendment No. 994 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Coburn Amendment No. 983 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Kohl Amendment No. 990 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Ensign Amendment No. 1004 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Ensign Amendment No. 1003 fell (under the previous order)
April 27, 2009	*155 Cong Rec S 4740* Hatch Amendment No. 1007 fell (under the previous order)
April 28, 2009	*155 Cong Rec S 4774* Senate resumed consideration
April 28, 2009	*155 Cong Rec S 4776* Senate passed, as amended, by 92 yeas to 4 nays (*Vote No. 171*)
May 5, 2009	*155 Cong Rec H 5106* Remarks by Rep. Cohen (D-TN)
May 6, 2009	*155 Cong Rec H 5260* House considered under suspension of the rules
May 6, 2009	*155 Cong Rec H 5271* House agreed to suspend the rules and pass, as amended, by 367 yeas to 59 nays (*Roll No. 235*)
May 7, 2009	*155 Cong Rec E 1090* Remarks by Rep. Dingell (D-MI)
May 7, 2009	*155 Cong Rec E 1100* Remarks by Rep. Tanner (D-TN)
May 12, 2009	*155 Cong Rec E 1120* Remarks by Rep. Fortenberry (R-NE)
May 14, 2009	*155 Cong Rec S 5494*

	Senate considered House amendments
May 14, 2009	*155 Cong Rec S 5495*
	Senate agreed to House amendments (by unanimous consent)
May 18, 2009	*155 Cong Rec H 5686*
	House considered Senate amendment under suspension of the rules
May 18, 2009	*155 Cong Rec H 5689*
	House agreed to suspend the rules and agree to Senate amendment, by 338 yeas to 52 nays (*Roll No. 268*)
May 18, 2009	*155 Cong Rec H 5690*
	Remarks by Rep. Gutierrez (D-IL)
May 18, 2009	*155 Cong Rec H 5690*
	Remarks by Rep. Mica (R-FL)
May 19, 2009	*155 Cong Rec E 1196*
	Remarks by Rep. Graves (R-MO)
May 19, 2009	*155 Cong Rec E 1196*
	Remarks by Rep. Barrett (R-SC)
May 19, 2009	*155 Cong Rec E 1198*
	Remarks by Rep. Van Hollen (D-MD)
May 19, 2009	*155 Cong Rec E 1201*
	Remarks by Rep. Ryan (D-OH)
May 19, 2009	*155 Cong Rec E 1202*
	Remarks by Rep. Maloney (D-NY)
May 19, 2009	*155 Cong Rec S 5614*
	Presented to the President
May 20, 2009	*155 Cong Rec E 1219*
	Remarks by Rep. McCollum (D-MN)
May 20, 2009	*155 Cong Rec D 614*
	Signed by the President and became Public Law (*P.L. 111-21*)
May 21, 2009	*155 Cong Rec E 1229*
	Remarks by Rep. Johnson (R-IL)
May 21, 2009	*155 Cong Rec E 1239*
	Remarks by Rep. Carney (D-PA)
May 21, 2009	*155 Cong Rec E 1252*
	Remarks by Rep. Kissell (D-NC)
June 3, 2009	*155 Cong Rec E 1295*
	Remarks by Rep. Berman (D-CA)

SUMMARY:
(from the CONGRESSIONAL RESEARCH SERVICE)

Digest:

Fraud Enforcement and Recovery Act of 2009 or FERA -(Sec. 2) Amends the federal criminal code to include within the definition of"financial institution" a mortgage lending business or any person or entity that makes, in whole or in part,a federally related mortgage loan. Defines"mortgage lending business" as an organization that finances or refinances any debt secured by an interest in real estate, including private mortgage companies and their subsidiaries, and whoseactivities affect interstate or foreign commerce.

Extends the prohibition against making false statements in a mortgage application to employees and agents of a mortgage lending business.

Applies the prohibition against defrauding thefederalgovernment to fraudulent activities involving the Troubled Asset Relief Program (TARP) or a federal economic stimulus, recovery, or rescue plan.

Expands securities fraud provisions to cover fraud involving options and futures incommodities.

Expands the concept of monetary proceeds, for purposes of enforcing prohibitions against money laundering, to include gross receipts.

Expresses the sense of Congress with respect to the prosecution of money laundering crimesin combination with other closely-connected offenses. Requires the Attorney General to report to the House and Senate Judiciary Committees on such prosecutions.

(Sec. 3) Authorizes appropriations to the Attorney General for FY2010-FY2011 forinvestigations, prosecutions, and civil and administrative proceedings involving federal assistance programs and financial institutions. Allocates such funds among various departments of the Department of Justice (DOJ). Requires that an appropriatepercentage of such funds be used to investigate mortgage fraud.

Authorizes additional appropriations to the U.S. Postal Service, the Inspector General for the Department of Housing and Urban Development (HUD), the U.S. Secret Service, and theSecurities and Exchange Commission (SEC), including the Office of Inspector General, in FY2010-FY2011 for similar investigations.

Requires the Attorney General, in consultation with the U.S. Postal Inspection Service, the Inspector General forHUD, the Secretary of Homeland Security, and the SEC Commissioner [sic], to submit a report to Congress identifying: (1) amounts spent for investigations, with a certification of compliance that funds have been spent in accordance with this Act;and (2) amounts recovered from criminal or civil restitution, fines, penalties, and other monetary recoveries.

(Sec. 4) Amends the False Claims Act to: (1) expand liability under such Act for making false or fraudulent claims to the federalgovernment; and (2) apply liability under such Act for presenting a false or fraudulent claim for payment or approval (currently limited to such a claim presented to an officer or employee of the federal government). Requires persons who violate such Actto reimburse the federal government for the costs of a civil action to recover penalties or damages.

Modifies and expands provisions of the False Claims Act relating to intervention by the federal government in civil actions for false claims,sharing of information by the Attorney General with a claimant, retaliatory relief, and service upon state or local authorities in sealed cases.

(Sec. 5) Establishes in the legislative branch the Financial Crisis Inquiry Commission to examine thecauses of the current U.S. financial and economic crisis, taking into account fraud and abuse in the financial sector and other specified factors.

Requires the Commission to submit a final report on its findings to the President andCongress on December 15, 2010. Requires the Commission chairperson to appear before the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs within 120 days after the submission of such report. Terminatesthe Commission 60 days after the submission of such report.

Authorizes appropriations.

CRS Index Terms:

Civil actions and liability
Commodities markets
Congressional oversight
Crime and law enforcement
Criminal investigation, prosecution, interrogation
Currency

Department of Housing and Urban Development
Department of Justice
Executive agency funding and structure
Financial crises and stabilization
Fraud offenses
Government investigations
Housing finance and home ownership
Postal service
Securities
Tax administration and collection, taxpayers

Display Co-Sponsors by Name
Display Co-Sponsors by Political Party
Display Co-Sponsors by Date, Descending
Display Co-Sponsors by Date, Ascending

CO-SPONSORS BY DATE
Original Cosponsors:

Grassley(R)-IA	KAUFMAN(D)-DE	

Added February 23, 2009:
KLOBUCHAR(D)-MN

Added March 5, 2009:
Schumer(D)-NY

Added April 20, 2009:

Bayh(D)-IN	Dorgan(D)-ND	Harkin(D)-IA
Levin(D)-MI	Murray(D)-WA	Rockefeller(D)-WV
Shaheen(D)-NH	Snowe(R)-ME	Specter(D)-PA
WHITEHOUSE(D)-RI		

Added April 21, 2009:

SANDERS(I)-VT	Stabenow(D)-MI	

Added April 22, 2009:

BENNET(D)-CO	Durbin(D)-IL	

Added April 27, 2009:

Begich(D)-AK	Burris(D)-IL	CARDIN(D)-MD
Dodd(D)-CT	GILLIBRAND(D)-NY	Menendez(D)-NJ
Mikulski(D)-MD	Pryor(D)-AR	Reid(D)-NV

SUBJECT: JUSTICE DEPARTMENTS (94%); INVESTIGATIONS (92%); ATTORNEYS GENERAL (92%); LAW ENFORCEMENT (91%); FRAUD & FINANCIAL CRIME (91%); MORTGAGE BANKING & FINANCE (91%); REAL ESTATE FRAUD (90%); HOUSING AUTHORITIES (90%); MORTGAGE REFINANCING (90%); LEGISLATIVE BODIES (90%); ECONOMIC CRISIS (90%); CITY LIFE (90%); TROUBLED ASSET RELIEF PROGRAM (90%); SPECIAL INVESTIGATIVE FORCES (90%); MORTGAGE BANKING (90%); APPROPRIATIONS (90%); LAWYERS (90%); REAL ESTATE (90%); FINANCIAL CRIME COUNTERMEASURES (90%)

LOAD-DATE: June 5, 2009

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FRAUD ENFORCEMENT W/8 2009

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COMMITTEE REPORTS

111th Congress, 1st Session

SENATE Report 111-10

111 S. Rpt. 10

FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

March 23, 2009--Ordered to be printed

SPONSOR: Mr. Leahy submitted the following

COMMITTEE: From the Committee on the Judiciary

TEXT:

NOTICE:
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March 23, 2009.--ordered to be printed

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

R E P O R T

[To accompany S. 386]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 386), to improve enforcement of mortgage fraud, securities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

CONTENTS

I. Background and Purpose of the Fraud Enforcement and Recovery Act of 2009

On February 5, 2009, Chairman Leahy and Senators Grassley and Kaufman introduced the Fraud Enforcement and Recovery Act of 2009 (FERA). Senators Klobuchar and Schumer have joined as cosponsors. This legislation will increase accountability for the corporate and mortgage frauds that have contributed to the recent economic collapse and will help protect Americans from future frauds that exploit the economic assistance programs intended to restore and rebuild our economy.

This legislation provides substantial funding for the Justice Department and other agencies to hire prosecutors, agents, and analysts in order to restore their capacity to pursue mortgage, corporate, and other financial fraud during this economic downturn. The bill also provides important clarifications to current criminal and civil fraud statutes to ensure that law enforcement has the tools it needs to prevent and punish these frauds, as well as to recover taxpayer money lost to these frauds.

a. background

Our Nation is in the midst of its most serious economic crisis since the Great Depression. With each passing week, tens of thousands more Americans lose their jobs to layoffs, and many thousands more are losing their homes to foreclosure. As we learn more and more each day about the causes of this debacle, it is clear that unscrupulous mortgage brokers and Wall Street financiers were among the contributors to this economic collapse. With the new tools and resources in this bill, it will be easier to ensure that all of those responsible for these financial crimes are held accountable.

While the full scope of the fraud that helped trigger the economic crisis is still unknown, we do know a great deal about what went wrong. As banks and private mortgage companies relaxed their standards for loans, approving ever riskier mortgages with less and less due diligence, they created an environment that invited fraud. Private mortgage brokers and lending businesses came to dominate the home housing market, and these companies were not subject to the kind of banking oversight and internal regulations that had traditionally helped to prevent fraud. We are now seeing the results of this lax supervision and accountability.

In the last six years, suspicious activity reports alleging mortgage fraud that have been filed with the Treasury Department have increased nearly tenfold to more than 62,000 in 2008. In the last three years, the number of criminal mortgage fraud investigations opened by the Federal Bureau of Investigation (FBI) has more than doubled, and the FBI anticipates a new wave of cases that could double that number yet again in coming years. Despite these increases, the FBI currently has fewer than 250 Special Agents nationwide assigned to these financial fraud cases. At current levels, they cannot individually review, much less thoroughly investigate, the more than 5,000 fraud allegations received by the Treasury Department each month.

Of course, the problem is not limited to mortgage frauds. As is so common in today's financial markets, home mortgages were packaged together and turned into securities that were bought and sold in largely unregulated markets on Wall Street. Here again, the environment invited fraud. As the value of the mortgages started to decline with falling housing prices, Wall Street financiers began to see these mortgage-backed securities unravel. Unfortunately, some were not honest about these securities, leading to even more fraud and victimizing investors nationwide.

All of this fraud has contributed to an unprecedented collapse in the mortgage-backed securities market. In the past year, banks and financial institutions in the United States alone have suffered more than $500 billion in losses associated with the subprime mortgage industry. Some of our Nation's largest and most venerable financial institutions collapsed as a result. The list of publicly traded companies that declared bankruptcy or have been taken over by the

Federal Government because of the mortgage-backed securities market collapse includes Fannie Mae, Freddie Mac, Bear Stearns, IndyMac, and Lehman Brothers.

To make sure this kind of collapse cannot happen again, we must reinvigorate our anti-fraud measures and give law enforcement agencies the tools and resources they need to root out fraud so that it can never again place our financial system at risk. Taxpayers, who bear the burden of this financial downturn, deserve to know that the Government is doing all it can to hold responsible those who committed fraud in the run-up to this collapse.

b. purpose of the legislation

This bipartisan legislation will reinvigorate our Nation's capacity to investigate and prosecute the kinds of financial frauds that have so severely undermined our financial markets and hurt so many hard working people in these difficult economic times. This legislation provides the resources and new tools needed for law enforcement to uncover and prosecute these frauds and to aggressively work to detect and prevent fraud related to the Government's ongoing efforts to bail out banks and stimulate the economy.

The bill authorizes $165 million a year for hiring fraud prosecutors and investigators at the Justice Department in fiscal years 2010 and 2011. This includes $75 million in 2010 and $65 million in 2011 for the FBI to hire 190 additional special agents and more than 200 professional staff and forensic analysts to nearly double the size of its mortgage and financial fraud program. With this funding, the FBI can expand the number of its mortgage fraud task forces nationwide--from 26 to more than 50--that target fraud in the hardest hit areas in our Nation. This authorization also includes $50 million a year for U.S. Attorneys' Offices to staff those strike forces and $40 million for the Criminal, Civil, and Tax Divisions at the Justice Department to provide special litigation and investigative support in those efforts. In addition, the bill authorizes $80 million a year for fiscal years 2010 and 2011 for investigators and analysts at the U.S. Postal Inspection Service, the U.S. Secret Service, and the Office of Inspector General for the Department of Housing and Urban Development to combat fraud in Federal assistance programs and financial institutions.

This legislation also makes a number of important improvements to fraud and money laundering statutes to strengthen prosecutors' ability to combat this growing wave of fraud. Specifically, the bill amends the definition of "financial institution" in the criminal code (18 U.S.C. $S20) in order to extend Federal fraud laws to mortgage lending businesses that are not directly regulated or insured by the Federal Government. These companies were responsible for nearly half the residential mortgage market before the economic collapse, yet they remain largely unregulated and outside the scope of traditional Federal fraud statutes. This change would apply the Federal fraud laws to private mortgage businesses, just as they apply to federally insured and regulated banks.

The legislation would also amend the false statements in mortgage applications statute (18 U.S.C. $S1014) to make it a crime to make a materially false statement or to willfully overvalue a property in order to influence any action by a mortgage lending business. Currently, this false statements offense only applies to Federal agencies, banks, and credit associations and does not necessarily extend to private mortgage lending businesses, even if they are handling federally-regulated or federally-insured mortgages. Similar to expanding the definition of "financial institution", this provision would ensure that private mortgage brokers and companies are held fully accountable under this Federal fraud provision. This is a particularly important as false appraisal fraud has been a particularly problematic type of fraud during the recent financial crisis.

The bill would amend the major fraud statute (18 U.S.C. $S1031) to protect funds expended under the Troubled Asset Relief Program and the economic stimulus package, including any Government purchases of preferred stock in financial institutions. The U.S. Government has provided extraordinary economic support to our banking system, and we need to make sure that none of those funds are subject to fraud or abuse. This change will give Federal prosecutors and investigators the explicit authority they need to protect taxpayer funds.

The legislation would amend the Federal securities statute (18 U.S.C. $S1348) to cover fraud schemes involving commodities futures and options, including derivatives involving the mortgage-backed securities that caused such damage to our banking system.

This bill would amend the Federal money laundering statutes (18 U.S.C. SS1956, 1957) to correct an erroneous Supreme Court decision in 2008 that significantly weakened these statutes. In United States v. Santos, the Supreme

Court misinterpreted the money laundering statutes, limiting their scope to only the "profits" of crimes, rather than the "proceeds" of the offenses. 128 S. Ct. 2020 (2008). The Court's decision was contrary to Congressional intent and will lead to criminals escaping culpability simply by claiming their illegal scams did not make any profit. Indeed, proceeds of "Ponzi schemes" like the Bernard Madoff case, which by their very nature do not include any profit, would be out of the reach of the money laundering statutes under this decision. This flawed decision needs to be corrected immediately, as dozens of significant money laundering cases have already been dismissed.

Lastly, FERA improves one of the most potent civil tools for rooting out waste and fraud in Government--the False Claims Act (18 U.S.C. $S3729 et seq.). The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and, in some cases, allow subcontractors paid with Government money to escape responsibility for proven frauds. The False Claims Act must be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis.

II. History of the Bill and Committee Consideration

a. introduction of the bill

On February 5, 2009, Chairman Leahy introduced the bill, S. 386, with Senators Grassley and Kaufman. Senators Klobuchar and Schumer have joined as cosponsors.

b. committee consideration

1. Committee hearing

On February 11, 2009, the Committee held a hearing entitled "The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn" to, among other things, consider this legislation. At the hearing, three witnesses testified: FBI Deputy Director John S. Pistole; Special Inspector General for the Troubled Asset Relief Program ("TARP") Neil M. Barofsky; and the Acting Assistant Attorney General for the Criminal Division of the Justice Department Rita M. Glavin. All three witnesses testified favorably concerning the need for this legislation.

Deputy Director Pistole testified that the number of mortgage fraud cases opened by the FBI had more than doubled in the past three years, with 721 cases open in 2005 and more than 1,800 at the end of 2008. Transcript of Hearing at 13. In his oral and written testimony, Pistole analogized the current situation to the Savings and Loan crisis of the late 1980s and early 1990s, when the Federal Government needed to improve financial fraud enforcement and did so by passing the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989 and the Crime Control Act of 1990. Id. at 27-28; Statement of John S. Pistole, FBI Deputy Director at 1-2. Pistole warned, however, that the losses in this economic crisis dwarf those of the Savings and Loan debacle, and the need for more enforcement is even greater now than it was then. Transcript of Hearing at 28; Statement of John S. Pistole, FBI Deputy Director at 1-2.

Special Inspector General Barofsky described how law enforcement resources had understandably been diverted from traditional "white collar" crime to terrorism following the attacks on September 11, 2001. Transcript of Hearing at 19. This trend left the Justice Department's capacity to respond to financial and securities fraud significantly weakened, and with the recent trends shifting even more resources to mortgage frauds, other white collar efforts were even further "underfunded and underprosecuted." Id. Barofsky warned that with trillions of dollars being spent under TARP and other associated programs, "it is essential that the appropriate resources be dedicated to meet the challenges of both deterring and prosecuting fraud." Id. at 20.1
1

Barofsky specifically commented on S. 386 as follows: "I applaud the efforts of this Committee to introduce bipartisan legislation, such as the Chairman and Senator Kaufman's Fraud Enforcement [and] Recovery Act and Senator Schumer and Senator Shelby's Safe Markets Act. These will ensure that law enforcement has the necessary resources to meet the daunting challenges that [lie] ahead. Such measures will greatly assist us and our partners as we engage in this historic effort to deter and prosecute those who would seek to criminally profit from a national crisis." Transcript of Hearing at 20.

Acting Assistant Attorney General Glavin emphasized the need for this legislation amidst the current economic crisis. Id. at 22. Glavin testified that S. 386 would provide the Justice Department with needed tools "to aggressively fight fraud in the current economic climate" and "provide key statutory enhancements that will assist in ensuring that those who have committed fraud are held accountable." Id. at 23. Glavin also stated that the resources in the bill were needed for the Justice Department to respond to fraud in the midst of this crisis, and S. 386 was "an important and timely step in the process and we applaud the initiative of this Committee in proposing this Act." Id. at 26.

The Committee also received written testimony supporting S. 386 from the Kenneth M. Donohue, the Inspector General for the Department of Housing and Urban Development, and from William R. Gilligan, Jr., Acting Chief Postal Inspector.

2. Committee executive business meetings

On February 26, 2009, the Committee held an executive committee business meeting to consider S. 386, and other measures, and the bill was held over for further consideration at the request of the ranking member.

On March 5, 2009, the Committee adopted by unanimous consent a complete substitute to the bill offered by the Chairman and Senators Grassley, Schumer, Kaufman, and Klobuchar. The complete substitute made several technical corrections and clarifications to the bill requested by the Justice Department in the appendix to Acting Assistant Attorney General Glavin's written testimony and in a Justice Department views letter about Section 4 of the bill. The substitute also increased the authorized funding for the FBI by $10 million in fiscal year 2010 and added $20 million in fiscal year 2010 and 2011 for the U.S. Secret Service to combat financial fraud. Senator Schumer also offered an amendment to add funding for the Securities and Exchange Commission to the bill, but withdrew the amendment after Senator Grassley opposed it.

The Committee then voted to report the Fraud Enforcement and Recovery Act of 2009, as amended, favorably to the Senate by voice vote.

III. Section-by-Section Summary of the Bill

Sec. 1. Short title

This section provides that the legislation may be cited as the Fraud Enforcement and Recovery Act of 2009 (FERA).

Sec. 2(a) and 2(b). Definition of financial institution expanded to include mortgage lending businesses and mortgage brokers

At the height of the subprime lending era, independent mortgage companies--those that are not depository institutions or their subsidiaries or holding company affiliates--made nearly half of the higher-priced, first-lien mortgages in America. The loans originated by these private mortgage companies were not generally covered by current Federal fraud statutes, such as the bank fraud and bank bribery statutes. As a result, these Federal fraud statutes need to be updated by expanding the definition of "financial institution" to include mortgage lending businesses.

The recent financial crisis has further demonstrated how fraudulent mortgages can affect the health of the banking system and the overall economy. Those who engage in frauds on mortgage lending businesses should be held to the same standards that apply to traditional financial institutions, given the impact of these businesses on federally-insured and federally-regulated institutions.

This section amends the definition of a "financial institution" in Title 18 of the United States Code to include a "mortgage lending business," which is defined as "an organization * * * which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries" whose activities affect interstate or foreign commerce. The definition also includes "any person or entity that makes in whole or in part a federally-regulated mortgage loan as defined in 12 U.S.C. $S2602(1)."

These new definitions for "financial institution" and "mortgage lending business" (18 U.S.C. $S$$S20, 27) will ensure that private mortgage brokers and companies are held fully accountable under Federal fraud laws, particularly where they are dealing in federally-regulated or federally-insured mortgages. For example, the bank fraud statute, 18 U.S.C. $S1344, prohibits defrauding "a financial institution," and the amendment to this definition would extend the bank fraud statute beyond traditional banks and financial institutions to private mortgage companies. This definition of "financial institution" would also apply to the following criminal provisions: 18 U.S.C. $S215 (financial institution bribery); 18 U.S.C. $S225 (continuing financial crimes enterprise); 18 U.S.C. $S1005 (false statement/entry/record for financial institution); and 18 U.S.C. $S1344 (bank/financial institution fraud). The new definition would also provide for enhanced penalties for mail and wire fraud affecting a financial institution, including a mortgage lending business, pursuant to 18 U.S.C. $S$$S1341 and 1343.

Expanding the term "financial institution" to include mortgage lending businesses would also strengthen penalties for mortgage frauds and the civil forfeiture in mortgage fraud cases. It would extend the statute of limitations in investigations of mortgage fraud cases to be consistent with bank fraud investigations.

This definition of "financial institution" would not apply to the Suspicious Activity Reports (SARs) that banks and other financial institutions are required to file, as "financial institution" is defined separately under the Bank Secrecy Act, 31 U.S.C. $S5312(a)(2).

Sec. 2(c). False statements and appraisals by mortgage brokers and agents in loan applications

This section would amend the false statements in mortgage applications statute (18 U.S.C. $S1014) to make it a crime to make a materially false statement or to willfully overvalue a property in order to influence any action by a mortgage lending business. The current offense only applies to Federal agencies, banks, and credit associations and does not extend to private mortgage lending businesses, even if they are handling federally-regulated or federally-insured mortgages. Similar to expanding the definition of "financial institution" in Sections 2(a) and 2(b), this provision would ensure that private mortgage brokers and companies are held fully

Sec. 2(d). Major fraud against the government amended to include economic relief and Troubled Asset Relief Program funds

This section would amend the Federal major fraud statute (18 U.S.C. $S1031) to include "any grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance, including through the Troubled Assets Relief Program, an economic stimulus, recovery or rescue plan provided by the Government, or the Government's purchase of any preferred stock in a company." This amendment will make sure that Federal prosecutors have jurisdiction to use one of their most potent fraud statutes to protect the Government assistance provided during the current economic crisis, including money from the TARP and circumstances where the Government purchased preferred stock in companies to provide economic relief. These amendments, however, only apply to major frauds against the Government, where the value of the contract or services is more than $1,000,000.

Sec. 2(e). Amending securities fraud statute to include commodities fraud

This section would amend the Federal securities fraud statute (18 U.S.C. $S1348) to include commodities fraud, in addition to securities fraud. Currently, the securities fraud statute does not reach frauds involving options or futures, which include some of the derivatives and other financial products that contributed substantially to the current financial collapse.

Sec. 2(f). Amending the money laundering statute to include the proceeds for specified unlawful activity

This section would amend the criminal money laundering statutes (18 U.S.C. $S$$S1956, 1957) to make clear that the proceeds of specified unlawful activity include the gross receipts of the illegal activity, not just the profits from the illegal activity. The money laundering statutes make it an offense to conduct financial transactions involving the "proceeds" of a crime (referred to as "specified unlawful activity" in the statutes). These statutes, however, do not define the term "proceeds," and the term has been left to definition by the courts. For 22 years, since the money laundering statutes were enacted in 1986, most courts have construed "proceeds" to mean "gross receipts" and not "net profits" of illegal activity, which was consistent with the original intent of Congress. In United States v. Santos, 128 S.Ct. 2020

(2008), however, the Supreme Court in a four-justice plurality suggested that the term "proceeds" was "ambiguous" and as a result, under the rule of lenity the Court gave the term a narrower meaning. In this decision, the Court mistakenly limited the term "proceeds" to the "profits" of a crime, not its receipts.

As a result, the Supreme Court's decision has limited the money laundering statutes to only profitable crimes, and permits criminal defendants to reduce their culpability for money laundering by deducting the costs of their criminal conduct. For example, if a fraudulent mortgage broker intentionally overvalued the fair market value of a home for purposes of a mortgage, that broker could only be charged for money laundering related to any fees or potential profit made in the fraudulent transaction, not based on the full value of the house. Furthermore, an executive who committed securities fraud could not be charged with money laundering, if the fraud did not result in a profit, even though there was a fully completed financial transaction using money stolen by fraud. This decision is contrary to the intent of Congress in passing the money laundering statutes and weakens one of Federal Government primary tools used to recover the proceeds of illegal activity, including mortgage, securities, and other financial frauds.

Sec. 2(g). Making the international money laundering statute apply to tax evasion

This section would amend the international money laundering provision in the Federal money laundering statute (18 U.S.C. $S1956(a)(2)) to make it a crime for individuals to transport or transfer money in and out of the United States to evade taxes.

Sec. 3. Funding for investigators and prosecutors for mortgage fraud, securities fraud, and cases involving federal economic assistance

The economic crisis has revealed an epidemic of fraud related to the mortgage crisis and the resulting corporate collapses. The FBI and other Federal agencies will soon be overwhelmed with new cases. In the past year, the Treasury Department has received more than 62,000 Suspicious Activity Reports (SARs) from banks alleging mortgage fraud. The number of mortgage fraud SARs has gone up nearly tenfold in the last six years, and doubled even in the last three years. Currently, however, the FBI has fewer than 250 agents assigned to investigate these mortgage fraud allegations, even though the number of FBI investigations has doubled in the past three years, with the expectation that it will grow further in the coming months and years. Investigators and agents at the Inspector General's Office for Housing and Urban Development (HUD), the U.S. Secret Service, and the U.S. Postal Inspector Service have seen a similar rise in their investigations of mortgage and other corporate frauds. In addition, the U.S. Postal Inspection Service, traditionally one of the Nation's bulwarks against white collar fraud, has consistently lost funding and support over the years and needs substantial support in these times of economic crisis. The resources included in this bill will help the Justice Department, the FBI, and other investigative agencies responsible for enforcing mortgage and securities fraud hold accountable those responsible for contributing to this economic crisis, as well as protecting the resources being spent to stabilize the banking system and rebuild our economy.

This section authorizes appropriations of $165 million a year to the Attorney General for fiscal years 2010 and 2011 to be allocated to the FBI ($75 million in 2010 and $65 million in 2011), U.S. Attorney's offices ($50 million), and Criminal, Civil, and Tax Divisions of the Justice Department ($40 million). This section also authorizes additional appropriations for the Postal Inspection Service ($30 million), the Inspector General for HUD ($30 million), and the U.S. Secret Service ($20 million). This section provides that the money authorized may only be used for fighting mortgage, securities, and other financial institution frauds, and frauds against Federal assistance and relief programs, as well as for recovering funds lost to those frauds, and the Justice Department, in consultation with the other agencies and departments, would have to certify that these funds were used for those purposes, after expended.

Sec. 4. Clarifications to the False Claims Act to reflect the original intent of the law

In response to the economic crisis, the Federal Government has obligated and expended more than $1 trillion in an effort to stabilize our banking system and rebuild our economy. These

One of the most successful tools for combating waste and abuse in Government spending has been the False Claims Act (FCA), which is an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse. The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect the Federal assistance and relief funds expended in response to our current economic crisis.

This section amends the FCA to clarify and correct erroneous interpretations of the law that were decided in Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008), and United States ex. rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004).2 In Allison Engine, the Supreme Court held that Section 3729(a)(2) of the FCA requires the Government to prove that "a defendant must intend that the Government itself pay the claim," for there to be a violation. 128 S. Ct. at 2128. As a result, even when a subcontractor in a large Government contract knowingly submits a false claim to general contractor and gets paid with Government funds, there can be no liability unless the subcontractor intended to defraud the Federal Government, not just their general contractor. This is contrary to Congress's original intent in passing the law and creates a new element in a FCA claim and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute. Similarly, in Totten, the Court of Appeals for the District of Columbia Circuit held that liability under the FCA can only attach if the claim is "presented to an officer or employee of the Government before liability can attach." 380 F. 3d at 490. Known as the "presentment clause," the D.C. Circuit interpreted this clause to limit recovery for frauds committed by a Government contractor when the funds are expended by a Government grantee, such as Amtrak. The Totten decision, like the Allison Engine decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.
2

The provisions in Section 4 were drawn, in significant part, from the Committee's previous work on S. 2041, the False Claims Act Corrections Act of 2008, in the 110th Congress. S. 2041 was favorably reported from Committee and a detailed Committee report was filed on S. 2041 outlining the conflicting interpretations and providing significant background on why the Committee chose to make the amendments contained in the bill. The Committee feels that the report to S. 2041, *S. Rpt. 110-507*, should be read as a complement to this report due to a number of similar changes contained in S. 386.

As the bill makes a number of changes to the liability provisions compared to the current statute, this report will outline the new clarifications to the law by topic.

A. Fraud against government contractors and grantees

Following the decision in Totten a number of courts have held that the FCA does not reach false claims that are (1) presented to Government grantees and contractors, and (2) paid with Government grant or contract funds.3 These cases are representative of the types of frauds the FCA was intended to reach when it was amended in 1986. This section of the bill clarifies that liability under section 3729(a) 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 Federal 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. The bill explicitly excludes from liability requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or has received as an income subsidy, such as Social Security benefits.
3

380 F.3d 488 (D.C. Cir. 2005); see, 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., 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); United States, ex rel., Rutz v. Village of River Forest, 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007); United States, ex rel., Arnold v. CMC Engineering, 2007 WL 442237 (W.D. Pa. Feb. 7, 2007).

As some defendants have argued that Totten and Atkins restrict FCA liability from attaching to Medicaid claims, the bill clarifies the position taken by the Committee in 1986 that the FCA reaches all false claims submitted to State administered Medicaid programs. By removing the offending language from section 3729(a)(1), which requires a false claim be presented to "an officer or employee of the Government, or to a member of the Armed Forces," the bill clarifies that direct presentment is not required for liability to attach. This is consistent with the intent of Congress in amending the definition of "claim" in the 1986 amendments to include "any request or demand * * * 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." 31 U.S.C. $S3729(c) (2000).4

4

See also S. Rpt. No. 99-345, at 5282-5301 (providing section-by-section analysis explaining that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government).

This section differs also addresses the Supreme Court's decision in Allison Engine, 128 S. Ct. 2123 (2008). In Allison Engine, the Court held that the FCA contained an intent requirement in sections 3729(a)(2) and (a)(3) that had not previously been required to prove for FCA liability to attach. The Allison Engine decision created a significant question about the scope and applicability of the FCA to certain false claims, effectively limiting FCA coverage for some Government programs and funds. As a result, defendants across the country have cited Allison Engine in seeking dismissal of certain FCA cases claiming that the FCA no longer applies to Government programs traditionally covered. Further, one court has even gone as far as dismissing a case sua sponte.5

5

See United States v. Russell T. Hawley, et al., No. C06-4087-MWB (N.D. Iowa).

To correct the Allison Engine decision, S. 386 contains three specific changes to existing section 3729(a)(2) and (a)(3). In section 3729(a)(2) the words "to get" were removed striking the language the Supreme Court found created an intent requirement for false claims liability under that section. In place of this language, the Committee inserted the words "material to" a false or fraudulent claim. Further, the language "paid or approved by the Government" was removed to address both the decision in Allison Engine, and to prevent a new "presentment" requirement from being read into the section. Finally, the new term "material" is defined later in the section to mean "having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property." This definition is consistent with the Supreme Court definition, as well as other courts interpreting the term as applied to the FCA.6

6

See Neder v. United States, 527 U.S. 1, 16 (1999); United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008); United States v. Rogan, 517 F.3d 449, 452 (7th Cir. 2008); United States ex rel. Bahrani v. Conagra, Inc., 465 F.3d 1189, 1204 (10th Cir. 2006); United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc., 400 F.3d 428, 446 (6th Cir. 2005); United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 913, 916-917 (4th Cir. 2003); United States ex rel. Cantekin v. University of Pittsburgh, 192 F.3d 402, 415-416 (3d Cir. 1999).

The other change responding to Allison Engine is in current section 3729(a)(3). While this section includes further modifications discussed below, the words "defraud the Government by getting a false or fraudulent claim allowed or paid" were removed to specifically address the intent requirement read into the section by the Court in Allison Engine. As a result, the provision now just extends FCA liability to those who conspire to commit a violation of any substantive section of 3729(a).

B. Fraud against funds administered by the United States

The Committee included provisions in the bill to address a recent decision involving funds administered by the U.S. Government during the reconstruction of Iraq. In United States ex rel. DRC, Inc. v. Custer Battles, LLC, a district court set aside a jury award finding that Iraqi funds administered by the U.S. Government on behalf of the Iraqi people were not U.S. Government funds within the scope of the FCA. 376 F. Supp. 2d 617 (E.D. Va. 2006). The Committee believes this result is inconsistent with the spirit and intent of the FCA.

When the U.S. Government elects to invest its resources in administering funds belonging to another entity, or providing property to another entity, it does so because use of such investments for their designated purposes will further the interest of the United States.7 False claims made against Government-administered funds harm the ultimate

goals and U.S. interests and reflect negatively on the United States. The FCA should extend to these administered funds to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government. Accordingly, this bill includes a clarification to the definition of the term "claim" in new Section 3729(b)(2)(A) and attaches FCA liability to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration.
7

See, e.g.,United States ex rel. Haynes v. CMC Electronics, Inc., 297 F.Supp.2d 734 (D.N.J. 2003) (discussing sales of equipment to foreign governments under the Arms Export Control Act).

C. Conspiracy

As noted above, the current FCA contains a provision that subjects those who knowingly conspire to defraud the Government by getting a false or fraudulent claim allowed or paid. Some courts have interpreted this provision narrowly.8 The current FCA conspiracy provision does not explicitly impose liability on those who conspire to violate other provisions of the FCA, such as delivery of less Government property than that promised or making false statements to conceal an obligation to pay money to the Government. See 31 U.S.C. SS3729(a)(4-6) (2000). Because of the confusion and uncertainty surrounding the application of the conspiracy provision, the bill amends current section 3729(a)(3) to clarify that conspiracy liability can arise whenever a person conspires to violate any of the provisions in Section 3729 imposing FCA liability.
8

See, e.g., United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Products, 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)).

D. Wrongful possession, custody or control of government property

Section 3729(a)(4) of the FCA has remained unchanged since enactment of the FCA in 1863. This provision establishes FCA liability upon an individual that 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 of receipt." 31 U.S.C. $S3729(a)(4)(2000). This section allows the Government to recover losses that are incurred because of conversion of Government assets. However, because this section has remained unchanged from the original act that was drafted in 1863, the archaic language has made recoveries under a conversion theory contingent upon the individual receiving an actual receipt for the property. The new section, renumbered as Section 3729(a)(1)(D) in the bill, updates this provision by retaining the core conversion principle while redrafting it in a more straightforward manner and removing the receipt requirement. Where knowing conversion of Government property occurs, it should make no difference whether the person receives a valid receipt from the Government.

E. "Reverse" false claims

Section 3729(a)(7) of the FCA currently imposes liability on any person who "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." 31 U.S.C. $S3729(a)(7)(2000). This provision is commonly referred to as creating "reverse" false claims liability because it is designed to cover Government money or property that is knowingly retained by a person even though they have no right to it. This provision is similar to the liability established under 3729(a)(2) for making "false records or statements to get false or fraudulent claims paid or approved." 31 U.S.C. $S3729(a)(2)(2000). However, the provision does not capture conduct described in 3729(a)(1), which imposes liability for actions to conceal, avoid, or decrease an obligation directly to the Government. This legislation closes this loophole and incorporates an analogous provision to 3729(a)(1) for "reverse" false claims liability.

Further, this legislation addresses current confusion among courts that have developed conflicting definitions of the term "obligation" in Section 3729(a)(7).9 The term "obligation" is now defined under new Section 3729(b)(3) and includes fixed and contingent duties owed to the Government--including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on imported goods.10 It is also noteworthy to restate that while the new definition of "obligation" expressly includes contingent, non-fixed obligations, the Committee supports the position of the Department of Justice that current section 3729(a)(7) "speaks of an 'obligation,' not a 'fixed obligation.'11 By including contingent obligations such as, "implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship," this new section reflects the Committee's view, held since the passage of the 1986 Amendments,12 that an "obligation" arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined13 to the instance where there is a relationship between the Government and a person that "results in a duty to pay the Government money, whether or not the amount owed is yet fixed."14

9

See, e.g., United States ex rel. Prawer & Co. v. Verrill & Dana, 946 F. Supp. 87, 93-95 (D. Me. 1996) (discussing the definition of "obligation" at length); Am. Textile Mfr's Inst., Inc. v. The Limited, Inc., 190 F.3d 729, 736 (6th Cir. 1999) (discussing definition of "obligation").

10

The new definition of the term "obligation" in S. 386 does not include specific reference to "customs duties for mismarking country of origin," which was a singular type of obligation referred to in S. 2041. The Committee originally included this language in S. 2041 in response to the decision in American Textile Manufacturers Institute, Inc. v. The Limited, Inc. where the Sixth Circuit Court of Appeals narrowly defined the term "obligation" to apply reverse false claims to only fixed obligations and dismissing a claim for false statements made by importers to avoid paying customs duties. See 190 F.3d 729 (6th Cir. 1999). After subsequent discussion with the Department of Justice, the Committee decided to remove the "customs duties" language in S. 386, as the Committee believes that customs duties clearly fall within the new definition of the term "obligation" absent an express reference and any such specific language would be unnecessary.

11

Brief for United States at 23, United States v. Bourseau No. 06-56741, 06-56743 (9th Cir. July 14, 2008).

12

See S. Rpt. No. 99-345 at 5283.

13

See, e.g., Am. Textile Mfrs. Inst. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999); United States v. Q Int'l Courier, Inc., 131 F.3d 770 (8th Cir. 1997).

14

Brief for United States at 24, United States v.Bourseau No. 06-56741, 06-56743 (9th Cir. July 14, 2008) (citing United States ex rel. Bahrani v. Conagra, Inc., 465 F.3d 1189, 1201 (10th Cir. 2006), mot. for reh'g pending, (10th Cir. 2007)); United States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1237-38 (11th Cir. 1999) (en banc).

The Committee also notes that the reverse false claims provision and amendments to that provision do not include any new language that would incorporate or should otherwise be construed to include a presentment requirement. This is consistent with various court decisions that have held that the current reverse false claims provision does not contain a presentment requirement.15

15

See, e.g., United States ex rel. Bahrani, 465 F.3d 1189, 1208 (10th Cir. 2006); United States ex rel. Koch v. Koch Indus., 57 F.Supp.2d 1122, 1144 (N.D. Okla. 1999).

The new definition of "obligation" includes an express statement that an obligation under the FCA includes "the retention of an overpayment." The Department of Justice supported the inclusion of this provision and provided technical advice that the proper place to include overpayments was in the definition of obligation.16 This new definition will be useful to prevent Government contractors and others who receive money from the Government incrementally based upon cost estimates from retaining any Government money that is overpaid during the estimate process. Thus, the violation of the FCA for receiving an overpayment may occur once an overpayment is knowingly and improperly retained, without notice to the Government about the overpayment. The Committee also recognizes that there are various statutory and regulatory schemes in Federal contracting that allow for the reconciliation of cost reports that may permit an unknowing, unintentional retention of an overpayment. The Committee does not intend this language to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation, provided the receipt of the overpayment is not based upon any willful act of a recipient to increase the payments from the Government when the recipient is not entitled to such Government money or property. Moreover, any action or scheme created to intentionally defraud the Government by receiving overpayments, even if within the statutory or regulatory window for reconciliation, is not intended to be protected by this provision. Accordingly, any knowing and improper retention of an overpayment beyond or following the final submission of payment as required by statute or regulation--including relevant statutory or regulatory periods designated to reconcile cost reports, but excluding administrative and judicial appeals--would be actionable under this provision.
16

Letter from Brian Benczkowski, Principal Deputy Assistant Attorney General, United States Department of Justice, to Senator Patrick Leahy, Chairman, Senate Committee on the Judiciary Appendix 3 (Feb. 21, 2008).

S. 386 also includes the term "statutory" to the definition of "obligation". This term was included to ensure that duties created by a statutory authority that may not be an express or implied contract or other relation are included as these statutory relationships confer a duty upon the recipient of Government funds regardless of the existence of a contract.

IV. Congressional Budget Office Cost Estimate

The Committee sets forth, with respect to the bill, S. 386, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

MARCH 18, 2009.

Hon. PATRICK J. LEAHY,

Chairman, Committee on the Judiciary,

U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 386, the Fraud Enforcement and Recovery Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 386-- Fraud Enforcement and Recovery Act of 2009

Summary: S. 386 would broaden the coverage of current laws against financial crimes, including fraud affecting mortgages, securities, and federal assistance and relief programs. The bill would authorize the appropriation of $245 million for each of fiscal years 2010 and 2011 for the Department of Justice (DOJ), the Postal Inspection Service, and other federal agencies to investigate and prosecute violators of the bill's provisions. S. 386 also would amend certain provisions of the False Claims Act (FCA), which allows private individuals with knowledge of past or present fraud committed against the government to file claims against federal contractors.

CBO estimates that implementing S. 386 would cost $490 million over the 2010-2014 period, assuming appropriation of the authorized amounts. S. 386 could affect direct spending and revenues; CBO has no basis for estimating the timing or magnitude of any such effects, but we estimate that they would have no net costs over both the 2010-2014 and 2010-2019 periods.

S. 386 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 386 is shown in the following table. The costs of this legislation fall within budget functions 370 (commerce and housing credit), 450 (community and regional development), and 750 (administration of justice).

	By fiscal year, in millions of dollars--					
	2010	2011	2012	2013	2014	2010-2014
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Authorization Level	245	245	0	0	0	490
Estimated Outlays	211	240	32	5	2	490

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted during fiscal year 2009, that the authorized amounts will be appropriated each year, and that spending will follow historical patterns for the authorized activities.

Spending subject to appropriation

S. 386 would authorize the appropriation of $245 million for each of fiscal years 2010 and 2011 for investigations and prosecutions relating to financial crimes. For each of those years the bill would authorize:

$75 million for the Federal Bureau of Investigation;

$90 million for offices of the United States Attorneys and the DOJ criminal, civil, and tax divisions;

$30 million for the Postal Inspection Service;

$30 million for the Inspector General for the Department of Housing and Urban Development; and

$20 million for the United States Secret Service.

Revenues and direct spending

CBO estimates that the provisions relating to the FCA would, on net, increase civil fines and recoveries collected by the federal government because it would likely lead to the initiation of additional claims under FCA. S. 386 also could increase collections of civil and criminal fines for violations of the bill's other provisions.

Recoveries from FCA cases would be recorded as offsetting receipts (a credit against direct spending). Civil fines are recorded as revenues and deposited in the U.S. Treasury. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and subsequently spent without further appropriation.

CBO has no basis for estimating the magnitude of any additional recoveries and collections of civil and criminal fines. However, we estimate that any such effects would have no net costs over both the 2010-2014 and 2010-2019 periods.

Intergovernmental and private-sector impact: S. 386 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Mark Grabowicz and Leigh Angres; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. Regulatory Impact Evaluation

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 386.

VI. Conclusion

The Federal Government has obligated and spent more than $1 trillion to stabilize our banking system and to rebuild our economy. But to date, we have paid far too little attention to investigating and prosecuting the mortgage and corporate frauds that have so dramatically contributed to this economic collapse and to deterring those who would seek to take advantage of the economic assistance provided to correct it. This legislation, S. 386, will address these serious and immediate problems by providing the resources and new tools necessary for the Justice Department and other investigative agencies to restore our Nation's capacity to combat and prosecute mortgage and other financial frauds. The Committee believes that Congress, as it did during the Savings and Loan crisis more than two decades ago, should take action to rebuild and strengthen our fraud enforcement efforts by passing S. 386 without delay.

VII. Changes to Existing Law Made by the Bill, as reported

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 386, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

PART I--CRIMES

CHAPTER 1--GENERAL PROVISIONS

Sec.

24.Definitions related to Federal health care offense.

25.Use of minors in crimes of violence.

26.Definition of seaport.

27.Mortgage lending business defined.

As used in this title, the term "financial institution" means--

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act; {D> or <D}

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978){D> . <D}; or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally-related mortgage loan as defined in 12 U.S.C. $S2602(1).

As used in this title, the term "mortgage lending business" means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.

CHAPTER 47--FRAUD AND FALSE STATEMENTS

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Federal Housing Administration, the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (*15 U.S.C. 662*), or the Small Business Administration in connection with any provision of that Act, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), {D> or <D} an organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a mortgage lending business whose activities affect interstate or foreign commerce, or any person or entity that makes in whole or in part a federally-related mortgage loan as defined in 12 U.S.C. $S2602(1)upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, loan, or insurance agreement or application for insurance or a guarantee, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent--

(1) to defraud the United States; or

(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance, including through the Troubled Assets Relief Program, an economic stimulus, recovery or rescue plan provided by the Government, or the Government's purchase of any preferred stock in a company, or inany procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of {D> the contract, subcontract <D} such grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance,or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.

CHAPTER 63--MAIL FRAUD AND OTHER FRAUD OFFENSES

Sec.

1346.Definition of "scheme or artifice to defraud"

1347.Health care fraud

1348.Securities and commodities fraud

1349.Attempt and conspiracy

1350.Failure of corporate officers to certify financial reports.

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, orany security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, orany security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));

shall be fined under this title, or imprisoned not more than 25 years, or both.

CHAPTER 95--RACKETEERING

(a)(2)(A) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with the intent to engage in conduct constituting a violation of *section 7201* or *7206 of the Internal Revenue Code of 1986*; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(c) As used in this section--

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States{D> . <D}; and

(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(f) As used in this section--

(3) the terms "specified unlawful activity" and "proceeds" shall have {D> has <D} the meaning given those {D> that <D} terms in section 1956 of this title.

CHAPTER 37--CLAIMS

Subchapter III--Claims Against the United States Government

(a) LIABILITY FOR CERTAIN ACTS.{D> --Any person who <D}--

(1)IN GENERAL.--Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, {D> to an officer or employee of the United States Government or a member of the Armed Forces of the United States <D} a false or fraudulent claim for payment or approval;

{D> (2) <D}(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to {D> get <D} a false or fraudulent claim {D> paid or approved by the Government <D};

{D> (3) <D}(C) conspires to {D> defraud the Government by getting a false or fraudulent claim allowed or paid <D} commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

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

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

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

{D> (7) <D}(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to {D> conceal, avoid, or decrease <D} an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

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

{D> (A) <D}(2)REDUCED DAMAGES.--If the court finds that--

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

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

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation{D> ; <D}, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of {D> the <D} that person.

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

(b) {D> KNOWING AND KNOWINGLY DEFINED <D}. DEFINITIONS.--For purposes of this section{D> , <D}--

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

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

{D> (1) <D}(i) has actual knowledge of the information;

{D> (2) <D}(ii) acts in deliberate ignorance of the truth or falsity of the information; or

{D> (3) <D}(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud {D> is required <D}.

{D> (c) <D}(2) {D> CLAIM DEFINED.--For purposes of this section, <D} the term "claim"--

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

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

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

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

(3) the term "obligation" means a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, statutory, fee-based, or similar relationship, and the retention of overpayment; and

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

{D> (d) <D} (c) EXEMPTION FROM DISCLOSURE.--Any information furnished pursuant to {D> subparagraphs (A) through (C) of subsection (a) <D} subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

{D> (e) <D} (d) EXCLUSION.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

SUBJECT: LEGISLATIVE BODIES (90%); FRAUD & FINANCIAL CRIME (90%); BANKING & FINANCE (89%); LAW ENFORCEMENT (89%); MORTGAGE BANKING (79%); LEGISLATION (79%); INVESTIGATIONS (79%); MORTGAGE LOANS (79%); MONEY LAUNDERING (79%); REAL ESTATE (79%); JUSTICE DEPARTMENTS (79%); SPECIAL INVESTIGATIVE FORCES (79%); FINANCIAL CRIME COUNTERMEASURES (79%); MORTGAGE BANKING & FINANCE (79%); REAL ESTATE FRAUD (79%); US FEDERAL GOVERNMENT (79%); PUBLIC FINANCE (59%); APPEALS (59%); APPROPRIATIONS (59%); GOVERNMENT BUDGETS (59%); SETTLEMENTS & DECISIONS (59%); LAW COURTS & TRIBUNALS (59%); LAWYERS (59%); ECONOMIC CRISIS (59%); MORTGAGE BROKERS (59%); TRENDS (59%); MORTGAGE BACKED SECURITIES (59%); PUBLIC CONTRACTING (59%); DECISIONS & RULINGS (59%); SUPREME COURTS (59%); GRANTS & GIFTS (59%); HOUSING AUTHORITIES (59%); MORTGAGE REFINANCING (59%); SAVINGS & LOANS (59%); LITIGATION (59%); HOLDING COMPANIES (59%)

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111th Congress, 1st Session

HOUSE Report 111-97

111 H. Rpt. 97

FALSE CLAIMS ACT CORRECTION ACT OF 2009

May 5, 2009--Ordered to be printed

SPONSOR: Mr. Conyers submitted the following

COMMITTEE: From the Committee on the Judiciary

TEXT:

NOTICE:
{D> Text within these symbols is deleted <D}

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 Page

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.

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.

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.

3

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

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

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).

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

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*.

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

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).

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

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. SS232-235 (1976); U.S. v. Pittman, 151 F.2d 851, 853-54 (5th Cir. 1945) (discussing the history of the 1943 amendments).

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 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.

14

Act of December 23, 1943, ch. 377, *57 Stat. 608*.

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

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).

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

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).

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.

21

False Claims Amendments Act of 1986, *Pub. L. No. 99-562, 100 Stat. 3153*, codified as amended at 31 U.S.C. SS3729-3733 (1994); 22 Weekly Comp. Pres. Doc. 1499 (Nov. 3, 1986).

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 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.

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. $S3730(e)(2)(A).

23

31 U.S.C. $S3730(d)(4).

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

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).

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 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.

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) .

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

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)).

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.

29

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

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.

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).

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

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).

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.

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).

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

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).

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.

36

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

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 leveled 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.

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."

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

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).

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.

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. Sa&#xfffd;AE1nchez		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	
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. Sa&#xfffd;AE1nchez		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			
Ms. Baldwin			
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sa&#xfffd;AE1nchez	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,

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. $S3729. 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 $S3729, 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]

39

See fn 32.

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 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 $S3732 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 $S3733 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

CHAPTER 37--CLAIMS

SUBCHAPTER III--CLAIMS AGAINST THE UNITED STATES GOVERNMENT

{D> (a) LIABILITY FOR CERTAIN ACTS.--Any person who--

{D> (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;

{D> (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;

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

{D> (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;

{D> (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;

{D> (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

{D> (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.

{D> (b) KNOWING AND KNOWINGLY DEFINED.--For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

{D> (1) has actual knowledge of the information;

{D> (2) acts in deliberate ignorance of the truth or falsity of the information; or

{D> (3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

{D> (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> (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.

{D> (e) EXCLUSION.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986. <D}

(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--

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.

(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. {D> The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting. <D} 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) * * *

{D> (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. <D}

(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.

{D> (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. <D}

(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. {D> 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. <D} 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. {D> 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. <D} 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 {D> necessarily <D} 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 {D> and shall be paid out of such proceeds <D}. Such person shall also receive an amount for reasonable expenses which the court finds to have been {D> necessarily <D} incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

{D> (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. <D}

(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) * * *

{D> (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.

{D> (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. <D}

(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.

{D> (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. <D}

(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.

{D> (a) A subpena <D} (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.

{D> (b) A civil action under section 3730 may not be brought--

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

{D> (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. <D}

(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.

{D> (c) In <D} (c) STANDARD OF PROOF.--In any action brought under section 3730, the {D> United States <D} plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

{D> (d) Notwithstanding <D} (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.

(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.

(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.

{D> The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. <D} Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General{D> , the Deputy Attorney General, or an Assistant Attorney General <D} 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 {D> or an Assistant Attorney General designated by the Attorney General <D} 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. {D> 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. <D}

(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{D> , the Deputy Attorney General, or an Assistant Attorney General <D} 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) * * *

{D> (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. <D}

(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); {D> and <D}

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

(A) * * *

(C) any index or other manner of access to any item listed in subparagraph (A){D> . <D}; 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 additional 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. SS3729-3733, 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

1

131 U.S.C. SS3729(a)(1)N(3).

2

31 U.S.C. $S3729(a).

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

3

See 31 U.S.C. $S3730.

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

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.

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 spending 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

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").

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

8

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

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 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 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.

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

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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).

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.

11

31 U.S.C. $S3730(e)(4)(A).

12

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

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

13

Justice Dept. Views Letter Appendix at 9.

14

Id.

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 language 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

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.

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

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)).

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 Indeed, 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

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).

20

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

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

21

Id.

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

22

Justice Dept. Views Letter Appendix at 6.

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,

23

Id.

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

24

Id. (citations omitted).

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

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.

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

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

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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.

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