U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 15, 2008

The Honorable John Conyers, Jr.
United States House of Representatives
Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Chairman:

This provides the Department's views on H.R. 4854, the "False Claims Act Correction Act of 2007", introduced in the House on December 19, 2007. As you know, the False Claims Act (FCA) is an important civil tool in fighting fraud against the public treasury and has worked well in its present form. As discussed below, the Administration has significant concerns with H.R. 4854 and cannot support the current version of the bill.

Since the FCA was amended in 1986, the Government, through the end of Fiscal Year 2007, has recovered over $20 billion pursuant to the statute. This remarkable accomplishment has been with the assistance of the *qui tam* provisions, which have augmented our resources to address fraud in connection with Government contracts and programs and which we continue to support vigorously. Indeed, of the $20 billion recovered under the FCA since 1986, over $12 billion was the result of *qui tam* actions. We have encouraged the Department's litigators to make every effort to work cooperatively with relators to maximize the Government's recovery. In implementing the FCA, we have scrutinized the legal arguments advanced to ensure that, in protecting the Government's recoveries, we do not impair the incentives which are necessary to ensure that relators come forward, especially in light of the large personal hardships many must endure in bringing these suits. The Department and its client agencies have dedicated enormous resources to the investigation and prosecution of these cases, and we have advanced legal arguments in courts throughout the nation, advocating the rights of relators.

As noted in the Views Letter submitted to the Senate on February 21, 2008, the Department believes that the FCA in its present form has worked well and we have seen no pressing need for major amendments. As we note in the attached Appendix, the Department is studying the Supreme Court's recent decision in *Allison Engine*. Nevertheless, we have significant concerns with a number of the changes proposed by H.R. 4854. Specifically, the Department strongly opposes Section 7, which would allow federal employees to act as relators. Section 7 is unsound as a matter of public policy, will cause an unnecessary drain on the Treasury, will invite interference with federal investigations, and thus will *not* further our shared goal of protecting the public fisc. We are, moreover, concerned that this provision, as well as other provisions in the proposed legislation, would serve to increase overall costs associated with government contracting by federal agencies, including increased discovery and litigation costs associated with unmeritorious *qui tam* litigation.

We are similarly concerned about Section 3(d)'s narrowing of the current public disclosure bar. This section severely restricts the circumstances where the bar would apply in a way that would reward relators with no firsthand 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. If 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, and even if there is an open Government investigation into the same matter. We think this is fundamentally at odds with the underlying purpose of the *qui tam* provisions, which is to give incentives to relators to disclose wrongdoing of which the Government would otherwise be unaware.

In addition, the Department strongly opposes Section 3(b). Among other problems, Section 3(b) would potentially expand the FCA's alternate remedy provision to encompass criminal proceedings, and thereby confer upon a relator the unprecedented, and possibly unconstitutional, right to participate in, and object to, such proceedings. The proposed changes would also appear to permit a relator to claim a share of a non-fraud recovery by the Government, which runs contrary to the very purpose of the FCA's reward system - to promote the Government's ability to recover losses due to fraud and to give private citizens the incentive to inform the Government of difficult-to-detect fraud.

The Administration cannot support H.R. 4854 as currently drafted. That said, to assist the Committee in its consideration of the present legislation, we have attached an appendix which contains a detailed analysis of the legislation's provisions. We would also appreciate the opportunity to continue to work with the Committee and its Members to find the best approach for furthering our common goal: fighting fraud against the public treasury.

The Office of Management and Budget has advised that there is no objection to the presentation of these views from the standpoint of the Administration's program. If we may be of additional assistance, please do not hesitate to contact this office.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar S. Smith
Ranking Member

APPENDIX

1. Presentment

Section 2 of H.R. 4854 proposes changes designed to address the primary holdings in *U.S. ex rel. DRC v. Custer Battles*, 376 F.Supp.2d 628 (E.D. Va. 2006) (appeal filed, No. 07-1220 (4th Cir.) and *U.S. ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542 (D.C. Cir. 2004). In *Custer Battles,* the United States District Court for the Eastern District of Virginia held that the FCA encompassed only claims for federal funds, and that false claims paid from the Development Fund for Iraq (DFI funds) did not give rise to FCA liability because DFI funds were not federal funds. In *Totten*, the United States Court of Appeals for the District of Columbia Circuit held that paragraphs 3729(a)(l) and (a)(2) of the False Claims Act (FCA) both require that a false claim be presented to an official of the United States, and not just a recipient of federal funds.

In *Allison Engine Co., Inc. v. United States ex rel. Sanders*, the Supreme Court considered a case raising the question whether paragraphs 3729(a)(2) and (a)(3) contain a presentment requirement. On June 9, 2008, the Court issued a decision holding that neither of these provisions requires proof that false claims were presented to the Government. Relying, however, on the words "to get" in § 3729(a)(2), the Court held that "a plaintiff asserting a § 3729(a)(2) claim must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim." *Allison Engine*, 2008 WL 2329722 at *3 (June 9, 2008). Similarly, the Court held that a plaintiff asserting a claim under § 3729(a)(3) must show that "the conspirators had the purpose of 'getting' the false record or statement to bring about the Government's payment of a false or fraudulent claim." *Id.* at *9. The Department is analyzing the Court's decision, and how it will be applied by the lower courts.

Section 2 would revise paragraphs 3729(a)(l) and (a)(2) to impose liability on any person who presents "a false or fraudulent claim for Government money or property" or uses "a false statement or record to get" such a claim paid. This language includes the same "to get" terminology that the Supreme Court relied upon as the basis for its holding in *Allison Engine*. The legislation defines "Government money or property" to include money or property that the United States "has provided . . . to a contractor, grantee, agent or other recipient . . . to be spent or used on the Government's behalf or to advance a Government program" or that the United States "holds in trust or administers for any administrative beneficiary." The legislation further defines an "administrative beneficiary" to include "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." We believe that the definition of "Government money or property" and "administrative beneficiary" are unclear and may engender significant litigation.

The Department has argued in numerous cases against the interpretation of the FCA adopted by the D.C. Circuit in *Totten*, including, most recently, as an amicus in the Supreme

Court in *Allison Engine*. In *Custer Battles*, the Department also filed an amicus brief in the Fourth Circuit disagreeing with the district court's ruling. Although the Department opposed the result in both *Totten* and *Custer Battles*, the Department did not take a position that the FCA imposes liability on all acts of fraud directed at any entity that receives money from the United States, and the Department does not understand the amendments to do so. We recognize that the amendments may be ambiguous on this issue, thereby potentially increasing the number of frivolous cases brought by relators and engendering significant litigation. Nevertheless, in the Government's view, the amendments do not (and should not) encompass fraud on an individual just because that individual is paid a federal salary or is the recipient of Government income subsidies or health benefits. Similarly, in the Government's view, under the amendments an FCA claim would not (and should not) exist if a contractor performs work for both the Government and private customers, and a subcontractor submits to the contractor a fraudulent invoice that only affects payments on a private customer's project. In both situations, the FCA should not be implicated due to the absence of any false claim for money or property that was intended "to be spent or used on the Government's behalf or to advance a Government program."

Additionally, we note that the revisions proposed in Section 2, though apparently designed in part to supersede the holding in *Custer Battles*, may not actually do so. The district court in that case concluded that the Coalition Provisional Authority (CPA) in Iraq, which controlled the DFI funds at issue, was not an entity of the United States. Section 2 seeks to redress this result by extending the FCA to any money or property that the United States administers for an "administrative beneficiary." However, the new definition of administrative beneficiary would only encompass the DFI monies at issue in *Custer Battles* if the United States can be said to have "serve[d] as the custodian or trustee" of the DFI funds "alone or with" the CPA. If neither the CPA, nor the American employees working for the CPA, is considered to constitute the "United States" for purposes of the FCA, then it is not clear that the outcome in *Custer Battles* would be different even under the proposed legislation.

As we also note below, the Committee should be aware that frivolous cases brought by relators impose unnecessary and sometimes burdensome costs on defendants, which can often be directly charged back to Government contracts if the defendant prevails, and which indirectly increase the Government's procurement costs by increasing the risk and costs of doing business with the Government. They can also impose direct costs on Government agencies forced to respond to burdensome discovery requests. These costs are ultimately passed on to the taxpayer.

2. Proof of Additional Elements

Section 2 of H.R. 4854 adds a new paragraph 3729(c) stating that "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 these provisions." The purpose and effect of this provision are unclear, and it could have unintended consequences. We oppose this proposed modification.

3. Penalties

Section 2 of H.R. 4854 describes the range of applicable penalties as "not less than $5,000 and not more than $10,000." Since the penalty range has been modified by other Acts of Congress to account for inflation, we recommend that the legislation clarify that it is not intended to override these subsequent modifications, by including the following language "not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 104-410, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134."

4. Voluntary Disclosure

Under current law the court may impose reduced damages under certain circumstances for a defendant that voluntarily self-discloses its fraud to the Government within 30 days and fully cooperates with the Government's ensuing investigation. Instead of treble damages, a court may impose damages of not less than twice the amount of damages that the Government sustains as a result of the fraud. *See* 31 U.S.C. § 3729(a). It has been the Department's position under current law that such a defendant is also subject to penalties of $5,000 to $10,000 per FCA violation, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 104-410, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134.

By placing the voluntary disclosure provision in a separate subsection, however, Section 2 of H.R. 4854 seemingly implies that a defendant that satisfies the voluntary disclosure criteria would not be subject to the penalties. The Department does not believe that there is a need to alter the voluntary disclosure provisions in current section 3729(a).

5. Disclosure Statement

Currently, section 3730(b) requires that relators serve upon the Department of Justice a "written disclosure of substantially all material evidence and information the [relator] possesses," along with a copy of the complaint. Section 3(a) of H.R. 4854 would protect from discovery, "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." This is apparently an attempt to codify judicial opinions holding that the written disclosure and other communications are protected by the work product doctrine.

The language of Section 3(a), however, goes far beyond that goal. Factual documents that were not created in anticipation of litigation that are in the relator's possession and provided by the relator to the Government should be subject to discovery; for instance, if a relator gives the Government internal corporate records of the defendant, those records would not generally be considered work product. Similarly, a defendant may be entitled to discover facts set forth in the relator's written disclosure (*e.g.*, through interrogatories or through the Government's mandatory Rule 26(a)(1) disclosures) even if the relator's written disclosure is itself work product.

In addition, because the relator's written disclosure statement and other communications by the relator are for the benefit of the Government, the Government should have the right to use them in whatever way it sees fit. There is no valid reason to limit the Government's ability to use these communications. Accordingly, if it is to be included, Section 3(a) should be revised to allow the Government to make whatever use it sees fit of the written disclosure statement or other communications, including the ability to disclose them to whomever the Government wants.

If the Committee wishes the bill to remove from the courts the determination of whether the written disclosure and other communications are work product, and in light of the Government's legitimate interest in having the unfettered use of the disclosure and other communications, one way of revising Section 3(a) is as follows: "The written disclosure of substantially all material evidence and information the person possesses, provided pursuant to 31 U.S.C. § 3730(b), and other communications between the person and the Government relating to the action brought by the person, shall be deemed to have been prepared in anticipation of litigation or for trial under Federal Rule of Civil Procedure 26(b)(3), provided, however, that the Government shall not be limited in any way as to how it uses or to whom it discloses the written disclosure or other communications."

6. Sealing of Complaints

Section 3(a) of H.R. 4854 revises Section 3730(b)(4)(B) of the FCA to provide that, if the Government declines to intervene in a *qui tam* action, the relator must within 45 days either dismiss the action, or notify the court of the relator's intention to proceed "and move the court to unseal the complaint." This language could be read to suggest that, where the Government declines to intervene, cases would be unsealed only if a relator chooses to pursue the litigation but would not be unsealed if the relator moves to dismiss without prejudice. We believe, and established case law supports, that the public has a presumptive right to know about all judicial proceedings that are filed. If the Committee revises subparagraph 3730(b)(4)(B), rather than stating that a relator shall file a motion to unseal when it elects to pursue a declined case, the legislation should provide for the Government, at the time it notifies the court that it declines to intervene in a *qui tam* action, to move to unseal. This would confirm the public's presumptive right of access to all categories of *qui tam* cases, while still permitting a relator in an appropriate case to make the substantial showing required to keep a case under seal.

7. Service of Complaints

Section 3730(b)(2) of the Act currently provides that the relator shall serve the United States with a copy of the relator's complaint and written disclosure pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The Rules have been amended, however, and Rule 4(d)(4) no longer addresses the issue of service on the United States. Accordingly, section 3730(b)(2) should be revised to refer to "Rule 4" instead of to "Rule 4(d)(4)." H.R. 4854 does not address this issue.

Additionally, Section 3(a) of the legislation states that a relator in a declined case has 120 days to serve the relator's complaint from the date that the complaint is unsealed. The proposed legislation makes no mention, however, of the time available for the Government to serve a complaint in a case where it chooses to intervene. While we believe Rule 4(m) already authorizes the Government to serve a complaint in intervention within 120 days, to avoid any confusion, the Committee may want to provide expressly that in an intervened case the Government also has 120 days from the date a case is unsealed to serve a complaint.

8. <u>First to File</u>

Section 3730(b)(5) of the FCA currently provides that no person "may intervene or bring a related action based on the facts underlying" a pending *qui tam* action. Commonly known as the first to file bar, this provision encourages those with knowledge of fraud to come forward promptly by allowing only the first person to file a complaint disclosing the fraud to qualify as a relator and claim a share of any recovery.

Section 3(a) of H.R. 4854 would eliminate this bar to intervention in a previously filed *qui tam* case and permit a third party to "join or intervene" in a pending action with "the consent of the person who brought the action." This would permit a putative relator who did not satisfy the requirements for relator status to avoid these requirements by adding another relator to his or her original *qui tam* action. Additionally, while a person with knowledge of fraud would still run the risk of being barred if she waited to file a *qui tam* suit to permit the government's damages (and her share of those damages) to increase, or for other reasons, the proposed change would lessen that risk. Even if another *qui tam* suit were filed in the interim, the putative relator could seek to join that action and obtain a relator share. We oppose any change that would reward a relator who is unqualified or that would weaken the disincentives for relators to delay in reporting fraud on the public treasury.

9. <u>Alternate Remedy</u>

Section 3(b) of H.R. 4854 proposes to revise the FCA's "alternate remedy" provision, which provides that the United States "may elect to pursue its claim through any alternate remedy available to the Government" and that "the person initiating the [*qui tam*] action shall have the same rights in such proceeding as such person would have if the action had continued under this section." 31 U.S.C. § 3730(c)(5). The purpose of this provision is to provide the United States with the flexibility to pursue its fraud claims against a defendant administratively rather than under the FCA, while simultaneously ensuring that the relator is still entitled to a share of any recovery for the FCA claims. *See* S. Rep. 99-345, 99th Cong., 2d Sess. 27, reprinted in 1986 U.S.C.C.A.N 5266, 5292 ("[The proposed alternate remedy provision] clarifies that the Government . . . may elect to pursue any alternate remedy for recovery of the false claim which might be available under the administrative process."); *id.* ("In the event the government chooses to proceed administratively, the *qui tam* relator retains all the same rights . . ."). We are concerned that the legislation's proposed changes would unduly expand the scope of the alternate remedy provision, and permit a relator to recover in too many situations and in situations not contemplated by the FCA.

First, the proposed legislation provides that an alternate remedy includes anything of value received by the Government from the defendant in exchange for an agreement by the Government "to decline to intervene in or investigate the [*qui* tam] action. . . ." The purpose for the quoted language (proposed subparagraph 3730(c)(5)(A)) is unclear. To be sure, the Government sometimes concludes that a defendant did not commit fraud, but nevertheless owes money to the United States. In such situations, the Government may decline to intervene in the *qui tam* case and settle with the defendant on a non-fraud basis; in such cases the False Claims Act claims would not be released or dismissed and the relator could still litigate them. The payment received by the Government is not in exchange for declining the *qui tam* case, however, but rather constitutes consideration for releasing its non-fraud claim. Nevertheless, the quoted language invites a relator's assertion that the Government has received consideration in exchange for declining the *qui tam* case, and the attendant litigation that would inevitably follow.

If the language quoted above is intended to permit a relator share of such a non-fraud recovery, then the legislation's intention is misguided (as well as unclear). The purpose of the FCA was to induce those with knowledge of fraud – which by its very nature is often difficult to detect – to disclose that wrongdoing. *See* Senate Report No. 99-345, reprinted in 1986 U.S.C.C.A.N. 5266, 5266 ("The purpose of S.1562 [the FCA Amendments of 1986] is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government"). 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. Moreover, where the Government has settled and receives compensation from a defendant on a non-fraud basis, the Government does not release a defendant for its fraud liability. Under those circumstances, the relator would still be free to prove that the defendant violated the False Claims Act, to obtain a full settlement or judgment, and to receive a share of any such recovery. While the defendant may be entitled to an offset for any monies previously paid to the Government, *see United States v. Bornstein*, 423 U.S. at 303, 316 (1970), the relator would still be entitled to a relator share of the entire settlement or judgment, before any offset is taken into account. Accordingly, 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.

Second, the proposed legislation states (at proposed subparagraph 3730(c)(5)(B)) that an alternate remedy includes 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." This language is also overly broad, and appears possibly to encompass any criminal proceeding arising out of the relator's *qui tam* action. The consequences of such an expansion would be unprecedented. Since the alternate remedy provision gives a relator the same rights in the alternate proceeding that the relator would be entitled to in her FCA action, extending the alternate remedy provision to criminal proceedings would potentially authorize relators to participate in those proceedings, and to object to any negotiated resolution, including any plea bargain. The FCA makes clear that the Government's pursuit of a criminal proceeding does not prevent a relator from pursuing her civil FCA claims. *See* 31 U.S.C. 3731(d) (providing for collateral estoppel in FCA cases based on a prior plea or judgment in a criminal proceeding). Accordingly, extending the alternate remedy provision to criminal proceedings will confer an unnecessary windfall on relators, while imbuing relators with uniquely problematic, and potentially unconstitutional, rights in such proceedings.

In addition, proposed subparagraph 3730(c)(5)(B) would risk interfering with the ability of other departments to resolve administrative exclusion matters. For example, in FCA cases involving Medicare or Medicaid fraud, the HHS Office of Inspector General may have the authority separately to seek to exclude the defendant from participating in federal health benefits programs. *See* 42 U.S.C. § 1320a-7. Frequently, the HHS-OIG agrees to waive its right to seek exclusion in exchange for the defendant's entering into a Corporate Integrity Agreement under which the defendant agrees to a program of enhanced internal controls to detect and prevent fraud or other violations of law. As worded, proposed section 3730(c)(5)(B) could mean that relators are entitled to a recovery based on the defendant's agreement, prospectively, to enter into a Corporate Integrity Agreement. Thus, expanding the definition of "alternate remedy" in this manner would interfere with the ability of non-DOJ departments to bring about improvements to corporate compliance programs, undermining efforts to ensure future compliance with the law.

For these reasons, we strongly oppose H.R. 4854's apparent expansion of the alternate remedy provision. In our view, the provision should continue to serve the purpose originally intended by Congress – to give the Government the option to pursue its fraud claims in an administrative proceeding rather than under the FCA, and to ensure that the relator retains the right to a share of a recovery in any such proceeding that is based on the defendant's submission of false or fraudulent claims.

10. <u>Payment of Interest to Relators by the Government</u>

Section 3(c) of H.R. 4854 provides for the payment of interest on an award due to a relator "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." We are not aware of any problems with respect to the timely payment of relator shares following a defendant's remittance of a judgment or settlement to the United States, and we oppose this provision.[1]

[1] If it is nevertheless determined that it is appropriate to award interest to relators in

11. Reduction of *Qui Tam* Awards

Subsection 3730(d)(1) (second sentence) caps a relator's share at ten percent if the *qui tam* action is based on certain enumerated disclosures (disclosures in a "criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media"). Section 3(c) of H.R. 4854 would permit the court to reduce the relator's share, but would eliminate the ten percent cap. The extent of reduction would be left entirely to court's discretion. In addition, section 3(c)(3) would limit the applicability of this provision to circumstances in which the relator "derived his or her knowledge . . . primarily from specific information . . . that the Government publicly disclosed . . . or that [the Government] disclosed privately . . ." to the relator.

We believe that the ten percent cap provision should be retained in its current form. Such a cap is all the more important if the legislation's version of the public disclosure provision is to be adopted, since a relator would not be barred from filing a *qui tam* action derived entirely from information provided by the Government to the relator. (See section 13, below). The issue of whether to keep the ten percent cap where the Government is already on the trail of the fraud would be mooted if the Committee adopts the proposed language for the public disclosure bar recommended below in section 13. Under the recommended language, a relator would be entitled to claim a share of any recovery even if the Government was already on the trail of the fraud, but only of the additional recovery attributable to any new information brought forth by the relator.

Furthermore, we believe that the ten percent cap should be applied to limit the recovery of an additional category of relator – the relator who planned or initiated the fraud. Subsection

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addition to their underlying shares, then Congress should use the rate set forth in the Prompt Payment Act, see 31 U.S.C. § 3902, rather than the underpayment rate in the Internal Revenue Code. The Prompt Payment Act rate is the one typically used by the Government to calculate late interest due for goods and services provided to the Government. Moreover, consistent with the requirements of the Prompt Payment Act, the proposed legislation should specify that no interest is due if there is a dispute over the payment or amount of the relator's share, *cf.* 31 U.S.C. § 3907(c), and that interest does not begin to run until all of the necessary payment information is provided to the person designated to receive that information, *cf.* 31 U.S.C. §§ 3901(a)(3), 3903(a)(1)(B).

3730(d)(3) of the FCA currently permits a court to reduce a relator's share to whatever level the court determines if the relator "planned and initiated" the fraud. We recommend that the ten percent cap also apply to relators who plan or initiate the fraud. In other words, while a court would have the discretion to reduce the award to a planner/initiator to zero, the most that such a relator could recover would be ten percent.

12. Public Disclosure

Section 3(d) of H.R. 4854 substantially narrows the current public disclosure bar. It permits dismissal only if "all essential elements" of the relator's allegations are "based exclusively on the public disclosure" of allegations or transactions in certain enumerated types of disclosures. A "public disclosure" is defined to be only a disclosure "on the public record" or that has otherwise been "disseminated broadly to the general public". Additionally, a relator's action is defined to be "based on" a public disclosure only if the relator "derived" his knowledge of "all essential elements of liability" from the public disclosure. Finally, the public disclosure bar is no longer defined as jurisdictional and only the Government (not the defendant) is allowed to dismiss on this ground.

The Department strongly opposes these changes. If enacted, these changes would severely narrow the circumstances where the bar would apply in a way that would reward relators with no firsthand 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. If these changes were implemented, then even if there is an open Government investigation into the same matter, 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. We think this is fundamentally at odds with the underlying purpose of the *qui tam* provisions, which is to give incentives to relators to disclose wrongdoing of which the Government would otherwise be unaware.

We also object to the proposed amendments to the public disclosure bar for the following additional reasons. First, with respect to the Government seeking the dismissal of a relator on public disclosure grounds, we think it is important that the Government be given adequate time to file such a motion, and recommend that the proposed legislation expressly provide for such a motion to be filed "on or before service of a complaint on the defendant pursuant to Section 3730(b), or thereafter for good cause shown." This change is particularly important if the current language of the proposed legislation is enacted, since it may require substantial investigation, including discovery of the relator, to determine where the relator derived his or her knowledge.

Second, by limiting a public disclosure to "disclosures made on the public record" or "broadly to the general public", the proposed amendment will encourage opportunism at the expense of the taxpayers. The new language would not cover the common situation where a private party, usually a company employee, learns of a Government investigation as a result of being questioned by Government auditors or investigators, or who is tasked with gathering information in response to a Government subpoena or audit request. Under the proposed legislation, such a person would be free to file a *qui tam* action, despite the fact that his or her lawsuit in no way helps the Government to protect the public treasury.

Third, the proposed legislation permits dismissal of a relator only if "all of the essential elements" of the relator's allegations are derived from the public disclosure. As discussed above, such a standard inappropriately would permit a relator who derives substantially all of his or her information about that scheme from a public disclosure, but then adds one additional element from another source, to reduce the Government's recovery for the taxpayers.

In lieu of the proposed amendments, the Committee should consider revising the public disclosure bar to permit dismissal of a *qui tam* action by the Government if it is already investigating the matter unless either: (1) the relator provides new information that would enhance the Government's recovery and which the Government's existing investigation would not have uncovered; or (2) the Government's investigation was the result of information voluntarily provided by the relator. This alternative approach would be consistent with what we believe to be two bedrock principles underlying the FCA's *qui tam* provisions: that a relator who brings nothing new to the suit should not be entitled to reap the rewards of a False Claims Act suit and that where the government is already pursuing a matter, paying a reward only harms the taxpayers by diverting up to 30 percent to the private plaintiff.

Specifically, we recommend that a case be subject to dismissal "if (A) on the date the action or claim was filed substantially the same matters as alleged in the action or claim were contained in, or the subject of, (I) a filed criminal indictment or information, or an open criminal, civil or administrative investigation, or (II) a news media report, or congressional hearing, report or investigation, if within 90 days of the issuance or completion of such news media report or congressional hearing, report or investigation, the executive branch of the Government opened an investigation or audit of the facts contained in such news media report or congressional hearing, report or investigation, (B) any new information provided by the person does not add substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation, or audit, and (C) the Government's existing indictment, information, investigation or audit was not initiated based on information voluntarily brought by the person to the Government."

In addition, we recommend a conforming change to the statute's provisions regarding relators' awards, by inserting the following sentence into § 3730(d)(1): "If the person bringing the action is not dismissed under subsection (e)(4) because the person provided new information that adds substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation or audit, then such person shall be entitled to receive a share, pursuant to the first sentence of this paragraph, only of proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person."

13. Damages for Administrative Beneficiaries

Section 3(f) of H.R. 4854 requires the United States to "pay from the proceeds of the action . . . all amounts that the Government has collected in the action for financial losses suffered by [an] administrative beneficiary." We do not support this proposed language. Because the obligations of the United States with respect to third parties may already be covered by existing law, we believe the better approach is to leave it to the potentially interested parties to determine on a case by case basis how any monies recovered by the United States should be allocated.

Section 3(f) also provides for a relator share of any additional actions pursued by an administrative beneficiary. Specifically, this section provides in relevant part that if an administrative beneficiary pursues "any alternate remedies available to them for losses or other harm suffered for [sic] them that are not pursued or recovered in an action under [section 3730(b)] . . . after [the relator] has initiated an action," then the relator "shall be entitled to have such alternative remedies considered in determining any award . . . to the same extent that [the relator] would be entitled under subsection (c)(5) with respect to any alternate remedy pursued by the Government." In permitting a relator to increase his or her recovery from the Government based on a recovery by an administrative beneficiary, this provision is contrary to the purpose of the *qui tam* provisions. The Government should not have to share out of its recovery because, as a byproduct of the relator's lawsuit, one private actor recovered from a second private actor.

14. <u>Statute of Limitations</u>

Section 4(a) of H.R. 4854 would provide for a single 10 year statute of limitations in all FCA cases, and clarify that the Government's pleading upon intervention relates back to the relator's complaint for statute of limitations purposes. The Department believes these changes would be useful inasmuch as they would increase recoveries for the Government.

15. <u>Pleading Standard</u>

Section 4(c) of H.R. 4854 would add a new section 3731(e) stating that, in pleading an action under 3730(b), a relator "shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint . . . provide a reasonable indication that one or more violations of section 3729 are likely to have occurred" and if the allegations "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."

This proposed language is presumably in response to certain decisions dismissing *qui tam* complaints for failure to plead fraud with "particularity" under Federal Rule of Civil Procedure 9(b) where the relator did not identify any specific false claims. *See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield* Hosp., 360 F.3d 220, 232-34 (1st Cir. 2004); *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002). Subsequent decisions have clarified, however, that a complaint may contain sufficiently detailed allegations to satisfy Rule 9(b) even though the complaint does not identify specific false claims. *See, e.g., Hill v. Morehouse Medical Associates, Inc.*, 2003 WL 22019936 (11th Cir. Aug. 15, 2003) (reversing Rule 9(b) dismissal even though the relator's complaint did not identify specific false claims; the relator "supported her legal theory with facts describing [the defendant's] billing process, the specific CPT and diagnosis codes that were altered for each of the five billing schemes, and the frequency of submission of each type of claim"); *United States ex rel. Singh v. Brandford Regional Medical Ctr.*, 2006 WL 2642518, at *4 (W.D. Pa. Sept. 13, 2006) ("Other courts presented with fraud schemes similar to the scheme alleged in the present case have also concluded that Rule 9(b) is satisfied without requiring specific identification of claims.").

The Department has argued that it is possible for a relator (or the Government) in an FCA action to describe the alleged fraudulent scheme with sufficient particularity to satisfy Rule 9(b) even without identifying specific false claims. A complaint that does not identify specific false claims may nonetheless allege sufficient information regarding the underlying fraudulent activities to put the defendant on notice of what it must defend, and to satisfy any other purpose of Rule 9(b). Whether a complaint alleges, or fails to allege, any specific false claims is one factor among others for a court to consider in determining whether the complaint was pled with "particularity," as Rule 9(b) requires. By necessity, this is a case-specific inquiry.

From the Department's perspective, Rule 9(b) should apply to *qui tam* actions, as the courts have uniformly held. *Qui tam* actions that fail to allege fraud with adequate particularly can waste the Government's investigative resources. Thus, we would oppose an attempt to exempt *qui tam* actions from the requirements of Rule 9(b), although, as noted, we do agree with the position reflected in Section 4(c) that it can be possible to satisfy Rule 9(b) even without identifying specific false claims.

Finally, as drafted, Section 4(c) applies only to actions brought by relators under subsection 3730(b), and not to actions brought by the Government under subsection 3730(a). There is no logical reason why this proposed rule should apply only to actions brought by relators, and not also apply to actions brought by the United States. The Department objects to any provision addressing pleading standards that would apply to relators but not to the Government as well.

16. <u>Waiver of Claims</u>

Section 4(c) of H.R. 4854 also adds a new subsection 3731(f) that prohibits "any contract, private agreement, or private term or condition of employment" from "limiting or circumventing . . . the rights or remedies provided to persons bringing actions under section 3730(b) and other cooperating persons under section 3729." The new subsection contains an exception for a "contract or private agreement that is entered into . . . with the United States and a person bringing the action under 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."

If the purpose of the new section is to protect putative relators from waiving, either unwittingly or under compulsion, their rights to pursue *qui tam* actions, then the language in the proposed legislation is overbroad and could lead to unintended and inappropriate consequences. As written, it might be read to preclude the United States from settling a *qui tam* action by entering into an agreement with a defendant absent the approval of the relator - since the carve out for settlement agreements applies only to those agreements that include the "person bringing an action under section 3730(b)." Such a reading would conflict with subparagraph 3730(c)(2)(B) of the FCA, which authorizes the United States to settle an action with a defendant "notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate and reasonable under all the circumstances." Moreover, preventing the Executive Branch from settling a *qui tam* action, unless the relator consents, could raise constitutional separation of powers concerns. *See, e.g., Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753-54 (5th Cir. 2001) (rejecting constitutional challenge to *qui tam* provisions, in part on the basis of Executive Branch authority to settle FCA claims over *qui tam* relator's objections). Accordingly, if the Committee enacts new subsection 3731(f), that subsection should be revised to clarify that nothing in that subsection limits the right of the United States to settle a *qui tam* action that is otherwise subject to approval under subparagraph 3730(c)(2)(B).

Furthermore, proposed subsection 3731(f) is so broadly worded that it could arguably be said to void agreements between employers and employees that require employees to inform the employer of all violations of law or fraudulent conduct of which the employee is aware. Such a contractual obligation is sometimes included in severance agreements with departing employees, and is a means by which employers can learn of noncompliance matters that they can correct. Such contractual provisions arguably "limit" or "circumvent" the ability of a relator to bring a *qui tam* action because they may enable an employer to come into voluntary compliance or make a voluntary self-disclosure to the Government and thereby reduce the value to the employee of bringing a *qui tam* action. The law, however, should encourage voluntary compliance measures, and should not interfere with efforts to bring about the internal corporate reporting of violations of law.

17. Serving State and Local Authorities

Section 5 of H.R. 4854 adds a new provision authorizing a sealed *qui tam* complaint to be served on the appropriate law enforcement authorities of any State or local government that is named as a co-plaintiff with the United States in the action. If such a provision is to be added to the FCA, it should clarify that any State or local law enforcement personnel who receive a copy of the sealed complaint are bound by the seal and may not publicly disclose the complaint.

18. Civil Investigative Demands

Section 6 of H.R 4854 proposes to amend the FCA's Civil Investigative Demand (CID) provisions to permit the Attorney General to delegate some of the authority currently conferred upon him by these provisions, to authorize the Government to share CID information with relators, and to add a definition of "official use." The Department believes these changes would be helpful, and has the following additional recommendations:

First, we recommend that the CID provisions be modified to permit the Attorney General to delegate all his authority relating to CIDs, including his authority in subparagraph 3733(a)(2)(G) to issue more than one CID for oral testimony on the same person. To that end, we recommend that the Committee strike the last sentence of this subparagraph, which currently prohibits the Attorney General from delegating this function. We also suggest that the CID provisions expressly delegate the Attorney General's authority under this section to the Assistant Attorney General for the Civil Division.

Second, the CID provisions should clarify that the Attorney General (or his designee) may issue CIDs in connection with a qui tam action prior to the Government's election to intervene or decline to intervene in that action. Specifically, we recommend that § 3733(a)(1), instead of stating that "the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue [a CID]" provide that "the Attorney General may, before commencing a civil proceeding under subsection 3730(a) or other false claims law, or electing pursuant to section 3730(b)(4) to intervene or decline to intervene in an action under subsection 3730(b), issue [a CID]."

19. Government Employees

Section 7 of H.R. 4854 would modify the FCA to permit *qui tam* suits by Government employees under certain circumstances. The new legislation would allow an FCA suit filed by a Government employee to proceed if it is based on information learned during the course of the employee's duties unless (i) "all the necessary and specific material allegations" underlying the employee's action were "derived from an open and active fraud investigation", or (ii) the employee failed to disclose "substantially all material evidence" in his or her possession to certain designated federal officials before filing suit or disclosed the evidence to the designated federal officials, and the Government filed an action within 12 months (or any extension of that period) of the employee's disclosure.

The Department strongly opposes the proposed amendment, and believes there should be a complete ban on any *qui tam* suit that utilizes information acquired during the course of Government employment. It has been the Department's longstanding view, through several Administrations, that allowing such suits is unsound as a matter of public policy, will cause an unnecessary drain on the Treasury, and will invite interference with federal investigations, and thus will *not* further our shared goal of protecting the public treasury. Each federal employee has an existing duty to report fraud. Adding a personal financial incentive to file *qui tam* suits creates the potential for conflicts with this duty, and undermines both the employees' loyalty to the Government and the public's confidence that the Government's decisions are based on the public interest rather than individual employees' personal financial interests. We note that existing mechanisms are available to all Government employees who seek to report fraud and initiate Government action. The Inspectors General of the executive agencies are charged with the responsibility to investigate and pursue allegations of fraud on their agency's contracts and programs; similarly, the Attorney General is charged with the responsibility to litigate and prosecute those allegations in the federal courts. In addition, where a federal employee believes he or she has suffered reprisals as a result of making such a report to an Inspector General or the Department of Justice, the employee can seek protection under the current federal whistleblower protection laws.

While it is true that all Government employees are obligated to report fraud, it is particularly true for those Government employees, such as auditors, investigators, attorneys, or contracting officials, who are paid salaries by the taxpayer to identify and root out fraud, and should not need an additional personal financial incentive to do their important jobs. The opportunity for personal gain presents a potentially corrupting incentive for such employees either to allege fraud where it does not exist, or to withhold information from supervisors and colleagues so that the Government is not able to pursue the fraud through official action and the employees instead may pursue it personally for their own financial benefit. Employees also will have an incentive to focus on those matters likely to lead to lucrative recoveries for themselves, perhaps at the expense of other official duties of equal or greater importance to the Government. Moreover, once an auditor or investigator has filed a *qui tam* suit, the question arises whether the employee's personal financial interest gives rise to a conflict of interest that impairs the employee's ability to work on the matter, *see, e.g.,* 18 U.S.C. § 208; 5 C.F.R. § 2635.101; Executive Order 1273 1 (Oct. 17, 1990), or to serve as a fact or expert witness for the Government in any criminal or civil trial. The taxpayers thus could end up paying the salaries of individuals whose personal financial interests limit their performance of the jobs the taxpayers are paying them to do. At a minimum, suits by this category of employees (or by any individual that utilizes information acquired by such employees) should be excluded.

In addition to the broad concerns regarding this category of relators, we also have a number of specific concerns. First, the dismissal provisions should be extended to cover any person who learns of information from a Government employee. Otherwise, a Government employee could skirt the limitations imposed by the current legislation by passing his or her information to a third party.

Second, it is unclear whether the United States would continue to have the right to dismiss *qui tam* actions filed by Government employees on grounds unrelated to their status as Government employees, such as the first to file or public disclosure provisions. We do not believe that the proposed legislation intended to confer any greater right upon Government employees to pursue *qui tam* actions than other citizens or to curtail the Government's power to dismiss *qui tam* actions under 31 U.S.C. § 3730(c)(2). To the extent Section 7 may be construed otherwise, it potentially raises constitutional concerns, because it would diminish the Government's control over litigation to enforce its interests. Court challenges that have upheld the constitutionality of the existing *qui tam* provisions against separation of powers challenges have relied at least in part on the Government's broad power of dismissal. *See, e.g., United States ex rel. Kelly* v. *Boeing Co.,* 9 F.3d 743, 754-55 (9th Cir. 1993). Therefore, the proposed legislation should clarify that it is intended neither to have this effect, nor to limit the government's right to dismiss on any other grounds.

Third, the proposed legislation permits the Government to dismiss a Government employee's *qui tam* action if "all the necessary and specific allegations were derived from an open and active fraud investigation." The proposed standard for dismissal is too narrow in several important respects. By limiting dismissal to situations where the Government employee "derived" his or her information from a Government investigation, it would permit the employee to claim a share even where the Government is actively investigating the fraud, and the employee has contributed nothing to that investigation. Additionally, the requirement that "all the necessary and specific allegations" be derived from the Government's investigation will enable an employee who derives the core allegations of his or her complaint from such an investigation, but then adds one additional allegation from some other source, to share in a case the Government unquestionably is pursuing. Furthermore, the reference to an "active" fraud investigation is not defined, and many investigations are not labeled "fraud" investigations, at least initially, but nonetheless often form the basis for FCA referrals and cases. Finally, a Government employee should be prohibited from borrowing from audits as well as investigations.

Fourth, the proposed legislation also permits the Government to dismiss a Government employee *qui tam* action if the employee failed to disclose "substantially all material evidence" in his or her possession to certain designated federal officials prior to filing suit or the Government did not file an action within 12 months of those disclosures, or any extension of that period. The proposed amendments do not specify, however, where the Government is to file an extension application given that there is no pending court action at that point. To avoid this logistical difficulty, the additional 12 month period should be triggered upon written notice by the Government to the employee.

Fifth, the legislation provides the Government with only 60 days to file a motion to dismiss once the relator's suit is filed. We believe this time period is too short. A minimum of 120 days should be provided, since the Government will be required to use its limited resources both to investigate how the relator learned of the fraud and whether he or she made the requisite disclosures, in addition to investigating the underlying merits of the relator's allegations. We also believe the Government should be able to dismiss even after the initial dismissal period expires "for good cause shown." Otherwise, the Government would be potentially without recourse if it learned that an employee had misrepresented facts bearing upon his or her compliance with the disclosure requirements until after the initial period for filing a motion to dismiss had expired.

Sixth, the legislation does not expressly state that the *qui tam* action must be dismissed if the stated criteria are not satisfied. This omission should be corrected.

Seventh, the proposed legislation requires the Government's motion to dismiss to "set forth documentation of the allegations, evidence and information in support of the motion." It is not clear what "documentation of the allegations, evidence and information" refers to, or why this provision is necessary. To the extent that it suggests that the burden of proof is on the

Government, we disagree and believe instead that the relator should have the burden of showing entitlement to funds that would otherwise belong to the American taxpayers.

Eighth, the proposed legislation provides insufficient protection for information that the Government may introduce in support of a motion to dismiss. While the defendant is not permitted to seek discovery of such information from the Government, only the relator is authorized to object to the public disclosure of this information, and neither the relator nor the Government may prevent the disclosure of this information to the defendant, which may obtain this information at the discretion of the court. Because the information introduced by the Government may relate to an ongoing investigation, disclosure of this information to the defendant or others may jeopardize the Government's evidence or legal theories, and thereby adversely impact the Government's ability to protect the public treasury. Thus, we think it is important that the legislation provide that the evidentiary material submitted by the Government shall not be disclosed to the defendant, and that the Government may move to restrict the relator's access to this information as well.

Conversely, the legislation provides that if the Government employee's suit is dismissed, the matter "shall" remain sealed. As noted, established case law supports the public's presumptive right to learn about judicial decisions. Accordingly, we recommend that the question of whether a case should remain sealed after it is terminated should continue to be decided by the courts on a case by case basis, consistent with the traditional standards governing public access to court proceedings.

Ninth, the proposed legislation requires the Department to report every 6 months on any motions filed by the Government to dismiss Government employees from a *qui tam* suit. This requirement would impose an unnecessary burden on the Department and distract from the pressing business of investigating and litigating claims of fraud on the Government. Moreover, the current seal provisions of the FCA would preclude such reporting, absent leave of court, and if the proposed legislation is enacted, would also prohibit such reporting absent the consent of the relator.

Finally, the legislation should clarify that the right of Government employees to file *qui tam* actions does not bring them within the ambit of the "whistleblower protection" provisions in § 3730(h) of the Act, since federal employees are covered by, and entitled to the protection of, the Civil Service Reform Act, which was intended to provide the exclusive remedy for claims against federal employers.

20. Effective Date

Section 8 of H.R. 4854 states "[t]he amendments made by this Act shall take effect on the date of enactment of this Act and shall apply to any case pending on, or filed on or after, that date." To avoid extensive litigation over retroactivity, we recommend that Section 8 be clarified to state that the amendments to section 3729 apply prospectively to conduct occurring after the date of enactment, that the amendments to 3731(b)(l) apply to cases filed after the date of enactment and shall not revive claims that are time-barred as of the date of enactment, and that all other parts of the legislation apply to cases pending on the date of enactment.