The Blind Side:
Recent False Claims Act Amendments and New Liability Exposure For Health Care Entities (Supplement / Cases)

Robert T. Rhoad and David W. O'Brien

HOOPS2010

Crowell & Moring LLP

Recent Settlements and Cases Involving Plans & Payors

© Crowell & Moring LLP 2010

HOOPS2010
Crowell & Moring LLP

RightCHOICE Managed Care (2007)

- Government alleged RightCHOICE, which participated in the FEHBP as part of the Blue Cross and Blue Shield Service Benefit Plan, passed on excessive costs to the FEHBP in connection with compensating a preferred provider network of physicians.
- Paid **$975,000** to settle allegations that it violated the FCA in connection with providing health care benefits to federal employees and their dependents in Missouri.

© Crowell & Moring LLP 2010

U.S. ex rel. Tyson v. Amerigroup Illinois, (2008)

- Jury verdict that Amerigroup violated FCA by (1) purposely avoiding enrollment of "unhealthies" and pregnant women and falsely certifying compliance with Medicaid managed care contract's non-discrimination terms, resulting in false claims for federal funds by state and (2) fraudulently inducing state to enter into contract
- Judge imposes **$144 million** in damages (including trebling) and additional **$190 million** civil penalties (applicable fine x each enrollment form!!)
- March 2007 ruling followed by July 2008 settlement for **$240 million**

© Crowell & Moring LLP 2010

Healthfirst PHSP, Inc. (Sept. 2008)

- **$35 million** resolves New York civil charges that Medicaid plan paid productivity bonuses based on sale representatives' enrollment volumes in violation of state law and then made false statements to the State about its marketing practices
- **Former CFO and EVP indicted**; health fraud counts dismissed 12/2008, but filing false instruments charges remain

© Crowell & Moring LLP 2010

United States v. Janke, No. 14044 (S.D. Fla. Feb. 2009)

- Government alleges Florida health plan inflated Medicare Advantage premiums via submission of risk adjuster diagnosis codes not substantiated by medical records or conditions of Medicare Advantage beneficiaries
- Individual owners of **America's Health Choice** HMO sued; assets frozen

© Crowell & Moring LLP 2010

Wellcare (May 2009)

- Alleged overstatement of behavioral health claims expense to avoid premium refunds under Florida Medicaid and Healthy Kids contracts setting minimum 80/20 and 85/15 medical loss ratios.
- Medical claims costs reported could not include overhead or administrative expenses. Plans required to refund excess premiums above specified loss ratio.

© Crowell & Moring LLP 2010

Wellcare (May 2009)

- Scheme allegedly included using transaction with subsidiary to conceal actual claims expenses
- **$80 million**, including refund and forfeiture, to be paid under deferred prosecution settlement of criminal information announced in May 2009
- Individual rating analyst already pled guilty to fraud ***U.S. v. West, No. 07cr00527*** (Dec. 2007)

© Crowell & Moring LLP 2010

U.S. ex rel. Cooper v. BCBSFL, 19 F.3d 562 (11th Cir. 1994)

- Medicare beneficiary, Cooper, alleged Medicare Secondary Payor fraud when BCBSFL repeatedly returned medical bills Cooper submitted for payment. Alleged some of the bills said "Medicare must pay first," and in other cases BCBSFL paid only a secondary amount after deducting what it believed Medicare should pay.

- FCA case based on alleged false claims submitted to Medicare each time Medicare was billed improperly as the primary insurer for the relator-beneficiary.

© Crowell & Moring LLP 2010

U.S. ex rel. Flynn v. BCBSMI, 1995 WL 71329 (D. Md. Jan. 10, 1995)

- BCBSMI, under a contract with HCFA, managed Medicare Part A program and was required to audit the cost reports of participating hospitals, determine which costs were authorized under Medicare regulations and make the appropriate payments.
- Alleged scheme to defraud the Government while acting as a fiscal intermediary responsible for the audit and administration of Medicare claims by hospitals.

© Crowell & Moring LLP 2010

U.S. ex rel. Flynn v. BCBSMI, 1995 WL 71329 (D. Md. Jan. 10, 1995)

- Blue Cross Blue Shield of Michigan paid the United States **$27.6 million** to settle civil claims it improperly billed and submitted false documentation to the government as the fiscal intermediary of the Medicare program in Michigan.

© Crowell & Moring LLP 2010

U.S. ex rel. Conrad v.BCBSMS, (S.D. Miss. Feb. 5, 2008)

- Relator, Conrad, alleged that BCBSMS "caused" the submission of false claims to Medicare when it "failed to uncover or investigate" certain instances of fraud by a Medicare provider, including multiple billings for a single service, billing for personal items such as a boat, and illegal related party transactions.
- Court concludes that Conrad's allegations legally sufficient to state claim under the FCA.

© Crowell & Moring LLP 2010

Contact Information

Robert T. Rhoad
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004

Phone: (202) 624-2545
E-mail: rrhoad@crowell.com

David W. O'Brien
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004

Phone: (202) 628-5116
E-mail: dobrien@crowell.com

© Crowell & Moring LLP 2010

A GATHERING STORM: THE NEW FALSE CLAIMS ACT AMENDMENTS AND THEIR IMPACT ON HEALTHCARE FRAUD ENFORCEMENT

Robert T. Rhoad, Esq.
Matthew T. Fornataro, Esq.
Crowell & Moring LLP
Washington, DC

Introduction

On May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 ("FERA")[1] was signed into law. It includes the most comprehensive and significant amendments to the civil False Claims Act ("FCA" or "Act")[2] – the Government's chief weapon and enforcement tool against the healthcare industry – in nearly 25 years. While the purported intent of FERA's sweeping amendments to the FCA is to enhance the federal government's ability to fight fraud in the financial industry in the wake of the establishment of the Troubled Asset Relief Program ("TARP") and unprecedented economic stimulus spending, the amendments apply equally to all, including healthcare entities.

FERA's amendments to the FCA constitute an exponential expansion of the FCA's liability provisions as well as its *qui tam* "whistleblower" provisions. These amendments will have a substantial impact on virtually every person, company, or entity that pays money to the government or receives federal funds. Healthcare entities, which have been the primary focus of the government's FCA enforcement efforts for over a decade, are no exception and are likely to be the hardest hit.

In tandem with these expanded liability and *qui tam* provisions, the Draconian penalties provided for under the Act – *e.g.*, treble damages, penalties of up to $11,000 per violation, assessment of attorneys' fees and costs, and suspension and debarment – warrant grave concern and demand the highest attention of healthcare leaders and executives to ensure that compliance programs are in place and effective. FERA contains vague provisions, undefined terms, and inconsistencies and it may be months, if not years, until judicial decisions interpreting and applying its amendments to the FCA provide needed clarity. One thing, however, is likely: the government will not wait to pursue investigation and enforcement in the interim. Healthcare entities must exercise extreme caution to avoid falling prey to investigations due to their unfamiliarity with new legal boundaries – even vague ones. Measures should include the implementation and execution of robust compliance programs and initiatives, including fraud and abuse education and training for managers and employees,[3] fraud "hot line" and/or other reporting mechanisms, response and investigation procedures, and constant auditing of compliance programs to ensure they are both current and effective.

FERA's amendments to the FCA are but one factor in a gathering storm in healthcare fraud enforcement resulting in a perfect confluence that will bring dire consequences for the unwary. The book, *The Perfect Storm*, by Sebastian Junger, describes in graphic detail the havoc created when three smaller storms gather and combine into one. Not unlike the gathering storms in the book, three metaphorical "storms" have now combined in the health fraud enforcement world, and their force is bearing down to create substantial risk of liability for healthcare entities.

The first storm is the federal government's current spending spree in federal healthcare programs and economic recovery efforts. Combined with Medicaid and Medicare spending, new TARP and stimulus funds have the government on track to spend trillions of dollars in the coming years. These government funds are being distributed at a staggering rate to a wide array of companies. Under FERA's amendments, the distribution of these funds will constitute federal funding capable of triggering potential FCA liability. Any entity that either directly or indirectly receives federal funds, including healthcare providers that participate in federal programs such as Medicaid and Medicare, are at risk. These entities, including contractors, subcontractors, and vendors, are also likely to face whistleblower retaliation claims from employees, former employees, and competitors.

The second storm has arisen from FERA's recent amendments to the FCA. By amending the Act, Congress removed two key provisions, which prevented it from operating as a "boundless" "all-purpose antifraud fraud statute."[4] First, Congress removed the requirement that the allegedly false claim actually be presented *to the government* for payment. Now liability may attach to claims that are submitted to a "contractor, grantee, or other recipient" of federal funds, regardless of whether a false claim was submitted to the government. Congress also removed the requirement that a subcontractor act with the specific intent "to get" a false claim paid "by the government."[5] As a consequence, there is no longer a requirement that an individual or entity act with the specific intent to defraud the government. Together, these two amendments expose a large number of companies to potential liability under the FCA, including companies that are not traditionally thought of as – and have never considered themselves to be – government contractors, such as subcontractors and vendors who simply work with grantees or recipients of federal funds.

The third storm in play is ignorance. A recent study found that nearly 80 percent of business executives from a broad array of companies, including those in the healthcare industry, were

unfamiliar with the FCA.[6] This means that many companies, which are now unwittingly in the cross-hairs of federal fraud enforcement, are likely unprepared to prevent FCA violations through the implementation and execution of adequate compliance measures. Perhaps more problematic, these entities are also likely ill-equipped to respond if and when potential problems arise.

It is crucial that all entities, including healthcare entities, whether traditional government contractors, government program participants, or merely recipients of federal funding, heed warnings and take measures to avoid disastrous FCA liability. First and foremost, it is necessary to understand the FCA, its recent amendments, and their implications for the healthcare industry. Only then may one assess the compliance challenges that must be met. This article begins with a basic overview of the FCA, followed by a review of its use in healthcare fraud enforcement. The article then examines specific FCA provisions, and then presents an in-depth discussion of the recently enacted amendments to the Act and their practical effects and implications for the healthcare industry. Finally, this article addresses the compliance challenges created for healthcare entities and the measures that must be taken to address them.

Brief Overview of the FCA

Congress enacted the federal FCA[7] in 1863 to combat abuse of federally funded programs in the Civil War reconstruction era. In essence, the FCA prohibits the submission of false claims for payment where federal funds are involved. Although its use as an enforcement tool diminished greatly over the century that followed, its use by the federal government re-emerged as a mechanism for addressing abuses in the defense contracting industry in the 1980s.[8] This was due, in part, to the FCA amendments in 1986, which significantly expanded the incentives – *i.e.*, monetary awards, damages, and penalties – and reduced the barriers to bringing actions against entities alleged to have engaged in fraud by lowering the standards for intent and burden of proof required to establish liability.[9] Combined, these amendments ushered in a sharp increase in FCA cases in the decades which followed.

The popularity and strength of the FCA as an enforcement tool is a result of its financial potential and extensive reach. Violations of the FCA are subject to treble damages,[10] penalties of between $5,500 to $11,000 per violation above and beyond the damages subject to the FCA's trebling provision,[11] and attorneys' fees and costs to successful whistleblowers if they file suit under the *qui tam* provisions of the Act.[12] The Act's *qui tam* provisions permit private individuals – colloquially referred to as "whistleblowers" and referred to under FCA law as "relators" – to act in place of government enforcement agencies and offer financial incentives to them to investigate and bring to the federal government allegations of abuse of public funds.

Qui tam actions are brought under the FCA "for the person and for the United States government," in the name of the United States.[13] The FCA requires a relator to file the complaint under seal, and gives the government sixty days to investigate the relator's allegations and determine whether to intervene in and take over the action.[14] After the government fully investigates the allegations made by the relator in the complaint and written disclosure, it has several options. It may: (1) notify the court that it will intervene in the suit and take over responsibility for the litigation;[15] (2) formally decline intervention, thus allowing the relator to conduct the litigation on his or her own;[16] (3) move to dismiss the litigation, even over the relator's objection;[17] or (4) seek to settle the case.[18] If the government elects to intervene in the suit, it then takes over control and, importantly for the relator and his or her counsel, the bulk of the work and costs attendant to the litigation. If the government declines intervention, then the FCA allows the relator to continue the litigation without the active participation and financial support of the government. If successful, a relator may receive between 15 percent and 30 percent of any recovery obtained, in addition to attorneys' fees and costs.[19] Once the government makes its decision and determines whether to intervene in the case, the case is unsealed and the litigation – regardless of the government's election – proceeds very similarly to any other federal case under the Federal Rules of Civil Procedure.

In the wake of the 1986 amendments to the FCA, which increased damages and penalties, lowered the standards for intent and burden of proof required to establish liability, and enhanced whistleblower incentives, many commentators suggested that the FCA's character shifted from a true fraud statute into what is, in essence, a "recklessness" statute.[20] Of course, similar criticisms have recently been voiced with the fresh passage of the new amendments to the FCA under FERA, which expand the FCA well beyond the 1986 amendments.

The Use of the FCA in Healthcare Fraud Enforcement

Since the early 1990s, the FCA has become the primary enforcement tool used by the federal government to combat fraud, waste, and abuse in federal healthcare programs, including Medicaid and Medicare. FCA cases have been brought against virtually every segment of the healthcare industry, and the large settlements and judgments in those cases make up a substantial portion of the government's total FCA recoveries.

Since the last major amendments to the FCA in 1986 through and including fiscal year 2008, a total of 10,063 cases were filed under the civil FCA.[21] Thirty-eight percent (3,864) of these cases were non-*qui tam* cases filed by the government without any *qui tam* relator (*i.e.*,

continued on page 16

continued from page 15

cases *not* initiated under the *qui tam* provisions of the FCA by a relator or so-called "whistleblower"), while 6,199 or 62 percent of these cases were initiated and filed by *qui tam* relators.[22] Through settlements and judgments, the government has recovered nearly $22 billion in FCA cases during this time. Of this amount, approximately $8 billion has come from non-*qui tam* cases and approximately $14 billion has come from cases brought under the Act's *qui tam* provisions.[23] And, of the $14 billion in recoveries from cases initiated by *qui tam* relators, almost all – or $13.3 billion – has come from cases in which the government intervened.[24] The total relator shares of these recoveries during this time amounts to almost $2.2 billion, with approximately $2.1 billion going to relators in *qui tam* cases in which the government intervened and the remainder going to *qui tam* relators in non-intervened cases.[25]

While the FCA has been applied primarily to the defense contracting and healthcare industries since its 1986 amendments, the majority of dollars recovered have come from healthcare cases. Of the 10,063 FCA cases brought during this time period, 3,933 or nearly 40 percent involved the healthcare industry. The total recovery for these healthcare industry FCA cases, however, is roughly $14.3 billion – nearly 66 percent or *two-thirds* of the entire $22 billion recovered by the government in all FCA cases.[26]

Over the past two decades, monetary recoveries have increased sharply, as has FCA litigation involving the healthcare industry. This is mostly attributable to the 1986 amendments to the FCA and to the increasingly complex regulatory environment in which healthcare organizations operate. With the new amendments to the FCA just enacted in FERA and with an ever-increasingly complex healthcare regulatory regime, enforcement and recoveries are destined to increase sharply. This environment presents enormous compliance challenges for healthcare organizations and, concomitantly, heightened exposure to FCA and state false claims law liability.

Key FCA Liability Provisions Prior to FERA

Under the FCA – prior to its most recent amendment – liability arose primarily under the provisions of 31 U.S.C. §§ 3729(a)(1)-(7). The four most commonly invoked liability provisions of the FCA included:

- Section 3729(a)(1), also known as "direct" false claims to the federal government, which imposed liability for submitting or causing another to submit a false claim[27];
- Section 3729(a)(2), which imposed liability for the making of false records or false statements to support a false claim[28];
- Section 3729(a)(3), which imposed liability for participation in a conspiracy to submit a false claim for payment[29]; and
- Section 3729(a)(7), also known as "reverse false claims provision," which imposed liability for the submission of a false claim or statement to avoid payment of, or to decrease, an obligation to the government.[30]

FERA's Recent Amendments To The FCA

As a result of FERA's recent amendments to the FCA, any company or individual doing business in the healthcare marketplace – providers, payors, subcontractors, and vendors – are potentially subject to the FCA. It is incumbent on those in the industry to be aware of the substantive and procedural provisions of the Act as amended in order to ensure that they have effective compliance programs in place as their first line of defense. While the substantive changes are likely to have the greatest impact on how such programs are structured, the procedural changes, which are focused on the investigatory provisions of the Act, will also greatly impact those who may unwittingly find themselves in the government's enforcement net. Thus, a full understanding of both the substantive and procedural provisions of the Act and the changes brought about by its recent amendment by FERA is essential.

Substantive Changes to the FCA

1. Expansion of the Scope of the FCA

FERA's amendments to the FCA exponentially expand the FCA's scope. Not only do these amendments remove statutory language limiting its reach, they also eliminate some historical and commonly used legal defenses to alleged FCA violations. In broad terms, FERA extends the FCA's reach to any false or fraudulent claim for government money or property regardless of whether the claim is presented to a government official or employee; the government holds title or has physical custody of the money; or the defendant specifically intended to defraud the government.

The purported intent of the Act is to "correct" and/or "clarify" statutory language as well as erroneous interpretations of the law by the federal judiciary, including the U.S. Supreme Court in *Allison Engine Co. v. United States ex rel. Sanders*,[31] which limited the scope of the law, allowed subcontractors and non-governmental entities to assert defenses against allegations of fraud, and arguably limited the FCA's application to Medicaid claims.

a. Re-Definition of a "Claim"

FERA re-defines a "claim" under the FCA to mean "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 is 1) presented directly to the United States, or 2) "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 the government provides or reimburses any portion of the requested funds.[32] As made clear by this new definition, FCA liability can now attach to knowingly false requests paid with federal funds, regardless of whether the government has title to the money requested, and regardless of whether it is requested directly from the government or from a recipient of federal funds, so long as that money is used to "advance a Government program or interest."[33] Consistent with the elimination of the presentment language as described above, the change clarifies that requests for payment submitted to Medicaid contractors and managed care organizations are "claims" subject to liability under the FCA.

b. Elimination of the FCA's "Presentment" Requirements

Before enactment of the FERA amendments, proof of "presentment" – *i.e.*, that a false claim was presented to "an officer or employee of the Government, or to a member of the Armed Forces" was required to establish liability for a false claim under the FCA. As explained in the Senate Judiciary Committee report accompanying the legislation,[34] the FERA amendments clarify and confirm that FCA 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 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."[35] Furthermore, the Senate Judiciary Committee report specifically notes that removal of the presentment clause clarifies that the FCA "reaches all false claims submitted to State administered Medicaid programs."[36] This means that FCA liability may attach not only to any claims submitted to the government, but also to those submitted to intermediaries such as Medicaid Managed Care, Medicare Advantage, and Medicare Part D plans as well.

c. Elimination of the FCA's Intent Requirement

Prior to being amended by FERA, liability under the FCA would attach if a person "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."[37] The FERA amendments delete the language requiring that a person use a false statement "to get" a false claim "paid or approved by the Government." Now all that is required is that the false statement be "material to" a false claim. Thus, it is no longer required for the government or a relator to establish a direct connection between the allegedly false statement and the government's payment of the claim. Now all that is required for liability to attach is the establishment that such a statement has a "natural tendency to influence, or is capable of influencing" the payment of government funds.

The Senate Judiciary Committee report justifies these changes by characterizing them simply as changes that "clarify and correct erroneous interpretations of the law" stemming from the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*.[38] In *Allison Engine*, former employees of a Navy subcontractor alleged their employer submitted fraudulent certificates of compliance to the prime contractor, but could not prove that the fraudulent certificates were issued for the purposes of obtaining payment by the government.[39] The Supreme Court held that, to impose liability under the FCA, it was not enough merely to show that a false statement resulted in payment with government funds.[40] Rather, the Supreme Court made it clear that to establish liability under Section 3729(a)(2) of the FCA, it must be shown that a defendant using a false record or statement to get a false claim paid or approved by the government intended for the government itself to pay the claim.[41]

Allison Engine essentially stood for the proposition that, in order to establish liability under the FCA, there must be a clear link between a false claim and payment or approval by the government. As the *Allison Engine* Court cautioned, without this, the FCA would be "boundless" and tantamount to an "all-purpose antifraud statute."[42] FERA has legislatively overruled the Supreme Court's *Allison Engine* decision, which had cleared up varying interpretations in the lower courts, by eliminating this intent requirement. As amended by FERA, both the "to get" and "by the Government" language have been removed from the Act. The FCA now requires only that a false record or statement be "material to a false or fraudulent claim."[43] The government need no longer prove that the relator intended to get *the government* to pay any allegedly false claim.

Healthcare providers submitting claims for payment that are construed to be false may now be liable under FCA even if they do not present or intend to defraud the government. In essence, FERA has done precisely what the Supreme Court cautioned against: it has turned the FCA into a "boundless" "all-purpose antifraud statute."[44]

2. Expanded Conspiracy Provisions

The amendments also expand conspiracy liability under the FCA to include conspiracies to commit a violation of any other substantive section of the FCA.[45] Previously under the FCA, the conspiracy section covered only a conspiracy "to get a false claim paid or approved"[46] and most courts had construed this to limit the conspiracy section to apply only to violations of Section 3729(a)(1).

continued on page 18

continued from page 17

3. Explicit "Materiality" Requirement

The amendments also establish an express materiality requirement, which explicitly pertains where one "knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or fraudulent claim."[47] "Material" is now statutorily defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[48] Previously, the FCA did not expressly have a materiality requirement; however, many courts required such a finding as an implied standard within the Act, and some imposed a heightened materiality standard.[49]

In FCA cases before courts utilizing the heightened materiality standard, the government or relator was required to show that the government agency *would have* acted differently had it known of the alleged falsity.[50] Put another way, to establish materiality it had to be proven that (1) the alleged false statement was material; (2) the government agency relied on it; and (3) such reliance directly and proximately caused the government agency to make a decision that it would not have made if the statement had not been false. While FERA amends the FCA to confirm a materiality requirement in cases brought under the Act, it also adopts and incorporates the less demanding "natural tendency" of materiality rather than the heightened materiality standard, which was far more favorable to defendants.

4. "Reverse False Claims" and Overpayment "Obligations"

Perhaps the greatest expansion of the FCA relative to the healthcare industry are FERA's amendments to the FCA which expand liability for knowingly retaining Medicare or Medicaid overpayments and for presenting false or fraudulent claims for payment or approval. FERA amends the "reverse false claims" provisions of the FCA[51] to expand liability to "knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government."[52] Under this provision, there is now no longer a need for a person to have taken an affirmative act – a false statement or record – in order to conceal, avoid, or decrease the obligation to the government, and the Senate Judiciary Committee report on FERA states that the revised provision is aimed at imposing liability "without notice [by the provider] to the Government about the overpayment."[53] While it is clear that this change constitutes a vast expansion to the FCA's reach, the new metes and bounds of its scope are anything but clear, since courts will soon just begin to interpret these provisions. Compounding this is the confusion that has arisen over the use of the terms "obligation" and "knowingly."

Under the amendment to the FCA's false claims provisions, it is now sufficient for liability purposes that the defendant be found to have merely retained an overpayment where there was an "obligation" to repay the government. "Obligation" is confusingly defined as "an established duty, whether or not fixed" that arises from "a contractual, grantee, licensure or fee based relationship, from a statute or regulation, or from the retention of any overpayment."[54] Therefore, while there is no new "obligation" to repay an overpayment, the amendment describes a derivative "obligation" by referencing other possible legal situations where that obligation may be found.

Healthcare entities and their counsel know all too well that identifying such potential "obligations" to repay an overpayment within the complex healthcare regulatory scheme is not a simple endeavor. In the context of health insurers and payors, there is an existing "obligation" for disclosure of "Federal Employee Health Benefit Plan ("FEHBP") overpayments. The Federal Acquisition Regulation ("FAR"), which governs federal government contracting law, provides that a contractor may be debarred for "knowing failure . . . until 3 years after final payment on any Government contract . . . to timely disclose to the Government, in connection with the award, performance, or closeout of the contract . . . credible evidence of . . . [s]ignificant overpayment(s)."[55] Additionally, there is an existing "obligation" for disclosure of Medicare and Medicaid overpayments.[56] In order to meet the new FCA "obligation" to repay money to the government, counsel and healthcare entities must navigate these and numerous other statutory and regulatory provisions in order to identify areas in which repayment obligations *might* exist. This is no easy task. As one court has remarked:

> There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase.[57]

Furthermore, the amendment's use of the "knowingly" scienter standard also adds confusion. Under the FCA, "knowingly" is defined not only to comprise "actual knowledge" of a falsity, but also includes "deliberate ignorance" or "reckless disregard" of the "truth or falsity" of a claim or statement.[58] So, assuming the same usage of the term in application to FERA's "reverse false claims" language, a question is raised with regard to what responsibility is placed on the potential "possessor" of an overpayment to identify the existence of that overpayment. If an

entity's internal accounting or compliance systems are not state-of-the-art and able to detect immediately each and every potential overpayment, does that constitute "deliberate ignorance" or "reckless disregard"?

Regarding current potential overpayments, equally difficult questions arise. For example, how often must an entity check for overpayments to avoid being "reckless" or "deliberately ignorant"? How quickly must overpayments be returned to avoid liability? Once an overpayment is identified, and even when the entity's motivations are pure, the unanswered questions do not end: to whom and how should the repayment be made (since this information is not frequently included in statutory or regulatory provisions)? Perhaps most importantly, will the repayment itself resolve the FCA problem, or could repayment trigger the risk of further investigation or even a whistleblower action? These are merely some of the many difficult questions with which lawyers and their clients must grapple in the wake of the FERA amendments to the FCA.

Without sufficient statutory guidance, it may be some time before it will become clear how the language will be applied to overpayments retained by healthcare entities that participate in federal healthcare programs, particularly those programs that employ a periodic reconciliation process, such as under the Medicare cost reporting scheme. The only "guidance" offered by the government at this time comes from the Senate Judiciary Committee report, which states that the 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."[59] While at the same time, it attempts to offer some comfort by noting that the language is directed at the "willful" retention of overpayment, and is not intended to create liability for a "simple retention of an overpayment . . . permitted by a statutory or regulatory process for reconciliation."[60] Until, however, key terms such as "obligations" and "knowingly" are interpreted and clarified, through court decisions or otherwise, no comfort should be found in these words alone.

5. New Whistleblower Protections

FERA has also added new and expanded whistleblower protections to the FCA. FERA expands the class of persons who are entitled to protection for retaliation. The class now includes not just employees, but also contractors and agents.[61] The whistleblower is entitled to receive "all relief necessary" that will make the individual "whole."[62] The relief, according to the statute, shall include reinstatement at the same level of seniority, two times the amount of back pay, interest on the back pay, and compensation for any special damages, including litigation and attorneys' fees.[63]

The amendments also extend whistleblower protections to ensure that whistleblowers are protected when taking lawful actions "in furtherance of other efforts to stop 1 or more violations" of the FCA.[64] Previously, protection applied *only* when the purported whistleblower was engaged in conduct (*e.g.*, investigation) directly in furtherance of an actual action under the FCA, the employer had knowledge of such investigation, and then retaliated against the employee/whistleblower as a result. Extending the prior standard to include undefined "other efforts," as FERA has done, promises to expand the class of those who may seek protection – and a bounty – under the Act.

Procedural Changes to the FCA

1. The Government's Complaint

Previous case law, perhaps unsettled due to varying Circuit Court interpretations, stood for the proposition that the statute of limitations for the filing of the government's complaint began to run at the time of the relator's *qui tam* filing, and that the government's complaint-in-intervention did not relate back to the relator's complaint.[65] Congress again legislatively overruled the courts and concluded that the government's complaint should in fact relate back to the relator's filing. Specifically, the Act's liberal relation-back standard now reads: "any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."[66] This change permits the government more leeway in terms of meeting its original statute of limitations obligations, but the new provision also may permit the government additional room for discovery in various cases.

2. Service On State and Local Government Co-Plaintiffs

Numerous states have false claims laws analogous to the federal FCA and it is not uncommon for federal and state investigations to proceed in tandem. Because cases under the federal FCA are filed under seal and remain under seal during the government's initial investigation, a procedural question would arise as to whether a qui tam relator had the right to share the federal FCA complaint with state authorities without breaking the seal. The FERA amendments have clarified that, whenever a state or local government is named as a co-plaintiff in an action, the government or the relator "shall not [be] preclude[d] . . . from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence."[67]

3. Civil Investigative Demands

Civil Investigative Demands ("CIDs") are a powerful tool used by the government to conduct investigative discovery. CIDs are used prior to the time that the government makes an intervention decision, and they may take the form of typical discovery, including depositions and interrogatories.[68]

continued on page 20

continued from page 19

This tool, however, has been used infrequently in the past due to the fact that only the Attorney General had the authority to issue CIDs. The FERA amendments, however, have provided the authority for the Attorney General to delegate the power to issue CIDs to a designee.[69] The Justice Department is expected to issue regulations regarding this delegation of authority and it is probable that the frequency with which the government issues CIDs may be on the increase.

With the increased ability to delegate and manage this form of pre-intervention investigation, defendants may find themselves subjected to the various forms of investigation permitted, including oral questioning. In addition, where a *qui tam* relator is involved, the notion of information moving in one direction – from relator to the government – could be a vestige of the past and dilute defense opportunities. If the government uses its new CID authority to share information with relators, it may actually allow relators to cure a fatally deficient complaint by using information obtained through such sharing to shore up allegations that might otherwise be deemed infirm under Rule 9(b)'s strict pleading requirements.

Effective Date of Amendments

The FCA Amendments generally relate prospectively, affecting conduct that occurs on or after May 20, 2009, which is the enactment date of FERA.[70] One significant exception to this prospective application, however, relates to FERA's elimination of the "intent" requirement to have a false claim paid by the government. As amended, the new FCA materiality provision — requiring a false record or statement to be just "material to a false or fraudulent claim" — applies retroactively to all "claims" pending as of June 7, 2008.[71]

Potential Compliance Challenges For Healthcare Entities

Standing alone, the new reverse false claims and "overpayments" provisions pose significant compliance challenges for healthcare entities. As mentioned, it is difficult in many contexts to determine when one has an existing "obligation" to repay the government. In terms of contractual relationships, various forms, including the Centers for Medicare and Medicaid Services ("CMS") enrollment form and the electronic claim submission form, may give rise to certain obligations. Furthermore, elements of Corporate Integrity Agreements and Certification of Compliance Agreements may likely provide obligations to repay the government. The federal physician self-referral law ("Stark") also has a confusing statutory "refund" requirement, which establishes an "obligation" to refund Stark-tainted payments.[72] Such payments, however, go not to the government, but to the beneficiary.[73] *Also see, e.g.*, 42 U.S.C. § 1320a-7b(a)(3), where the statutory language elliptically describes the potential disclosure (not repayment) obligation of an "individual."

In order to meet the new FCA "obligation" to repay money to the government, counsel and healthcare entities must navigate these and numerous other statutory and regulatory provisions in order to identify areas in which repayment obligations *might* exist to avoid potentially making any "reverse false claims." The Medicare regulatory framework, for example, may pose myriad other circumstances in which repayment "obligations" may arise. Therefore, healthcare entities in particular must remain vigilant in all facets of their operation — from enrollment or initial contracting to day-to-day operations and claims submission — to ensure that they do not inadvertently expose themselves to liability. Furthermore, individuals and companies will likely require guidance, counseling, and legal support in assessing new areas that did not traditionally pose FCA risks.

Importantly, providers are not the only healthcare entities that should be concerned. Risk areas now exist for health insurers, payors, and managed care organizations not traditionally thought of as FCA targets. For example, there are enhanced risks for health plans sitting on overpayments, under Medicare, FAR, and FEHBP laws. Other key risk areas include inaccurately reporting or certifying data in bids and rate proposals, using inaccurate data to support reported claims experience and loss ratios, failing to correctly report rating or discounts for "similarly sized subscriber groups" under the FEHBP, recklessly relying on faulty data extraction tools in rate setting, falsely certifying compliance with marketing or other program requirements, inaccurately reporting enrollment or failing to correct inaccurate enrollment or other demographics, and manipulating provider or vendor dealings to distort reported claims expenses under governmental programs.

While the amendments to the FCA certainly create new compliance challenges for *all* those in the healthcare industry, disastrous results can be avoided by heeding warnings and taking advantage of the opportunities that exist for compliance auditing, implementation, and execution. At the very least, the ability to demonstrate a significant and substantive internal compliance program — with evidence that it has been adhered to in good faith — may help allay the government's suspicion or help ward off an investigation. Even if an investigation proceeds and litigation is commenced, however, what a defendant has done — or not done — to comply with the FCA will assuredly come into play and likely affect the disposition of the action. Although some FCA

defenses have been eliminated or emasculated through FERA's amendments, others still remain and should be pursued creatively and vigorously to ward off an investigation and/or through litigation. But, as the old adage goes, an ounce of prevention is worth a pound of cure.

Conclusion

The new amendments to the FCA, however well-intentioned, will be significantly challenging for anyone or any entity that comes into contact with federal funds, and healthcare entities are no exception. They constitute the most sweeping expansion of the FCA's liability and *qui tam* provisions in nearly 25 years and will most certainly result in increased FCA enforcement by both the government and whistleblowers — including whistleblowers who may be disgruntled former employees, competitors, or simply "bounty hunters" motivated by greed. Moreover, the amendments enable both the government and whistleblowers to pursue FCA cases in situations that have not, in the past, been subject to liability or sanctions provided for by the Act.

The gathering storm, triggered by these amendments to the FCA, presages a new era in fraud and abuse enforcement – and compliance – for healthcare entities. The amendments stand to impact not only those traditionally susceptible to FCA enforcement, such as federal healthcare program participants, but also subcontractors, vendors, and others who are the indirect recipients of government funds. While traditional targets such as healthcare entities may be best equipped to prepare for this storm as compared to those unwittingly caught in its path, the fact remains that all who fail to heed its warnings are destined to become its victims.

Although much concern has arisen over the new amendments and their lack of clarity, one thing is clear: the new amendments constitute warnings and present compliance opportunities – and the time to take advantages of these opportunities is now. Healthcare entities must ensure that they maintain comprehensive and effective compliance programs, which will require careful and thoughtful legal counsel. All healthcare entities should reassess their potential FCA liability, evaluate their current compliance policies and programs, and implement new measures and modifications to gird themselves for increased scrutiny and enforcement activity.

Robert T. Rhoad is a partner resident in Crowell & Moring LLP's Washington, DC office. Mr. Rhoad is a member of the Firm's Healthcare and Government Contracts Groups, and is Co-Leader of its Healthcare Litigation Team. He focuses his practice on complex litigation involving the federal False Claims Act, state false claims laws, fraud and abuse matters, and civil and criminal government enforcement matters. Prior to joining Crowell & Moring LLP in 2007, Mr. Rhoad spent nine years at a national law firm where he was a partner and chaired its Healthcare Litigation Practice Group and, prior to that, served for nearly six years in the Navy Judge Advocate General's ("JAG") Corps. He has successfully represented clients in both the healthcare and government contracts industries in myriad of matters, including many False Claims Act cases. Mr. Rhoad has also presented at numerous conferences and authored various articles on the False Claims Act and other areas related to fraud enforcement. And, since 2002, he has taught litigation courses as an Adjunct Professor at The George Washington University Law School. Mr. Rhoad's full professional biography may be accessed at *http://www.crowell.com/Professionals/Robert-Rhoad* and he may be reached at *rrhoad@crowell.com*.

Matthew T. Fornataro is an associate resident in Crowell & Moring LLP's Washington, DC office. Mr. Fornataro is a member of the Firm's Healthcare Group and his practice includes counseling a variety of healthcare entities faced with regulatory and compliance issues, including fraud and enforcement issues under the federal False Claims Act, state false claims laws, anti-kickback, and physician self-referral issues. He also litigates such matters on behalf of clients as well as matters involving general Government enforcement, insurance, transactional, and licensing issues. Mr. Fornataro has authored several articles on government fraud and abuse enforcement in the healthcare industry, including articles focused on the False Claims Act. Mr. Fornataro's full professional biography may be accessed at *http://www.crowell.com/Professionals/Matthew-Fornataro* and he may be reached at *mfornataro@crowell.com*.

Endnotes

1 P.L. 111-21.

2 31 U.S.C. § 3729 *et seq.*

3 *See, e.g.*, Robert T. Rhoad, "False Claims Education Requirements Under The Deficit Reduction Act: Compliance Guidance For Health Care Organizations In The Wake Of Uncertainty," *The Health Lawyer*, Vol. 19, Issue 5 (April 2007).

4 *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2130 (2008).

5 31 U.S.C. 3729(a)(2) (1986).

6 Corporate Compliance Insights, "Deloitte Online Poll: More Than Half of Business Professionals Think It Impossible To Achieve Transparency Promised for Bailout Fund Spending" (May 4, 2009) *available at http://www.corporatecomplianceinsights.com/2009/deloitte-poll-business-professionals-bailout-fund-spending-transparency*.

7 31 U.S.C. §§ 3729 *et seq.*

8 *See, e.g.*, John T. Boese, *Civil False Claims and Qui Tam Actions*, §§ 1.01-1.04 (3d ed. 2006).

9 False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-33 (2000)), which, *inter alia*, provided for the establishment of defendant liability for "deliberate ignorance" and "reckless disregard" of the truth; restoration of the "preponderance of the evidence" standard for all elements of the claim, including damages; imposition of treble damages and civil fines of $5,000 to $10,000 per false claim; increased rewards for *qui tam* plaintiffs of between 15-30 percent of the funds recovered from the defendant; and payment of attorney's fees; and, employment protection for whistleblowers. *See also*, John T. Boese, *Civil False Claims and Qui Tam Actions*, § 1.04 (3d ed. 2006).

10 31 U.S.C. § 3729(a).

11 28 U.S.C.A. § 2461 note (2002); 28 C.F.R. § 85.3(9) (2000). The FCA previously provided for the imposition of a civil penalty "of not

continued on page 22

A Gathering Storm: The New False Claims Act Amendments...

continued from page 21

less than $5,000 and not more than $10,000 for each false claim." 31 U.S.C. § 3729(a). This penalty range was adjusted for inflation under the Federal Civil Monetary Penalties Inflation Act of 1990, Pub. L. No. 101-410, Title III, § 31001, and the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, to between $5,500 and $11,000 for conduct occurring after September 29, 1999. 28 U.S.C.A. § 2461 note (2002); 28 C.F.R. § 85.3(9) (2000). The next inflationary increase that could have been implemented under the Inflation Adjustment Act was due, according to the analysis of a General Accounting Office report, on August 30, 2003, Gen. Acct. Off., GAO-030409, *Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, at 13 (Mar. 2003), but no additional penalty increase was announced by the Department of Justice by that date.

12 *See* 31 U.S.C. § 3730(d)(1). The FCA also provides, on a very limited basis, for the possibility for the recovery of fees and expenses by defendants who prevail. 31 U.S.C. § 3730(d)(4) (permitting prevailing defendants to recover fees and expenses if the Government does not intervene, and if the court finds that the relator's claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.").

13 31 U.S.C. § 3730(b)(1). The term *"qui tam"* is derived from a Latin phrase, *"qui tam pro domino rege quam pro se ipso,"* or "who pursues this action on our Lord the King's behalf as well as his own." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 n. 1 (2000).

14 *Id.* at § 3730(b)(2). In addition to serving the federal government with a copy of the complaint, a relator is required to file with the federal government *before* filing suit a "written disclosure of substantially all material evidence and information the [relator] possesses." *Id.*

15 *Id.* at § 3730(b)(4)(A).

16 *Id.* at § 3730(b)(4)(B).

17 *Id.* at § 3730(c)(2)(A). *See also United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F. 3d 1139 (9th Cir. 1998).

18 *Id.* at § 3730(c)(2)(B).

19 *Id.* at § 3730(d). The maximum share is increased from 25 percent to 30 percent if the Government declines to intervene and the relator succeeds in the litigation. *Id.*

20 *See, e.g.*, John T. Boese, "New False Claims Law Incentives Pose Risk For Contractors and States," *Government Contract* (September 11, 2006).

21 United States Department of Justice, Civil Division, "Fraud Statistics — Overview: October 1, 1986 - September 30, 2008" (November 5, 2008).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* Of the $14.3 billion in health care industry-related FCA recoveries, $4.2 billion was from non *qui tam* cases with the remainder – approximately $10.1 billion coming from qui tam cases. *Id.* The total relator shares of these recoveries amounted to over $1.6 billion. *Id.*

27 31 U.S.C. § 3729(a)(1)(1986).

28 *Id.* at § 3729(a)(2)(1986).

29 *Id.* at § 3729(a)(3)(1986).

30 *Id.* at § 3729(a)(7)(1986).

31 *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008).

32 31 U.S.C. 3729(b)(2). The definition excludes demands for money or property the government has provided to federal employees as compensation or as an income subsidy.

33 *Id.*

34 S. Rep. No. 111-10 (2009).

35 31 U.S.C. 3729(b)(2).

36 S. Rep. No. 111-10.

37 31 U.S.C. 3729(a)(2) (1986).

38 *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008).

39 *Id.*

40 *Id.* at 2128.

41 *Id.*

42 *Id.* at 2128-2130.

43 31 U.S.C. 3729(a)(1)(B).

44 *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2130 (2008).

45 31 U.S.C..3729(a)(1)(C).

46 *Id.* at 3729(a)(2).

47 *Id.* at 3729(a)(1)(C). (emphasis added).

48 *Id.* at 3727(b)(4).

49 *See e.g. United States ex rel. A+ Homecare Inc. v. Medshares Mgmt. Group Inc.*, 400 F.3d 428, 440-445 (6th Cir. 2005) (false statements or conduct must be material to the false or fraudulent claim to hold a person civilly liable under the FCA); *United States ex rel. Siewick v. Jamieson Sci. and Eng'g, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000) (requiring showing that payment would have been withheld had the government known of the defendant's statutory violation and that "payment [was] conditioned on that certification" of compliance with the statute); *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 19 (D.D.C. 2003) (requiring showing that "if the government had known of the violation when presented with the claim for payment, it would not have paid the claim"). *See also United States ex rel. Marcy v. Rowan Co.*, 520 F.3d 384 (5th Cir. 2008) (rejecting "capable of influencing" test in favor of more stringent materiality test).

50 *See, e.g., Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 563 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998).

51 31 U.S.C. 3729(a)(7).

52 *Id.* at 3729(a)(1)(G).

53 S. Rep. No. 111-10, at 15 (2009).

54 31 U.S.C. 3729(b)(3).

55 73 Fed. Reg. 67,064, 67,091 (Nov. 12, 2008), amending, 48 C.F.R. § 9-406-2(b)(1)(vi)(C).

56 42 U.S.C. §1320a-7b(a)(3).

57 *Rehabilitation Assoc. of Va. V. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994).

58 31 U.S.C. § 3729(b).

59 S. Rep. No. 111-10.

60 S. Rep. No. 111-10.

61 31 U.S.C. § 3730(h)(1).

62 *Id.*

63 *Id.*

64 *Id.*

65 *See e.g. United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 268 (2nd Cir. 2006).

66 31 U.S.C. 3731(c).

67 *Id.* at 3732(c).

68 *Id.* at 3733(a)(1).

69 *Id.*

70 P.L. 111-21.

71 *Id.* Moreover, the use of the term "claims" in this provision may also raise uncertainty as to whether the legislators intended retroactive application to actual cases filed as of June 7, 2008, or, as read literally, whether perhaps the drafters meant to apply this retroactive application to pending and viable FCA "claims." The difference pertains to how far along in the process a relator or the government must have been in June of 2008 in order to get this more favorable treatment under the Act.

72 42 U.S.C. § 1395nn(g)(2).

73 *Id.*

THE FEDERAL FALSE CLAIMS ACT
31 U.S.C. §§ 3729-3733

Reflecting amendments in S. 386, the Fraud Enforcement and Recovery Act of 2009, as signed by the President on May 20, 2009

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—~~Any~~

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

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

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

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

(~~4~~D) 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,~~ knowingly delivers, or causes to be delivered, less ~~property than the amount for which the person receives a certificate or receipt~~than all of that money or property;

(~~5~~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;

(~~6~~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

(~~7~~G) knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~conceal, avoid, or decrease~~ 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~~, except that if~~.

(2) REDUCED DAMAGES.—If the court finds that—

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

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

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

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of ~~the~~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) ~~KNOWING AND KNOWINGLY DEFINED~~DEFINITIONS.—For purposes of this section~~,~~—

(1) the ~~terms~~terms "knowing" and "knowingly~~"~~"—

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

(~~1~~i) has actual knowledge of the information;

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

(~~3~~iii) acts in reckless disregard of the truth or falsity of the information~~,~~; and

(B) require no proof of specific intent to defraud ~~is required.~~;

~~(c) CLAIM DEFINED. For purposes of this section,~~(2) the term "claim~~" includes~~"—

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

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

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

(I) provides or has provided any portion of the money or property ~~which is~~ requested or demanded~~,~~; or ~~if the Government~~

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

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

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

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

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

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

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

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

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

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

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

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

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

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

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

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act

of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

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

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

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

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

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

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

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

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

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

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

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

(d) AWARD TO QUI TAM PLAINTIFF.—

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

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

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 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.

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

(e) CERTAIN ACTIONS BARRED.—

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

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8)

of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

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

(4) (A) 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 [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

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

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) ~~Any employee who~~RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment ~~by his or her employer~~ because of lawful acts done by the employee, contractor, or agent on behalf of the employee ~~or~~, contractor, or agent or associated 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~~other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status ~~such~~that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable

attorneys' fees. An ~~employee may bring an~~ action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731. False claims procedure

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

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

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

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

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

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

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

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OF 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, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

§ 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section), 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, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

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

The Attorney General may ~~not~~ delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney

General or designee determine it is necessary as part of any false claims act investigation.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

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

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

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1).

Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

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

(7) CONDUCT OF ORAL TESTIMONY.—

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed

that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18 [18 USCS §§ 6001 et seq.].

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

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

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice~~, who is authorized for such use under regulations which the Attorney General shall issue~~. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. ~~Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.~~

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(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.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of

discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

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

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

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

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

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

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

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

* * *

S. 386 Section 4(f):

EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of the Act and shall apply to conduct on or after the date of enactment, except that—

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.