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REPORT

False Claims Act

Proposed FCA Amendments—a Recipe for Goverment Gridlock? (Part I)

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I. INTRODUCTION

A. Overview

With procurement spending at an all-time high of more than $500 billion in 2008, the financial institution bailouts, passage of the American Recovery and Reinvestment Act (Recovery Act), and impending legislation adding billions more for mortgage relief and other forms of stimulus, there is frenetic activity in Congress and the Obama administration to add oversight and enforcement mechanisms. With due respect for the reasonable interest in protecting taxpayer dollars, the headlong rush to be the latest to enact a new anti-fraud measure is likely to result in an uncoordinated morass of provisions that risks gridlocking the government's ability to manage the very programs such provisions are intended to protect, and further risks imposing significant (and unnecessary) costs on contractors and recipients of federal funds.

In addition to existing statutory and regulatory provisions aimed at preventing fraud—many of which have been enacted or promulgated very recently—new oversight remedies have become all the rage, including new measures in the Recovery Act and proposals to strengthen the civil False Claims Act, 31 U.S.C. §§ 3729-3733. Of particular concern are the proposed amendments to the FCA, which would add to the many recent measures and dramatically increase the burdens on entities receiving federal funds as well as agencies responsible for managing such entities. Several aspects of these proposed amendments raise legitimate concerns that could be pushed aside by the accelerating clamor to impose additional anti-fraud laws.

In this environment, which risks becoming overheated, some objectivity should be maintained. One of the authors of this article recently testified, on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform, before the House Committee on the Judiciary concerning proposed amendments to the FCA. *Written Statement of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform on H.R. 1788 The False Claims Act Correction Act of 2009 Before the H. Comm. on the Judiciary*, 111th Cong. ___ (2009) (statement of Marcia Madsen). That testimony focused on problems with specific provisions of the proposed amendments. This article provides an additional perspective by discussing various factors that should be considered before strengthening the FCA, including the stunning power and success of the FCA following the 1986 amendments to that Act; the government's vast anti-fraud remedies, resources, and protections—including recent mandatory disclosure rules; the substantial burdens imposed by the FCA on a wide array of entities; the FCA's role in discouraging commercial companies from selling to the government; and the risk that the amendments will result in investigatory congestion and negatively impact the government's ability to manage its programs.

In part because of the sheer extent of the government's existing anti-fraud weaponry, this article is presented in two parts. Part I summarizes the proposed FCA amendments and discusses part of the govern-

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ment's anti-fraud arsenal; Part II will complete the discussion of that arsenal and discuss additional factors that should be taken into account in a reasoned assessment of the FCA.

B. The Problem

Notwithstanding the flurry of activity to add new anti-fraud laws to the books,[1] there is no visible effort by Congress or the Executive Branch to examine the new measures in the context of existing ''fraud, waste, and abuse'' remedies as a whole to: determine whether more new measures really are necessary; assess the burden on the government and its contractors and grantees of trying to comply with various overlapping and confusing mandates; consider the impact on already overcrowded courts; analyze the loss of competition and proven products from commercial firms that avoid the high-risk federal market; or determine whether adding to the multitude and complexity of existing laws actually would help the government deliver its programs more effectively. Before giving *qui tam* relators and the Justice Department more power under the FCA, several factors should be examined, including whether existing ''fraud, waste, and abuse'' remedies are the product of a stovepiped legislative/regulatory process that has failed to consider their impact or whether they add any incremental value.

C. Summary of Pending FCA Legislation

During the 110th Congress, both the Senate and House Judiciary Committees reported amendments to the FCA (S. 2041 and H.R. 4854), but Congress did not pass the legislation. On February 24, 2009, Sen. Charles Grassley (R-Iowa) introduced S. 458, the False Claims Act Clarification Act of 2009, which is similar to the 2008 legislation. In addition, legislation that is similar to H.R. 4854 as reported from the House Judiciary Committee in 2008 has just been introduced – H.R. 1788, The False Claims Act Correction Act of 2009. This pending legislation includes, among others, the following provisions:

- The Senate bill re-defines ''claim'' to cover false claims submitted to a ''contractor,'' ''grantee,'' or ''other recipient'' if the government provides or has provided any portion of the amount claimed or will reimburse the contractor, grantee, or other recipient, and regardless of whether the government has title to the money or property (*e.g.*, the government was a custodian), except that requests or demands for money that the government has paid to federal employees as compensation or income subsidies are excluded.[2]
- The House bill increases liability by changing 31 U.S.C. § 3729 to add a new definition of ''government money or property'' to include (1) ''money or property belonging to the United States Government'' that is provided to a ''contractor, grantee, agent, or other recipient,'' or which will be used to ''reimburse a contractor, grantee, agent or other recipient;'' and (2) ''is to be spent or used on the government's behalf or to advance a government program.'' The proposed amendments also extend liability for false claims involving ''money or property that the United States holds in trust or administers for any administrative beneficiary.''
- The Senate bill expands liability for reverse false claims to cover situations where a person knowingly conceals, avoids, or decreases an obligation to pay or transmit money or property to the government. The term ''obligation'' is defined to include contingent duties arising from, *e.g.*, implied or quasi-contractual or grantor-grantee relationships, and the retention of any overpayment.
- The Senate bill expressly permits government employees (or family members) to be relators using information obtained in their federal employment if: (1) the relator disclosed the allegations to the Inspector General (''IG'') and advised his/her supervisor and the Attorney General of such disclosure; and (2) the government does not file suit on those allegations within 18 months, except that DOJ ''may'' move to dismiss claims brought by government employees whose duties include uncovering and reporting the type of fraud alleged and the employee, as part of his/her duties, is participating in or knows of an investigation or audit of the alleged fraud, or if the material allegations were derived from a filed indictment, information, or open investigation or audit.
- Both the Senate and House bills repeal the public disclosure bar as a jurisdictional defense that may be raised by defendants; only DOJ could file a motion to dismiss based upon public disclosure. In addition, the House bill requires even DOJ to meet a higher standard of public disclosure by changing what constitutes ''public disclosure'' to require that ''all essential elements of liability'' of the claim ''are based exclusively on the public disclosure.'' Further, a public disclosure includes ''only disclosures that are made on the public record or have otherwise been disseminated broadly to the general public.'' A claim is ''based on'' a public disclosure ''only if the person bringing the action derived . . . knowledge of all essential elements of liability . . . from the public disclosure.''
- Both bills extend the statute of limitations for all claims (Senate bill – 10 years, House bill – 8 years), and allow the government to intervene at any time adding new claims or information. The complaint would ''relate back'' to the date of the relator's original filing to the extent that the government's claim arises out of the conduct, transactions, or occurrences in the original filing. In both bills, the new statute of limitations applies to actions filed after the date of enactment. In the Senate bill, the amendments to the definition of ''claim,'' and the expansion of liability for reverse false claims (including the definition of ''obligation''), apply to conduct occurring after the date of enactment. All other provisions in the Senate bill apply to civil actions filed before, on, or after the date of enactment (including the changes to the public disclosure bar). In the House bill, amendments relating

[1] In addition to other examples cited herein, Rep. Neil Abercrombie (D-Hawaii) introduced a bill (H.R. 1667) on March 23, 2009, entitled the ''War Profiteering Prevention Act of 2009.'' Among other items, that bill provides criminal penalties for certain conduct involving a contract with, or the provision of goods or services to, the U.S. or a provisional authority in connection with a U.S. mission overseas.

[2] In addition to the House and Senate bills seeking to amend the FCA, there is language in proposed mortgage fraud legislation, S. 386, that would amend the FCA with respect to the definition of ''claim.''

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to the failure to comply with a statutory or contractual obligation to disclose an overpayment (§ 3729(a)(1)(C)(i)) and the retaliation provision (§ 3730(h)), to the extent that section applies to discrimination against a person because of lawful acts done by others associated with that person, apply on or after the date of enactment. All other provisions in the House bill apply to any case pending on, or filed on or after, the date of enactment.

- Both bills allow DOJ to share information obtained from a Civil Investigative Demand (CID) with a relator even before a *qui tam* complaint is unsealed.
- Both bills amend the retaliation provision to apply anytime an employee or agent is discriminated against because of attempts to stop an FCA violation, without regard to whether such employee or agent files a *qui tam* action.

D. Assumptions Underlying The Proposed FCA Legislation

The proposed FCA amendments appear to be based in part on an assumption that massive amounts of actual fraud involving federal programs are somehow slipping (or will slip) through the existing gauntlet of government administrative officials, auditors, inspectors, inspectors general, and lawyers (discussed below), as well as the burgeoning *qui tam* relator industry. In introducing amendments to the FCA in December 2007, Rep. Howard Berman (D-Calif.) stated that ''[i]f construed according to Congress' original intent, [the FCA] could be bringing in many billions of additional dollars in recoveries from those who have cheated at the expense of the taxpayer.'' 153 Cong. Rec. E2658 (daily ed. Dec. 19, 2007) (statement of Rep. Berman).[3] The assumption behind this statement may be that mere *allegations* of fraud that have not been tested by facts and legal arguments presented by defendants, nor proven under the Federal Rules of Civil Procedure and Federal Rules of Evidence, constitute a material part of the claimed fraud that has gone unaddressed: ''[T]he courts have dismissed cases brought by insiders *who know key details of fraudulent schemes* because they can't plead specific details of the billing documentation . . . .'' *Id.* (emphasis added). Insiders whose cases have been dismissed only *claim* to ''know key details'' of ''schemes'' that are only *allegedly* fraudulent.

Sponsors of the proposed amendments also claim that changes are needed to clarify the ''original intent'' of the 1986 amendments to the Act in response to court decisions. Sen. Leahy stated last year that ''opponents of the False Claims Act, those who defend the major defense contractors and big drug companies, have worked hard to undermine the original intent of these amendments, and a series of recent court decisions have placed new, technical impediments on false claims cases.'' *The False Claims Act Corrections Act of 2007 (S. 2041) – Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2 (2008) (statement of Sen. Leahy, Chairman, Senate Comm. on the Judiciary).[4] *See also False Claims Act Corrections Act (2007)*: *Joint Hearing on H.R. 4854 Before the Subcomm. on Courts, the Internet, & Intellectual Prop., and Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 1-2 (2008) (statement of Rep. Berman, Member, House Comm. on the Judiciary) (''Unfortunately, over the last several years, a series of judicial decisions have severely weakened key provisions of the [FCA] and narrowed its application.''). These statements suggest that the FCA currently is ill-equipped to address a huge amount of actual fraud that must be occurring somewhere, somehow.

Such assumptions concerning the FCA deserve to be investigated carefully by collecting and assessing *all* relevant facts. It would be prudent to consider the government's large number of remedies and resources that already exist – as well as the costs to agencies, courts, contractors, and taxpayers of adding to those remedies – in assessing whether and what further action may be warranted. In addition, a thoughtful review would consider the complexities and risks of conducting business with the sovereign, as well as the rights of defendants. *See Coral Petroleum, Inc.*, ASBCA No. 27888, 1985 WL 17228, at *23 n.16 (Oct. 31, 1985) (''When the government enters the marketplace 'it should be animated by a justice as anxious to consider the rights of [its contractors] as to insist upon its own.' '' (alteration in original) (quoting *United States v. Purcell Envelope Co.*, 249 U.S. 313, 318 (1919)).

II. THE FCA IS POWERFUL, BURDENSOME, AND INTRUSIVE—ANY CHANGES SHOULD BE CAREFULLY CONSIDERED

Following the significant expansion wrought by the 1986 amendments, the FCA is one of the most extraordinary, far-reaching, and forceful of the many enforcement tools available to the government in dealing with contractors and other recipients of federal funds. One of the most remarkable aspects of the FCA is that it authorizes private citizens to raise allegations of wrongdoing on behalf of the government, as *qui tam* relators, and to share in any recovery – between 15 and 30 percent. This type of authority is rare – only three other *qui tam* statutes exist.[5]

[3] In addition, Sen. Patrick Leahy (D-Vt.) stated in February of 2008 that ''[s]ince 2002, our government has spent nearly $500 billion on the wars in Iraq and Afghanistan, much of it on government contracting, and billions of taxpayers' dollars have been lost to fraud, waste, and abuse.'' *The False Claims Act Corrections Act of 2007 (S. 2041) – Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 2-3 (2008) (statement of Sen. Leahy, Chairman, Senate Comm. on the Judiciary).

[4] This statement seems to suggest that courts have placed ″technical impediments″ on the FCA (at least in part) as a result of ″opponents″ of the Act—″those who defend the major defense contractors and big drug companies.'' Presumably, lawyers who defend *anyone* unfortunate enough to be the target of FCA allegations do so ethically, which includes zealous representation – the same ethical duty owed by counsel for *qui tam* relators to their clients. Also, courts presumably craft decisions in FCA cases after carefully assessing the evidence and the law – including the language Congress selected in amending the FCA in 1986 – which results in fair, unbiased, and just determinations as opposed to the implementation of ''technical impediments'' designed to thwart the statute.

[5] The other three statutes are: 15 U.S.C. § 81, providing a cause of action against a person contracting with Indians in an unlawful manner; 25 U.S.C. § 201, providing a cause of action against a person violating Indian protection laws; and 35 U.S.C. § 292(b), providing a cause of action against a person falsely marking patented articles. *Vermont Agency of Natural*

Because the FCA is a civil statute, the government is not shackled by the requirements inherent in criminal prosecutions of procurement fraud, such as proving guilt ''beyond a reasonable doubt.'' The FCA incorporates the far more lenient ''preponderance of the evidence'' standard. *See* 31 U.S.C. § 3731(c). Further, while the FCA is most often characterized as a ''fraud'' statute, the government and relators do not have to demonstrate a specific intent to defraud in order to establish liability, and instead need only show ''deliberate ignorance'' or ''reckless disregard'' of the truth or falsity of information. 31 U.S.C. § 3729(b).

Moreover, the FCA packs a powerful wallop—treble damages plus penalties of between $5,500 and $11,000 for each false claim—that extends beyond purely remedial damages. As amended in 1986, the Act ''imposes damages that are essentially *punitive* in nature.'' *Vermont Agency*, 529 U.S. at 784 (emphasis added); *see also id*. at 786 (''The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.'') (citation omitted). Additionally, persons violating the Act are liable to the government for the costs of the FCA action (31 U.S.C. § 3729(a)), and relators can recover from defendants reasonable and necessary expenses, as well as reasonable attorneys' fees and costs (31 U.S.C. § 3730(d)(1) and (2)). Thus, the FCA combines a low standard of intent and a low burden of proof with punitive damages, fines, and costs.

Unquestionably, the 1986 amendments have proven to be spectacularly successful, as even members of Congress who support the proposed legislation recognize. Sen. Leahy noted that ''[i]n recent years, the [FCA] has become the government's most effective tool against fraud. Since 1986, it has been used to recover more than $20 billion lost to fraud, about half of that coming in just the past five years.'' *The False Claims Act Corrections Act of 2007 (S. 2041) - Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Sen. Leahy, Chairman, Senate Comm. on the Judiciary). Rep. Berman stated that ''[f]or the most part, the law has been a resounding success.'' 153 Cong. Rec. E2658 (daily ed. Dec. 19, 2007); *see also False Claims Act Corrections Act of 2007: Joint Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Property and Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary,* 110th Cong. 5 (2008) (statement of James Helmer, Helmer, Martins, Rice & Popham Co., L.P.A.) (''By any measure, the 1986 Amendments have proven wildly successful in recovering taxpayer money fraudulently taken from the Treasury . . . .''). Not only have the 1986 amendments proven successful in monetary recoveries, they have promoted litigation—producing an entire industry that churns out creative ways to initiate FCA actions.

When it chooses to do so, the government can deploy significant resources and techniques to investigate and enforce the FCA. As a memorandum on DOJ's website notes, ''[u]nder the [FCA], the Attorney General (or a Department of Justice attorney) must 'diligently' investigate the allegations of violations of the [FCA]. The investigation usually involves one or more law enforcement agencies (such as the Office of Inspector General of the victim agency, the Postal Inspection Service, or the FBI.).'' U.S. Dep't of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited April 3, 2009). State attorneys general may participate in the investigation and work closely with the federal government. In addition,

> [t]he investigation will often involve specific investigative techniques, including subpoenas for documents or electronic records, witness interviews, compelled oral testimony from one or more individuals or organizations, and consultations with experts. If there is a parallel criminal investigation, search warrants and other criminal investigation tools may be used to obtain evidence as well.

Id.

As Deputy Assistant Attorney General Michael Hertz indicated in his Senate FCA testimony last year, DOJ ''continues to actively support the qui tam provisions of the Act by dedicating the resources necessary to investigate allegations to the fullest extent, by litigating the meritorious cases vigorously, and by ensuring that settlements reflect both the gravity of the violations and the loss to the Treasury.'' *The False Claims Act Correction Act (S. 2041) – Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 186, 189 (2008) (statement of Michael Hertz, U.S. Deputy Assistant Attorney Gen.). Moreover, Mr. Hertz testified that in addition to efforts of *qui tam* relators, ''we believe that the success of the Act's qui tam provisions are in large part due to the efforts of the government attorneys, agents, auditors and other personnel charged with responsibilities under the statute,'' and that DOJ has ''approximately 75 full-time attorneys in the Civil Division responsible for [FCA] cases, as well as scores of Assistant United States Attorneys throughout the country. This is a highly professional, skilled and dedicated group of lawyers who are fully committed to the task at hand . . . .'' *Id.*

III. THE GOVERNMENT HAS SUBSTANTIAL ANTI-FRAUD REMEDIES, RESOURCES, AND PROTECTIONS

There is a huge number of statutes and regulations aimed at detecting, deterring, and punishing fraud in federal contracts or other federally funded programs. Although many of these provisions have been around for years, several measures have been created very recently, and more are under consideration. There is no visible evidence that any congressional committee or administration entity has examined this oversight/investigative landscape to see what authorities exist, how they are working, whether there is unnecessary duplication, or whether the government is wasting resources and burdening its own programs with multiple layers of auditors and investigators—all repeatedly checking and re-checking the same things, and second-

Res. v. United States, 529 U.S. 765, 768 n.1 (2000). As the Sixth Circuit noted last year, ''it is no exaggeration to say that the FCA – or its predecessor – is virtually the *only qui tam* statute whose invocation is actually the subject of any Supreme Court case law handed down in this century or the last.'' *Stalley v. Methodist Healthcare*, 517 F.3d 911, 917 (6th Cir. 2008) (emphasis in original).

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guessing contracting officers and other government officials who are already charged with administering these programs.

A. New Laws Creating Layers of Oversight and Investigative Bureaucracy

Just since 2007, several measures have been enacted that have created new layers of oversight bureaucracy and remedies that will increase investigative congestion and further burden contractors, grantees, agencies, and courts. Many of these measures are contained in the annual defense authorization bills that cover all of DOD, and frequently provide government wide authority. For example:

- Section 813 of the FY 2007, National Defense Authorization Act (NDAA) established a Panel on Contracting Integrity to review the potential vulnerability of the contracting system to fraud, waste, and abuse, issue reports, and recommend changes in law and regulation to address those areas. *John Warner National Defense Authorization Act for Fiscal Year 2007*, Pub. L. 109-364, 120 Stat. 2083 (2006).
- Section 841 of the FY 2008 NDAA created the Commission on Wartime Contracting to investigate, among other things, the extent of waste, fraud, and abuse under federal contracts awarded for the reconstruction of Iraq and Afghanistan, the logistical support of coalition forces, and the performance of security functions in those countries. The commission is currently holding hearings, is required to report to Congress regarding their fraud, waste, and abuse findings, and will recommend changes in the contracting process and procurement laws. *National Defense Authorization Act for Fiscal Year 2008*, Pub. L. 110-181, 122 Stat. 3 (2008).
- Section 846 of the FY 2008 NDAA substantially increased the whistleblower protections under 10 U.S.C. § 2409 by: (1) expanding the protected categories of disclosures; (2) adding potential violations to include gross mismanagement of a DOD contract or grant, gross waste of DOD funds, substantial danger to public health or safety, or a violation of law related to a DOD contract or grant; and (3) establishing a right, upon exhaustion (or deemed exhaustion) of administrative remedies, for the whistleblower to bring an action for *de novo* review in federal court seeking equitable relief and/or damages against the contractor or grantee. *Id.*
- Section 848 of the 2008 NDAA requires the Comptroller General to examine and report on the internal ethics programs of the major defense contractors. *Id.*
- Section 871 of the FY 2009 NDAA contains government wide authority for the Government Accountability Office not only to examine records of contractors and subcontractors, but also to ''interview any current employee regarding such transactions.'' *Duncan Hunter National Defense Authorization Act for Fiscal Year 2009*, Pub. L. 110-417, 122 Stat. 4356 (2008).
- Section 872 of the FY 2009 NDAA requires the creation of a new contractor misconduct database that requires individuals and entities (anyone receiving a contract or grant in excess of $500,000) to provide information about not only criminal convictions and civil fraud judgments, but also liabilities assessed in administrative proceedings to include administrative fines and penalties as well as any decision requiring the payment of damages, reimbursement, or restitution (this implicates outcomes of ordinary civil contract disputes). In addition, covered persons are required to disclose: settlements of any of the referenced proceedings, including administrative proceedings, if there is any acknowledgement of fault; any contracts terminated for cause; each suspension or debarment or agreement resolving a suspension or debarment; and any findings that a contractor may not be a responsible source. Although use of the database currently is limited to government purposes, the legislation as originally introduced called for it to be public and some members of Congress have indicated that they will change the law to make the database public. *Id.*

B. New Regulations—The Mandatory Disclosure Rule

In a highly significant regulatory development in late 2008, the DOJ prevailed upon the Office of Federal Procurement Policy and the Council that administers the Federal Acquisition Regulation to promulgate a new rule requiring federal contractors to disclose potential violations of certain federal criminal laws related to procurement, violations of the FCA, and the existence of ''significant'' overpayments. 73 Fed. Reg. 67,064 (Nov. 12, 2008). OMB made similar mandatory disclosure requirements applicable to grants and cooperative agreements funded under the Recovery Act by issuing guidance in February 2009.[6] The Treasury Department also got on the mandatory disclosure bandwagon by adding a provision that is similar to the FAR rule when it promulgated its recent TARP Conflicts of Interest Rule. 74 Fed. Reg. 3431, 3435 (Jan. 21, 2009). This rule applies to Treasury's financial agency agreements that are not subject to the FAR. In addition, Medicare Administrative contracts (which replace the former Fiscal Intermediary and carrier contracts) are now subject to the FAR—and thus are subject to the mandatory disclosure rule. 42 U.S.C. § 1395kk-1. The flurry of mandatory disclosure requirements raises serious questions about whether strengthening the FCA would simply impose additional burdens and costs on the government and its contractors and grantees. For example, does it make sense to encourage relators to bring actions if contractors and grantees already have disclosed potential FCA violations? Should relators be allowed to share

[6] OMB's guidance states:

> Include the requirement that each grantee or subgrantee awarded funds made available under the Recovery Act shall promptly refer to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, *or other person* has submitted a false claim under the False Claims Act or has committed *a criminal or civil violation of laws pertaining to* fraud, conflict of interest, bribery, gratuity, *or similar misconduct involving those funds*.

Memorandum For The Heads of Departments and Agencies: Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009 at 37 (Feb. 18, 2009) (emphasis added).

in the government's recovery if the government already had the information?

The FAR mandatory disclosure rule has two parts. First, companies with contracts valued at over $5 million and a performance period of 120 days or more are required to have a written ''Contractor Code of Business Ethics and Conduct.'' Also, such companies (other than small businesses) are required to have an ongoing business ethics and business awareness conduct program, and an internal control system. FAR 52.203-13. Although many of the major defense contractors have had such programs for 20 years or more, many mid-size companies and small businesses previously did not have elaborate ethics and compliance programs.

Second, under the new rule, a contractor can be debarred or suspended for a knowing failure by a ''principal'' to timely disclose to the government, in connection with the award, performance, or closeout of the contract *or a subcontract* under the contract, credible evidence of (1) violations of certain federal criminal laws, (2) violations of the FCA, or (3) significant overpayment(s) on the contract (other than certain financing payments). 73 Fed. Reg. at 67,091 (reflecting changes to FAR 9.406-2 and 9.407-2).[7] Also, the disclosure obligations exist until *three years* after final payment on *any* government contract awarded to the contractor.

The rule creates a new mandatory contract clause (FAR 52.203-13) that requires, among other things, timely written disclosure to the agency IG (with a copy to the Contracting Officer) whenever, in connection with the award, performance, or closeout of the contract or any subcontract thereunder, the Contractor has ''credible evidence'' that a principal, employee, *agent*, or *subcontractor* has committed a violation of certain federal criminal laws or the FCA. *Id*. The new rule also requires that the internal control system specified in FAR 52.203-13 must provide for such timely disclosure.[8] Moreover, the internal control system must provide for ''[f]ull cooperation with any government agencies responsible for audits, investigations, or corrective actions,'' and ''full cooperation'' includes providing access to employees with information. 73 Fed. Reg. at 67,091-92.

The FAR Council recognized that ''mandatory disclosure is a '*sea change*' and '*major departure*' from voluntary disclosure.'' *Id*. at 67,069 (emphasis added). Contractors now face the threat of being cut off completely from the federal marketplace for failures to ''timely'' disclose ''credible evidence'' that ''significant overpayments'' occurred or that certain criminal laws or the FCA were violated. In addition, the FAR Council recognized that mandatory disclosure of an FCA violation presents the risk that a *qui tam* action will follow. *Id*. at 67,082. And the mandatory disclosure requirements in the new suspension and debarment provision and the code of business ethics and conduct portion of FAR 52.203-13 apply to *contracts for commercial items*.

C. The Recovery Act—Creation Of Another Set Of Oversight And Investigative Requirements

Without any apparent recognition of the abundant existing anti-fraud resources, the Recovery Act added even more oversight and investigative layers. The Act created a new Recovery Accountability and Transparency Board ''to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse.'' American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1521 (2009) (the ''Recovery Act''). The board consists of numerous IGs, who already have responsibilities to detect and prevent fraud, waste, and abuse. IGnet Federal Inspectors General, http://www.ignet.gov (last visited Apr. 3, 2009) (federal IG Community's ''primary responsibilities, to the American public, are to *detect and prevent fraud, waste, abuse, and violations of law . . . .*'') (emphasis in original). The Act provides powers that echo existing IG authorities by specifying that in ''conducting audits and reviews, the board shall have the authorities provided under section 6 of the Inspector General Act of 1978 (5 U.S.C. App.).'' Recovery Act § 1524(c). The Act specifically empowers the board to issue subpoenas ''in the same manner as provided for'' subpoenas under the Inspector General Act. *Id*. The Act further empowers the board to hold public hearings, and provides additional subpoena power to compel testimony from non-federal individuals at such hearings. *Id*. § 1524(d).[9] Moreover, in multiple provisions, the Act appropriates millions of dollars to various IGs, while separately appropriating $84 million for the newly-created board that consists of IGs (*id*. Title V).[10]

Adding yet another level of oversight, the Act created a ''Recovery Independent Advisory Panel'' to ''make recommendations to the board on actions the board could take to prevent fraud, waste, and abuse relating to covered funds.'' Recovery Act §§ 1541 *et seq*. Similar to the board's powers, the Panel can hold hearings, take testimony, and receive evidence. *Id*. § 1543. In addition, both the Panel and the board may obtain information from federal agencies. *See id*. §§ 1525(b)(1), 1543(b).

The Recovery Act grants authority to IGs and the Comptroller General that will impose further burdens on entities receiving federal funds. In addition to specifying that IG representatives may examine records of contractors, grantees, subcontractors, and subgrantees pertaining to contracts and grants using covered funds, the Recovery Act authorizes such representatives to *interview* any officer or employee of contractors, grant-

[7] The new rule defines the term ''principal'' as ''an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).'' 73 Fed. Reg. at 67,090 (reflecting change to FAR 2.101).

[8] While the clause at FAR 52.203-13 must be included in contracts if the value is expected to exceed $5 million and the performance period is 120 days or more, the internal control system requirement of that clause does not apply to small businesses or contracts for commercial items. *See* 73 Fed. Reg. 67,091-92 (reflecting new subparagraph (c) of FAR 52.203-13).

[9] The Recovery Act specifies that such subpoenas ''may be enforced in the same manner as provided for inspector general subpoenas under section 6 of the Inspector General Act . . . .'' *Id*.

[10] The Recovery Act states that nothing ''in this subtitle shall affect the independent authority of an inspector general to determine whether to conduct an audit or investigation of covered funds.'' *Id*. § 1527. Interestingly, the Act also states that if the board requests that an IG conduct or refrain from conducting an audit or investigation, and the IG rejects the request in whole or in part, the IG must submit a report stating the reasons for the rejection to the board, the head of the applicable agency, and ''the congressional committees of jurisdiction'' – including the Senate and House Appropriations Committees – within 30 days after the rejection, while adding that the IG's decision shall be final. *Id*.

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ees, and subgrantees. Recovery Act § 1515(a). Similarly, the Act states that the Comptroller General and his representatives can examine contractor and subcontractor records directly pertaining to funded contracts and subcontracts, and also may *interview* any officer or employee of such contractors and subcontractors. *Id*. § 902(a). Of course, IGs can investigate the conduct of federal employees regarding their role in any alleged fraud, waste, or abuse of federal funds.

While the FCA and other laws already offer significant incentives and protections for whistleblowers, § 1553 of the Recovery Act contains lengthy provisions establishing protections for state and local government and contractor whistleblowers.[11] These provisions are similar to the recent whistleblower protection amendments to 10 U.S.C. § 2409 added by the FY 2008 NDAA (discussed above) with respect to gross mismanagement of DOD funds, or violation of a DOD contract or grant. The DOD provision also permits a whistleblower to bring an action for *de novo* review in federal court for both equitable relief and damages. It is unclear why, in addition to the FCA, these additional and largely identical whistleblower statutes are necessary. These overlapping authorities pose a real risk of burdening government entities, as well as contractors and grantees, with investigators and relators all colliding with each other as they pursue their own interests.

[11] The Recovery Act provides that an employee of any nonfederal employer receiving covered funds may not be discriminated against as reprisal for disclosing to specified entities information the employee reasonably believes is evidence of, among other things, ''a gross waste of covered funds'' or ''a violation of law rule, or regulations related to an agency contract . . . or grant, awarded or issued relating to covered funds.'' *Id*. § 1553(a). A person who believes that he or she has been subjected to such a reprisal can submit a complaint to the appropriate IG who, subject to certain exceptions, must investigate and submit a report. *Id.* § 1553(b). Within 30 days of receiving such a report, the head of the agency concerned must determine whether there is sufficient basis for the complaint and issue an order denying relief or ordering the employer to take certain actions, including reinstatement and payment of compensatory damages. *See id*. § 1553(c)(2). In addition to creating new duties for IGs and agencies, the Act provides for the involvement of federal courts in various circumstances: complainants can bring an action against employers seeking a jury trial after exhausting administrative remedies; agencies must file actions to enforce orders issued concerning reprisal complaints (*e.g.*, an order for reinstatement); and any person adversely affected by such an order may obtain court review. *Id*. § 1553(c)(3)-(5). The Act's extensive whistleblower protection system thus imposes further responsibilities (and burdens) on IGs, agencies, and courts, not to mention the risks to employers involved in attempting to carry out the Act's stimulus goals.

D. Other Existing Fraud Statutes

Congress has enacted many other statutes that address fraud concerns in federal procurements and grants, including the Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58; the Major Fraud Act of 1988, 18 U.S.C. § 1031; section 604 of the Contract Disputes Act dealing with ''Fraudulent claims,'' 41 U.S.C. § 604; 28 U.S.C. § 2514, dealing with ''Forfeiture of fraudulent claims;'' the Procurement Integrity Act, 41 U.S.C. § 423; and the criminal False Claims Act, 18 U.S.C. § 287. Also, the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-3812 (PFCRA), was enacted just prior to the 1986 FCA amendments and ''was designed to operate in tandem with the FCA.'' *Vermont Agency*, 529 U.S. at 786 n.17. The PFCRA provides administrative remedies for the submission of false claims to federal agencies for smaller claims (the Act contains a $150,000 threshold on allegations of liability). These administrative remedies include a civil penalty of up to $5,000 for each false claim, as well as twice the amount of the claim if the government paid the claim. 31 U.S.C. § 3802(a)(1).

Further, FCA recoveries in connection with federal health care programs have skyrocketed. An additional tool available to the Department of Health and Human Services (HHS) under federal health care programs is the ability to impose Civil Monetary Penalties (CMP's) against any person who knowingly presents or causes to be presented to the government various types of claims, including a claim for a medical or other item or service that the person knows or should know is false or fraudulent. 42 U.S.C. § 1320a-7a(a). CMP's for such false or fraudulent claims may be up to $10,000 for each item or service, and the person is subject to up to 3 times the amount claimed for each such item or service. *Id*. Moreover, the term ''should know'' includes acting in deliberate ignorance or reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required. 42 U.S.C. § 1320a-7a(i)(7).

E. Suspension And Debarment—Perhaps The Ultimate Government Leverage

The government can suspend and debar companies and individuals from receiving procurement contracts,

grants, and cooperative agreements under a variety of circumstances. The government can impose suspension based on adequate evidence of the commission of fraud in connection with performing a public contract or subcontract (FAR 9.407-2), and can impose debarment based on a civil judgment for commission of fraud in connection with performing a public contract or subcontract (FAR 9.406-2). Additionally, HHS can exclude from participation in any federal health care program persons who have submitted false or fraudulent claims where the person is liable for CMP's. 42 U.S.C. § 1320a-7a(a).

Suspension, debarment, and exclusion are ''big sticks'' that agencies can wield to police fraudulent conduct.[12] Any debarment, suspension, or other government wide exclusion is effective across the Executive Branch. Executive Order 12,689; FAR 9.401. Suspension is a ''serious action'' (FAR 9.407-1(b)(1)), and debarment, for companies that depend primarily on government work, can strike a lethal blow. Indeed, the mandatory disclosure rule is built on the power of potential suspension or debarment.

F. The Government's Use Of Common Law And Contractual Remedies

Moreover, the government can and does pursue allegations of fraud using different common law and contractual remedies, such as conversion, money paid under mistake of fact, unjust enrichment, breach of contract, breach of warranty, rescission, reformation, and revocation of acceptance. *See* DOD Directive 7050.05, Enclosure 3 (June 4, 2008). As Deputy Attorney General Paul McNulty told the Senate Armed Services Committee in discussing the government's settlement with the Boeing Company, ''the [FCA] isn't our only remedy. *We have many others*. The remedies we considered and asserted against Boeing included the [FCA], the Procurement Integrity Act, common law claims for unjust enrichment, fraudulent procurement of contracts, and inducing a breach of fiduciary duty, as well as other statutory and common law remedies.'' *Boeing Co. Global Settlement Agreement, Hearing Before the S. Comm. on Armed Servs*., 109th Cong. 3 (2006) (statement of Paul McNulty, U.S. Deputy Att'y Gen.) (emphasis added). Mr. McNulty further stated that ''[s]ome of these remedies are mutually exclusive, which means we can collect on one but not both. *Others are cumulative*.'' *Id*. (emphasis added).[13]

This concludes Part I of this article. Part II will appear in next week's edition of Federal Contracts Report, and will continue to discuss the government's anti-fraud arsenal, as well as other factors that should be considered before strengthening the FCA.

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[12] As EPA indicates on its website, ''EPA's management authority includes an *effective administrative tool to address waste, fraud, abuse*, poor performance, environmental noncompliance or other misconduct. . .the authority to suspend and or debar individuals and entities.'' U.S. EPA, Suspension & Debarment Program, http://www.epa.gov/ogd/sdd/debarment.htm (last visited Apr. 3, 2009) (ellipsis in original, emphasis added).

[13] Similarly, a memorandum on DOJ's website concerning government intervention in *qui tam* cases indicates that, in addition to DOJ's usual practice of submitting its own complaint setting forth facts and relief sought, DOJ ''has the ability to, and often will, assert claims arising under other statutes (such as the Truth in Negotiation Act or the Public Contracts Anti-Kickback Act) or the common law, which the relators do not have the legal right to assert in their complaint . . . .'' *False Claims Act Cases: Government Intervention In Qui Tam (Whistleblower) Suits*, http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf.

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REPORT

False Claims Act

PROPOSED FCA AMENDMENTS – A RECIPE FOR GOVERNMENT GRIDLOCK? (PART II)

Marcia G. Madsen and Cameron S. Hamrick

This is the second part of a two-part article discussing various factors that should be considered before strengthening the civil False Claims Act. As mentioned in the introduction to Part I, which ran in Federal Contracts Report last week (91 FCR 308, 4/14/09), several aspects of the proposed FCA amendments raise legitimate concerns that should be considered objectively.[1]

Part I summarized the proposed FCA amendments and discussed part of the government's antifraud arsenal. Part II will complete the discussion of that arsenal and discuss additional factors that should be considered.

G. The Inspectors General and Investigations

In addition to possessing abundant anti-fraud weaponry in the form of numerous laws (some of which were discussed in Part I), the government has at its disposal a staggering number of personnel with responsibilities for preventing and/or investigating fraud, waste, and abuse in federal programs. Inspector General offices have been charged pursuant to the Inspector General Act for three decades with investigating fraud and abuse in federal contracts and federally-funded programs. There are numerous IGs in various federal ''establishments,'' including cabinet departments and independent agencies, as well as quasi-governmental entities such as the Tennessee Valley Authority and Amtrak. These IGs are armed with substantial audit and investigative powers, including the authority to issue subpoenas for contractor records (and, with respect to

[1] As noted in Part I, one of the authors of this article recently testified, on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform, before the House Committee on the Judiciary concerning proposed amendments to the FCA. *Written Statement of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform on H.R. 1788 The False Claims Act Correction Act of 2009 Before the H. Comm. on the Judiciary*, 111th Cong. ___ (2009) (statement of Marcia Madsen). That testimony focused on problems with specific provisions of the proposed amendments. This article provides an additional perspective by discussing various factors that should be considered before strengthening the FCA, including the stunning power and success of the FCA following the 1986 amendments to the act; the government's vast anti-fraud remedies, resources, and protections – including recent mandatory disclosure rules; the substantial burdens imposed by the FCA on a wide array of entities; the FCA's role in deterring commercial companies from selling to the government; and the risk that the amendments will result in investigatory congestion and negatively impact the government's ability to manage its programs.

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contracts and grants awarded using Recovery Act funds, the authority to interview contractor/grantee employees regarding such transactions). The IGs obtain information from agency hotlines established to facilitate the anonymous reporting of procurement misconduct.[2]

H. Anti-Fraud Organizations at HHS and DOD

DOJ statistics indicate that the two areas that dominate FCA cases are health care and defense. *See* Civil Division, U.S. Dep't of Justice, Fraud Statistics, http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm (last visited Apr. 3, 2009). Both HHS and DOD have multiple organizations focused on fraud, waste, and abuse.

1. HHS

According to the HHS IG, ''[a]ll HHS and contractor employees have a responsibility to assist in combating fraud, waste, and abuse in all departmental programs.'' Office of the Inspector Gen., U.S. Dep't of Health & Human Servs., Report Fraud, http://www.oig.hhs.gov/fraud/hotline/ (last visited Apr. 3, 2009). Additionally, HHS has substantial forces specifically charged with combating fraud, waste, and abuse in federal health care programs. For example, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) established a national Health Care Fraud and Abuse Contract Program (HCFAC) that is under the joint direction of the Attorney General and HHS, and is designed to coordinate federal, state, and local law enforcement activities concerning health care fraud and abuse. U.S. Dep't of Health & Human Servs. and U.S. Dep't of Justice, Health Care Fraud and Abuse Control Prog. Annual Report for FY 2006 (Nov. 2007), *available at* http://www.oig.hhs.gov/publications/docs/hcfac/hcfacreport2006.pdf. HCFAC is a ''far-reaching program to combat fraud and abuse in health care, including both public and private health plans.'' *Id*. at 3. HIPAA requires that amounts equaling recoveries from health care investigations be deposited in a Medicare Trust Fund, which in turn finances antifraud activities that generally supplement HHS and DOJ direct appropriations for health care fraud enforcement. *Id*.[3]

Also, CMS has implemented a Medicaid Integrity component in response to Congressional direction to establish the Medicaid Integrity Program, which has ''dramatically increased the resources available to CMS to combat fraud, waste and abuse in the Medicaid program.'' Centers for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., Medicaid Fraud & Abuse – Gen. Info., http://www.cms.hhs.gov/mdfraudabusegeninfo/ (last visited Apr. 3, 2009). Moreover, because individual States are primarily responsible for policing Medicaid fraud, CMS's resources are a secondary level of weaponry to combat Medicaid fraud. *See id*. CMS also announced in October of last year ''aggressive new steps to find and prevent waste, fraud and abuse in Medicare,'' including a national Recovery Audit Contractor Program. The Recovery Audit Contractors, or ''RACs,'' will review paid claims for all Medicare Part A and B providers to ensure the claims meet statutory, regulatory, and policy requirements. Press Release, Centers for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., CMS Enhances Program Integrity Efforts to Fight Fraud, Waste and Abuse in Medicare (Oct. 6, 2008), *available at* http://www.cms.hhs.gov/apps/media/ (follow ''Press Releases'' hyperlink; then locate and follow ''October 06, 2008'' hyperlink).

2. DOD

The DOD IG's website states that ''DoD employees must disclose any known fraud, abuse, corruption, mismanagement, or waste to the appropriate DoD, Federal government, other appropriate official, or hotline.'' Office of Deputy Inspector General for Policy and Oversight, Fraud Guidance, http://www.dodig.mil/inspections/apo/fraud/introduction.html (last visited Apr. 9, 2009). In addition, DOD houses multiple organizations with responsibilities for procurement fraud. The Defense Contract Audit Agency (DCAA) performs substantial audit work not only for DOD contracts, but also contracts of various civilian agencies. Other audit organizations include the Army Audit Agency, the Naval Audit Service, and the Air Force Audit Agency.

The Defense Contract Management Agency (DCMA), which employs over 10,000 civilian and military personnel, monitors contractor performance and management systems to ensure that cost, product performance, and delivery schedules comply with the terms and conditions of the contracts. Def. Contract Mgmt. Agency, About the Agency, http://www.dcma.mil/about.htm (last visited Apr. 3, 2009).

The Defense Criminal Investigative Service (DCIS), the criminal investigative arm of the DOD IG, investigates contractor fraud. DOD Acting IG Thomas Gimble testified to the Senate Judiciary Committee in March 2007 that DCIS had started a project designed to detect fraud by reviewing paperwork associated with payments made by the U.S. Army in Iraq. This project was expected to be a long-term effort and DCIS was working with the FBI and coordinating its activities with a U.S. Attorney's Office. *Combating War Profiteering – Are We Doing Enough to Investigate and Prosecute Contracting Fraud and Abuse in Iraq, Hearing Before the S. Judiciary Comm.*, 110th Cong. 6 (2007) (statement of Thomas Gimble, Acting Inspector Gen., U.S. Dep't of Def.). In addition to the DCIS, other military investigative organizations – the Army Criminal Investigation Command (CID), U.S. Air Force Office of Special Investigations (OSI), and Naval Criminal Investigation

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[2] DOJ's National Procurement Fraud Task Force website lists *thirty-six* different agency hotlines. U.S. Department of Justice, NPFTF, http://www.usdoj.gov/criminal/npftf/links/report_fraud.html (last visited Apr. 3, 2009).

[3] As one example of the allocation of money appropriated under HIPAA, the HHS/DOJ Annual Report for FY 2006 states that the Centers for Medicare and Medicaid Services (CMS) within HHS was allocated $22.3 million to fund a variety of projects related to fraud, waste, and abuse in Medicare and Medicaid programs. That Report noted that ''CMS has increased its efforts to use advanced technology to detect and prevent fraud and abuse and to ensure that CMS pays the right providers, the right amount, for the right service, on behalf of the right beneficiary.'' U.S. Dep't of Health & Human Servs. and U.S. Dep't of Justice, Health Care Fraud and Abuse Control Prog. Annual Report for FY 2006 at 34, *available at* http://www.oig.hhs.gov/publications/docs/hcfac/hcfacreport2006.pdf.

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Service (NCIS) – have procurement fraud responsibilities.[4]

Further, DOD's TRICARE program, which provides health benefits for military families, has a Program Integrity Office that is the central coordinating agency for allegations of fraud and abuse in the program. U.S. Dep't of Def., TRICARE Fraud & Abuse, http://www.tricare.mil/fraud/ (last visited Apr. 3, 2009). The Office is responsible for all anti-fraud activities around the world for the Defense Health Program. Rose M. Sabo, U.S. Dep't of Def., TRICARE Program Integrity Operational Report 1 (2006), *available at* http://www.tricare.mil/fraud/AnnualFraudReport/Document/EOY%20Report%202006_FinalWeb.pdf. In 2006, the Office implemented DOD Instruction 5505.12 requiring an anti-fraud program to be established at each military treatment facility. *Id*.

I. The Government Accountability Office

Although not an Executive Branch Agency, the GAO has a very large role in auditing and investigating fraud, waste, and abuse in federal contracts and programs. *See* 31 U.S.C. §§ 711 *et seq*. GAO maintains ''FraudNET,'' which is an e-mail, telephone, and fax hotline that facilitates reporting of alleged fraud, waste, abuse, or mismanagement of federal funds. Reports may be made anonymously and GAO treats inquiries confidentially. On March 30, 2009, GAO issued a press release seeking the public's help in fighting fraud, waste, abuse, and mismanagement of Recovery Act funds via reports to FraudNET. Also, GAO and its high risk series have played a significant role in identifying agency vulnerabilities and recommending approaches to protect against fraud, waste, and abuse.

J. Law Enforcement Organizations

The government's immense law enforcement resources are fully engaged in investigating and prosecuting fraud. DOJ can and does call upon the FBI for investigations – over and above the IGs. Both the Civil and Criminal Divisions of the DOJ, as well as the U.S. Attorneys, are engaged in pursuit of fraud.

In October 2006, Deputy Attorney General Paul McNulty announced the formation of a ''National Procurement Fraud Task Force'' to promote the early detection, prevention, and prosecution of procurement fraud. The Task Force is a partnership involving U.S. Attorneys' Offices, DOJ's Civil Division, and a large number of other agencies that underscores the breadth of the government's anti-fraud network. U.S. Dep't of Justice, Deputy Attorney General Paul J. McNulty Announces Formation of National Procurement Fraud Task Force (Oct. 10, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/October/06_odag_688.html. The Task Force is composed of *fifty-eight* member prosecutorial and investigative agencies, including *thirty-five* Inspectors General. Overview of U.S. Dep't of Justice Nat'l Procurement Fraud Task Force (NPFTF), http://www.usdoj.gov/criminal/npftf/overview/index.html (last visited Apr. 3, 2009).[5]

And the government has formed another task force – the International Contract Corruption Task Force – to focus specifically on procurement fraud related to the wars in Iraq and Afghanistan. *Combating War Profiteering – Are We Doing Enough to Investigate and Prosecute Contracting Fraud and Abuse in Iraq?*: *Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 3, 5 (2007) (statements of Barry Sabin, Deputy Att'y Gen., U.S. Dep't of Justice, and Thomas Gimble, Acting Inspector Gen., U.S. Dep't of Def.). The organizations participating in this task force are DCIS, Army CID, Department of State IG, Agency for International Development IG, the FBI, and the Special Inspector General for Iraq Reconstruction. *Id*.

K. The Federal Acquisition System is Structured to Protect the Government

Other government antifraud protections should be considered. The federal acquisition system is meticulously designed to protect the government's interests. Doing business with the government is radically different from conducting business in the private sector. The federal statutory and regulatory framework governs every aspect of the acquisition process in intricate – and often confusing – detail (the FAR covers 18 volumes of the Code of Federal Regulations). Government rules impose burdens on contractors that are foreign to commercial contracting, such as special accounting standards and disclosure of detailed cost information.[6] Statutes impose numerous socioeconomic requirements that have little or nothing to do with the actual work to be performed. The government also has extraordinary

[4] U.S. Army regulations at 32 C.F.R. Subpart H, Remedies in Procurement Fraud and Corruption, set forth policies, procedures, and responsibilities for reporting and resolving allegations of procurement fraud or irregularities within the Army. Among other things, the regulations establish the Procurement Fraud Division, U.S. Army Legal Services Agency, as the Army's single centralized organization ''to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement.'' 32 C.F.R. § 516.58(c). The regulations also specify an array of administrative and contractual actions to be considered in response to confirmed fraudulent activity, including termination for default, contract rescission, revocation of acceptance, use of contract warranties, withholding of payments, offset of payments due to the contractor from other contracts, denial of contractor claims, and suspension and debarment. 32 C.F.R. § 516.66.

[5] The non-IG participants include the Air Force OSI, DOJ's Antitrust Division, the Army CID, the Army Legal Services Agency, DOJ's Civil Division, DOJ's Criminal Division, DCAA, DCIS, DCMA, DOJ's Environmental Resources Division, DOJ's Executive Office for U.S. Attorneys, the FBI, the Federal Law Enforcement Training Center, IRS-Criminal Investigations, the Naval Acquisition Integrity Office, NCIS, OMB-Office of Federal Procurement Policy, DOJ's Tax Division, U.S. Attorneys' Offices, and the U.S. Postal Inspection Service. U.S. Dep't of Justice, NPFTF, Frequently Asked Questions, http://www.usdoj.gov/criminal/npftf/overview/faq.html (follow ''Q: What agencies are members of the Task Force?'' hyperlink) (last visited Apr. 3, 2009).

[6] On top of onerous statutory and regulatory requirements, contractors may have to contend with other standard requirements buried in lengthy contracts, such as various Military Standards and Specifications that can dictate – in suffocating detail – products and services to be provided. As just one example, a ''Military Detailed Specification'' for ''Ham Chunks, with Juices, Canned,'' provides 13 pages of excruciating requirements, including but not limited to ''No ham chunks shall measure greater than 2.5 by 2.5 by 1 inch in size,'' and ''The average fat content of the entire can contents shall not be greater than 15.0 percent.'' U.S. Dep't of Def., Military Detailed Specification, MIL-DTL-44159C (Mar. 2, 1999), *available at* http://www.dscp.dla.mil/subs/support/specs/mil/44159.pdf.

contractual remedies, including broad termination rights. Further, unlike commercial companies, government contractors have limited remedies for business disputes regarding contracts. Disputes must follow an administrative process and can only be litigated in the Boards of Contract Appeals or the Court of Federal Claims. Case law favors the government in contract disputes with a presumption that government employees, but not contractor employees, act in ''good faith.''[7]

From the outset of the procurement process, there are abundant procedures and mechanisms designed to prevent and detect possible contractor errors and fraud, including numerous required certifications, record-retention obligations, mandatory disclosures, and extensive government audit rights. These procedures and mechanisms add significantly to contractors' costs, which in turn increases amounts the government pays for goods and services.

This protective machinery is administered by thousands of contracting personnel throughout the government. Their daily responsibilities include managing the acquisition process pursuant to statutes and regulations to support implementation of the agency's mission. FAR Part 42, applicable to all federal procurement contracts, sets forth regulations governing contract administration services. Contract administration responsibilities include a number of duties aimed in part at ensuring that taxpayers are not fleeced by false claims, including reviewing and evaluating contractor proposals, directing the suspension or disapproval of costs and approving final vouchers, and determining contractor compliance with Cost Accounting Standards. *See* FAR 42.302. This acquisition workforce is the first line of responsibility for seeing that government funds are spent in accordance with the law and the government's missions.

Furthermore, the government has expansive contractual inspection rights. Inspection ''is the primary means of ensuring that the government receives the quality of work for which it bargained,'' and ''[t]he standard inspection clauses provide the government with broad and comprehensive rights to inspect the contractor's work.'' John Cibinic, Jr. *et al*, *Administration of Government Contracts* 776-77 (4th ed. 2006). In addition, even after the government inspects and accepts contractor work, certain standard clauses provide a basis for the government to revoke the acceptance for, among other things, fraud. *See* FAR 52.246-2(k).

L. The Government Relies on a Robust Existing Audit and Investigative Bureaucracy

Listening to current rhetoric, one might conclude that the government lacks the ability to monitor public funds paid to contractors. However, the facts are that large numbers of government auditors have long been charged with monitoring compliance with financial requirements under federal programs. Federal auditors are responsible for analyzing contractor financial and accounting records (FAR 42.101), and the standard ''Audit'' clause for negotiated contracts (FAR 52.215-2) gives government representatives broad access to internal contractor information. Additionally, government auditors know to be on the lookout for fraud. The Generally Accepted Government Auditing Standards (GAGAS) published by GAO contain standards for audits of government programs, as well as of government assistance received by contractors, nonprofit organizations, and other non-government organizations. The GAGAS were revised in 1988 to increase significantly the auditor's responsibility, from remaining alert for indicators of fraud to designing steps to provide reasonable assurance of detection of irregularities and illegal acts.[8] Inspector General, Dep't of Defense, Handbook on Fraud Indicators for Contract Auditors, at i (Mar. 31, 1993), *available at* http://www.dodig.osd.mil/PUBS/igdh7600.pdf (DOD IG Handbook). The DOD IG has launched a new website entitled ''Fraud Indicators in Procurement and Other Defense Activities'' to assist the IG and federal procurement communities in detecting fraud by providing common fraud indicators. Among other things, the guidance provides tips for using data mining techniques and highlights key GAGAS requirements. *See* Office of Deputy Inspector General for Policy and Oversight, Fraud Indicators in Procurement and Other Defense Activities, http://www.dodig.mil/inspections/apo/fraud/Index.htm (last visited Apr. 9, 2009).[9]

[7] The government's lopsided advantages include the fact that while contractors may be required to provide numerous formal certifications to the government – which in turn can provide the basis for FCA allegations – the government is not required to provide reciprocating certifications. Also, if the government wrongfully withholds payments from a contractor, there is no army of private citizens waiting to file suit claiming that the government is liable for civil penalties and treble damages.

[8] In addition to other provisions concerning fraud and abuse, the July 2007 version of the GAGAS states that ''auditors have responsibilities for detecting fraud and illegal acts that have a material effect on the financial statements and determining whether those charged with governance are adequately informed about fraud and illegal acts.'' Gov't Accountability Office, *Government Auditing Standards, July 2007 Revision*, GAO-07-731G, ¶ 5.15 (July 2007).

[9] The DOD IG Handbook states that ''[f]inding and reporting fraud indicators are an auditor's responsibility and he/she should 'think fraud' when performing a review. This awareness factor cannot be overemphasized.'' Inspector General, Dep't of Defense, Handbook on Fraud Indicators for Contract Auditors, at i, *available at* http://www.dodig.osd.mil/PUBS/igdh7600.pdf. The ''think fraud'' mentality can potentially cloud the ability of government auditors and investigators to appreciate the complexities of the voluminous regulations that govern federal acquisition. Contractors and the government routinely litigate, under the Contract Disputes Act (41 U.S.C. §§ 601-613), very difficult legal and factual issues arising out of these voluminous regulations and clauses. Also, FCA cases can involve similarly difficult issues, which can cause federal judges to prepare lengthy decisions reflecting the complexity of the issues. Yet the ''think fraud'' mentality can lead to a simplistic black-and-white view that may ride roughshod over very real ambiguities or nuances, which in turn can lend costly momentum to FCA cases that lack merit. The GSA IG testified before a House Subcommittee that ''[c]learly, all contractors should be required to report fraud involving Federal contracts. *Fraud is fraud, and a contractor should not be able to hide behind the complexities of the FAR.*'' *New Contracting and Property Bills, Hearing Before the Subcomm. on Gov't Mgmt., Org. & Procurement of the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 6 (2008) (statement of Brian Miller, GSA IG) (emphasis added).

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M. Many Contractors Already Have Sophisticated Compliance Programs – More are Required by the 'Mandatory Disclosure Rule'

In addition to auditors, investigators, task forces, and other federal employees and organizations with responsibilities for procurement fraud and abuse, the government has for years pushed for contractors to have formal internal procedures focusing on compliance with procurement requirements. As such, many contractors have implemented sophisticated business ethics and compliance programs since the late 1980s. In introducing proposed amendments to the FCA in December 2007, Rep. Berman stated that ''[a]s a result of this aggressive enforcement action by our executive branch, many companies have been motivated to initiate compliance efforts, and have been deterred from engaging in the types of fraudulent schemes subject to enforcement activity.'' 153 Cong. Rec. E2658 (daily ed. Dec. 19, 2007). Of course, since that time, the mandatory disclosure rule has been promulgated requiring almost all contractors to have a mandatory business ethics awareness and compliance program and an internal controls program that provides in part for mandatory disclosure of credible evidence of violations of certain criminal laws or the FCA.[10] In light of these changes, the scope and effectiveness of contractor compliance programs should be carefully considered in determining whether amendments to the FCA are necessary to the government's fraud enforcement efforts.

IV. HIATUS AND AN ASSESSMENT

As should be obvious from the foregoing discussion – which only covers part of the federal arsenal – the government's anti-fraud resources are vast and have expanded with multiple recent new authorities.[11] All of this machinery creates a staggering burden on the government's programs, its contractors and grantees, the courts, and the economy. Before enacting even more draconian measures by strengthening the already potent FCA, the existing framework should be analyzed to determine whether the proposed amendments would materially help prevent or detect fraud, waste, and abuse in government programs, or instead would intensify investigative gridlock and/or redundancy, get in the way of federal investigators and auditors, further burden federal courts, and significantly increase the cost of doing business with the government while cutting off access to valuable goods and services from entities that avoid federal programs.

There is a real question whether such amendments are necessary in light of the Supreme Court's decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, __U.S. __, 128 S.Ct. 2123 (89 FCR 624, 6/10/08), and the 4th Circuit's recent opinion in *U.S. ex re. DRC, Inc. v. Custer Battles, LLC*, No. 07-1220, 2009 WL 971017 (4th Cir. Apr. 10, 2009). Primary arguments for the amendments have been that: (i) the requirement for ''presentment'' as articulated in *Totten* and *Custer Battles* would permit subcontractors (or contractors under grants) to commit fraud and escape the reach of the FCA; and (ii) claims to the Coalition Provisional Authority (CPA) in Iraq would escape the FCA under *Custer Battles*. However, these decisions, which were the basis for the legislation, have been reversed.

Furthermore, with the adoption of mandatory disclosure, which gives government investigators timely access to credible information regarding potential FCA violations, there is no basis to encourage more *qui tam* actions. Perhaps it would be wise to collect more specific data regarding the effectiveness of non-intervened *qui tam* actions in helping bring fraud to light. One suggestion would be to require that, when DOJ declines a case, it inform the court of the basis for its decision.

A. Impact of the Proposed FCA Amendments

Even a rudimentary analysis of the proposed amendments reveals that the primary effect of enactment will be to allow more claims by *qui tam* relators and to allow such claims to survive longer. While this imposes burdens on contractors and grantees, it also has real, but less visible, costs to federal agencies and their programs.

First, the ability of government employees to profit as *qui tam* relators from the information they handle as part of their government employment can only have the effect of reducing trust in government programs. The singular importance to the nation's economic circumstances of the Recovery Act is highly dependent on public employees who are wholly dedicated to the public interest. Local governments, contractors, and grantees should not have to worry that the public officials responsible for their programs are harboring secret intentions to assert violations of complex regulations and recover as *qui tam* relators. Nor should officials charged with important government programs have to worry that government employees who disagree with their supervisors or senior agency management about who can give directions to contractors, what clauses should go in a contract, how regulations or contract terms should be interpreted, whether performance meets contract requirements, etc., will use a *qui tam* action against a contractor in an effort to undermine the agency's direction to that contractor.[12] DOJ has told Congress that ''there should be a complete bar on *qui tam* suits filed by cur-

[10] Certain small business and commercial item contractors are not required to have such a program; however, as a practical matter, such a business awareness and ethics program is necessary for small business and commercial item contractors because they are covered by the requirement to timely disclose in the debarment and suspension provisions.

[11] Congress also has created two new subcommittees/task forces to oversee federal contracting. The Senate Homeland Security and Governmental Affairs Committee has created an ad hoc Subcommittee on Contracting Oversight. The House Armed Services Committee has created a new Panel on Defense Acquisition Reform to focus on DOD issues. Both of these groups can be expected to be active in investigating the government's acquisition system.

[12] The DCAA recently issued new guidance that contains the following instruction:

Certain unsatisfactory conditions related to *actions of government officials* [actions by government officials that appear to reflect mismanagement, a failure to comply with specific regulatory requirements or gross negligence in fulfilling his or her responsibility that result in substantial harm to the government or taxpayers, or that frustrate public policy] will be *reported to the Department of Defense Inspector General (DoDIG) in lieu of reporting the conditions to a higher level of management*.

Audit Guidance on Reporting Significant/Sensitive Unsatisfactory Conditions Related to Actions of Government Officials, PAS 730.4.A.4, *available at* http://image.exct.net/lib/

rent and former government employees that utilize information acquired during the course of Government employment.'' *The False Claims Act Correction Act (S. 2041) – Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 57, 63 (2008) (letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney Gen., to Sen. Patrick Leahy (D-Vt.), Chairman of the Senate Committee on the Judiciary).

Second, DOJ's own data shows that it is the cases pursued by DOJ that result in recoveries. Cases where DOJ either brings the case or intervenes account for 98 percent of all FCA recoveries. When DOJ intervenes, it takes primary responsibility for the case, but when DOJ declines to intervene, the relator may proceed to litigate the case alone. The cases where the relator proceeds alone account for 2 percent of the dollars recovered. Civil Division, U.S. Dep't of Justice, Fraud Statistics, http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm (last visited Apr. 16, 2009). In other words, when DOJ examines the case and decides not to intervene, the chances that the relator actually has a meritorious case are very low. The proposed amendments will produce more of these cases and make it harder for them to be dismissed.

For example, the proposed legislation makes a huge change to the public disclosure provisions of the FCA (§ 3730(e)(4)) by removing the ability of a defendant to make a jurisdictional challenge to a *qui tam* relator on the basis of publicly disclosed information in cases where DOJ already has examined the allegations and decided not to intervene. Defendants will no longer be able to seek dismissal of parasitic cases – only DOJ will have that authority and is unlikely to devote the resources to a second look at the same case. The current configuration of this section does not acknowledge or address the existence of the mandatory disclosure rule. The bill raises serious questions about whether disclosures made under that rule will become fodder for more *qui tam* actions and whether such actions will impede the government's ability to investigate and make its own determinations about the significance of such disclosures. If this section is not revised to take the mandatory disclosure rule into account, it will permit relators to share in a recovery that may result from pursuing a *qui tam* action using information that was already disclosed to the IG and under investigation. Such a result would be completely inconsistent with the purpose of the FCA, which is to encourage relators to bring *new* information about potential violations.

In addition, the proposed House bill imposes other impediments even on the ability of DOJ to raise the public disclosure bar. The House bill changes what constitutes ''public disclosure'' to require that ''all essential elements of liability'' of the claim ''are based exclusively on the public disclosure.'' Because of this ''exclusivity'' requirement, a relator could add a small amount of information and be allowed to proceed with a *qui tam* action. Further, under the House bill, a public disclosure would include ''only disclosures made on the public record or have otherwise been disseminated broadly to the general public.'' A claim is ''based on'' a public disclosure ''only if the person bringing the action derived . . . knowledge of all essential elements of liability . . . from the public disclosure.'' This language strongly suggests that where a mandatory disclosure has been made and is under investigation by the IG (or even DOJ) a relator may be able to proceed with an action, obtain the information in discovery, and receive a share of any recovery because the information did not meet the ''public'' requirement. Thus, a relator would obtain a share of the recovery although the government is fully aware of the information. Such a result merely siphons off a recovery that otherwise would have gone to the taxpayers.

Third, the House bill also relaxes the pleading standard under Federal Rule of Civil Procedure 9(b) only for relators. Rule 9(b) requires that allegations of fraud or mistake be pled with particularity. The purpose of the rule is to give defendants adequate notice of the nature of serious allegations against them. Under the House bill, DOJ would be required to comply with 9(b) when it brings an FCA action, but relators would not. In light of the mandatory disclosure rule, relators would be encouraged to file general and speculative claims because they know that they can potentially obtain more detailed information if the case can survive to the discovery stage. Relators would be allowed to proceed even though the government was aware of the information. At a minimum, the legislation should be amended to provide that where a contractor or other recipient of federal funds makes a mandatory disclosure of information, no *qui tam* suit can be filed based on that information.

An assessment should be made of the consequences of facilitating further non-meritorious *qui tam* cases, especially in light of the mandatory disclosure rule. Such cases impose significant burdens on the federal agencies whose contracts or grants are at issue. The agency is forced to devote resources – that otherwise would be available to run its programs – to respond to document discovery (often very old documents), as well as produce witnesses for deposition and trial. Multiplying these cases and extending their lives will only result in greater burdens on the agencies. No data currently exists on the extent of disruption caused to agencies that are forced to respond to non-meritorious cases. This issue should be examined closely before enacting any changes to the FCA. Further, the impact of the new Recovery Act Board and Commission should be examined – the programs and contracts belong to the government agencies who inevitably will have to provide information in the event of investigations and hearings.

B. Costs and Burdens of FCA Investigations and Actions That Should be Undertaken

The government's decision to investigate possible FCA violations can impose substantial costs and disruptions on contractors (and other federal program recipients) already weighed down by a patchwork of statutes, regulations, and contract clauses. Contractors may have to respond to requests for access to financial information in numerous locations, requests to interview employees, subpoenas seeking large amounts of documentation, and Civil Investigative Demands requiring employees to provide testimony. These requests and demands may emanate from a *qui tam* action filed under seal that the contractor does not know exists, which is one of several Kafkaesque scenarios that can arise during deployment of the government's anti-fraud weap-

fefd167774640c/d/1/DCAA%20Report%20.pdf (Mar. 13, 2009) (emphasis added).

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onry. *See* U.S. Dep't of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, *available at* http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (''The qui tam complaint must, by law, be filed under seal, which means that all records relating to the case must be kept on a *secret docket* by the Clerk of the Court.'') (emphasis added). And *qui tam* complaints can remain under seal for extended periods of time: ''In this District, most intervened or settled cases are *under seal for at least two years*.'' *Id*. (emphasis added).

Moving beyond FCA investigations, the impact on contractors and other recipients of federal funds caught up in FCA *litigation* can be devastating. Defendants may have to contend with the allegations for years, spending large amounts of money and diverting substantial resources away from productive business defending what could constitute nothing more than good-faith disputes over complex regulations. A GAO Report from 2006 indicates that *qui tam* cases ''in which DOJ intervened took a median of 38 months [*over three-and-a-half years*] to conclude and ranged from 4 months to *187 months [over fifteen years]*.'' U.S. Gov't Accountability Office, *Information on False Claims Act Litigation*, GAO-06-320R at 3 (Jan. 31, 2006) (emphasis added); *see also*, *e.g.*, *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228 (5th Cir. 2008) (affirming summary judgment for defendants after three-and-a-half years of discovery, where relator had produced no evidence creating a fact issue concerning scienter, and, at most, relator had shown innocent mistakes and negligence). The filing of *qui tam* cases can impugn reputations, threaten jobs, and create enormous stress.[13]

It may be prudent to hear directly from contractors and other recipients of federal funds who have been forced to defend *qui tam* cases that ultimately proved to be meritless.[14] It is easy to express outrage over money allegedly being lost to fraudulent contractors, and more difficult to take an objective, measured look at an already incredibly powerful law to assess its effect on contractors, in addition to its effect on the ability of an agency to accomplish its mission.

[13] Purely as a hypothetical example offered to highlight the burdens imposed by the FCA, suppose a busy DOJ lawyer submitted a reimbursement voucher for travel expenses in connection with official business that mistakenly claimed $750 instead of $500, perhaps because he/she prepared several expense vouchers in a hurry at the end of the month. How would that attorney feel if someone filed suit claiming that the attorney defrauded the United States and owed a penalty of $11,000? And how would that attorney feel about being forced to spend many thousands of dollars defending the allegations in court over the next two or three years, while facing the possibility of being fired and/or disbarred? Even if the attorney prevailed in the end, his or her views about the FCA's *qui tam* provisions likely would have changed substantially over the course of the litigation.

[14] While DOJ publishes statistics concerning amounts recovered under the FCA, there appear to be no DOJ statistics on the number of FCA cases filed that ultimately prove to be meritless, including the costs incurred by companies in defending those cases. Also, the DOJ statistics on FCA recoveries do not account for settlements by companies who are convinced that they did not violate the FCA but who make rational cost-benefit judgments to resolve FCA cases to avoid the substantial costs and disruptions of prolonged litigation.

C. The Interests of a Broad Array of Entities Who are Exposed to Potential Allegations of Misconduct Under the FCA Should be Considered

In addition to considering input from large contractors who provide much of the goods and services needed for the government to function, it may make sense to consider input from several other types of organizations who can be forced to incur substantial costs and disruptions based solely on *allegations* of FCA violations. The array of such organizations is almost limitless, and can include cities, counties, incorporated villages, municipalities, regional healthcare systems, nonprofit healthcare providers, charities, native American Indian tribes, universities, colleges, and small businesses.

Further, local governments will receive an enormous amount of funds under the Recovery Act, and will be working hard to process these funds, manage related transactions, and stimulate the economy at a critical time in the nation's history. Yet the volume of Recovery Act funds to local government entities and the pending amendments to the FCA portend a huge increase in *qui tam* actions against local governments (in addition to oversight by the Transparency Board, the Advisory Panel, the IGs, and GAO). This increase would, in turn, increase the likelihood that local governments will become sidetracked from their stimulus activities by having to defend against FCA lawsuits. These facts should be taken into account before amending the FCA.

D. Other Costs To The Government Of Strengthening The FCA

Other costs of further empowering *qui tam* relators, such as impacts on an over-crowded judiciary, and costs to taxpayers of increased prices for goods and services resulting from heightened risks of doing business with the government, should be considered. Another potential cost that should be considered before strengthening the FCA is further alienation of commercial companies. Most traditionally commercial companies give a wide berth to the highly regulated and risky federal market. Accordingly, the government loses the benefits of affordable goods and services that have been vetted and refined through private competition. It may be prudent to consider research into why these companies choose not to sell to the government, what might induce them to alter that choice, and see what *they* think about possibly strengthening the FCA – particularly in light of the recent mandatory disclosure requirements imposed on commercial contracts.

In *United States v. Southland Mgmt. Corp.*, 288 F.3d 665 (5th Cir. 2002), the court found that the government had conditioned payment of claims on a certification of compliance with a contract requirement that a housing complex was in '' 'decent, safe, and sanitary' condition,'' and noted that the government could prove *falsity* of a claim by establishing the *unreasonableness* of the defendant's *interpretation* of the regulation or contractual provision. *Id*. at 690. The dissent observed that the government knew of the property's problems for years but chose to work with the owners to seek remedies gradually. And the dissent warned that ''[t]he costs of government contracts are already inflated by complex rules unknown to private business transactions. This opinion will generate additional costly premiums to offset the increased risk posed by its expan-

sion of FCA liability. Indeed, the fear of having to defend an FCA claim for non-material misstatements or problems known by the government will discourage many businesses from bidding on government contracts.'' *Id*. at 691 (Jones, J., dissenting).

The government is schizophrenic over commercial contractors, wanting on the one hand to coax them into the federal market, while on the other hand considering or erecting further barriers such as strengthening the FCA and requiring disclosure of FCA violations.[15] This tension should be assessed in considering amendments to the FCA, including whether giving relators additional powers under a statute that is already subject to abuse will cause more harm than good.

V. CONCLUSION

The pace of new enactments and regulations directed at fraud, waste, and abuse has reached frenetic levels. These new provisions empower different constituencies to probe the government's decisions about how it spends its funds and what the recipients are doing with those funds. Each of these parties has an interest in zealous audit or investigation to support its own interests. This frenzy appears to ignore the reality that the government and its contractors and grantees have programs with critical missions to accomplish. The uncoordinated expansion of all of these various audit and investigative entities, combined with the pending FCA amendments, pose serious risks to the ability of these programs to succeed – they can only carry so much weight that is not central to their mission. Perhaps it would be wise to streamline these investigative authorities, consider whether it is necessary to encourage further outsourcing of the government's fraud investigation and litigation functions, and place some renewed emphasis on assuring that agencies have the management and technical resources at the front end of the process to accomplish their mission.

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[15] As an example of the government's desire to entice greater participation by commercial companies, last year, DOD published in the Federal Register a call for information about the definition of ''nontraditional defense contractor,'' stating that ''DoD is interested in creating new and/or expanding existing pathways for nontraditional contractor participation in defense procurements.'' DOD also stated that ''[s]ince the 1970s, DoD has encouraged its acquisition team to leverage, to the maximum extent possible, the commercial marketplace to acquire the Department's products and services.'' 73 Fed. Reg. 21,301 (Apr. 21, 2008). In addition, an article last year by the former general counsel of the Defense Advanced Research Projects Agency noted that the ''war on terror poses threats for the U.S. military not contemplated in the days of the Cold War or in contingency operations in its aftermath.'' Richard L. Dunn, *Feature Comment: Other Transactions – Another Chance?*, The Gov't Contractor at 1 (Feb. 6, 2008). The article indicated that two connected concepts had recently emerged. One is that the process of identifying and responding to threats needs to be expedited. Also, ''DOD laboratories and the defense industry are not developing the best threat-response technologies,'' and therefore an outreach to and a means to deal with a broader industrial base is needed. Yet the article noted that ''[e]ven if a capability is identified at a company that has not traditionally done R&D business with DOD, it may find the Government contracting process to be tortured or even 'too hard.' '' *Id*. at 3.

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