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# Good Policy, Poorly Legislated: A New Era Emerges for Those Doing Business with Uncle Sam

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During the past year, difficult times have lead the federal government to commit an impressive amount of financial resources to the improvement of a weakened and vulnerable economy. As those federal resources are harnessed, inevitably there will be an assembly of bad actors seeking to profit unfairly through various forms of fraud. It is sound public policy to safeguard the use and expenditure of public dollars, particularly in the post-Madoff era, and as massive amounts of federal assistance are flowing through the Troubled Asset Relief Program ("TARP") and other economic stimulus programs. Yet, while there is a need for tools to combat fraud, those tools must be properly constructed and minimally burdensome to those that remain honest in their dealings with the federal government.

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"). Individuals, businesses, and professionals that do business with the federal government as contractors, subcontractors, grantees, or healthcare providers, must take a moment to educate themselves in order to gain an appreciation for the landmark amendments that FERA makes to the civil False Claims Act.[1] This article provides a useful primer for concerned parties and their legal counsel.

## I. Historic Overview

### A. The False Claims Act of 1863

During the Civil War, President Lincoln signed into law the False Claims Act of 1863 to combat procurement fraud by suppliers of the Union Army.[2] The new anti-profiteering law was exceptional in that it included a "qui tam" provision allowing civil suits by private citizens in the name of the government.[3] The phrase "qui tam" is derived from a Latin phrase which means "who brings the action as well for the king as for himself."[4] Private citizens, called "relators" or "whistleblowers," would receive generous financial rewards for bringing successful qui tam lawsuits.[5] As one court later explained, "one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain."[6] Originally, the penalty was $2,000 per false claim and double the damages to the government.[7] Successful relators were entitled to remarkable 50% of the recovered proceeds.[8]

### B. The Act of December 23, 1943

The new qui tam provision eventually brought unintended consequences. Many decades later after the Civil War, several public officials protested a rise of qui tam suits during the spending increases leading up to World War II.[9] Citizens were filing qui tam suits based on information found within existing criminal indictments.[10] These perceived abuses lead Congress and President Roosevelt to amend the False Claims

Act in the Act of December 23, 1943.[11] The amendments added jurisdictional bars that removed the ability of citizens to bring qui tam suits when based upon evidence or information that was already within the government's knowledge.[12] In addition, the False Claims Act was amended to allow the Department of Justice to intervene and take over cases within sixty (60) days of being initiated by whistleblowers.[13] The impact of the 1943 amendments was even more substantial in light of new reductions to the financial rewards of successful relators. The maximum recovery for relators was limited to 10% of proceeds if the government intervened, or 25% of proceeds if the government did not intervene.[14]

### C. The Modern False Claims Act

On October 27, 1986, President Reagan signed into law the False Claims Amendments Act of 1986.[15] These new amendments gave rise to the modern form of the False Claims Act. The primary thrust of the 1986 amendments was the expansion of potential qui tam suits and increase in financial incentives for successful relators.[16] The restrictive jurisdictional bar on qui tam suits that were based upon matters within the government's knowledge was softened to merely bar qui tam suits that were based upon publicly disclosed allegations or transactions in the context of a criminal, civil, or administrative proceedings.[17] The penalty for each violations increased to \$5,000-\$10,000 per false claim, and the damages increased from two to three times the amount of damages to the government.[18] In addition, the successful relator would generally receive nothing less than 15% of proceeds, but possibly up to 25% in recognition of contributions to the government's prosecution of a suit.[19] For the successful prosecution of a qui tam suit absent government intervention, the relator would receive 25-30% of proceeds.[20]

The 1986 amendments included additional significant changes. Whistleblowers benefited from a new cause of action for retaliation.[21] Prevailing defendants, on the other hand, were able to request attorneys' fees for suits that were clearly harassing or frivolous.[22] The government, perhaps most importantly, also held new and expanded powers to investigate possible violations.[23]

## II. The Basics of the False Claims Act

### A. Certain False or Fraudulent Claims Give Rise to Liability

Historically, the False Claims Act focused on affirmative actions that operate to defraud the government. Prior to FERA, the acts giving rise to liability included conduct where a person:

| [Prior Version of 31 U.S.C. 3729(a)] |
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| (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; |
| (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; |
| (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; |
| (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; |
| (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; |
| (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may |

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| not sell or pledge the property; or |
| (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government,<br><br>is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if, […] |

From 1986 to present, the U.S. Supreme Court has built a rich body of precedents related to these provisions.[24] Many decisions narrowly interpreted provisions of the False Claims Act. By way of example, the impetus for some of FERA's amendments to the False Claims Act specifically arose from the case of *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, 128 S.Ct. 2123 (2008). Part of the dispute in *Allison Engine* concerned the legal sufficiency of trial evidence.[25] Evidence was introduced showing that a subcontractor submitted false statements to the contractor on a federally-funded project, but there was no evidence introduced showing that the subcontractor submitted those false statements for the purpose of inducing the government's payment.[26] As a consequence, the Supreme Court held that liability for certain actions under the False Claims Act, such as making false statements, requires proof of an intent to induce government payment.[27] In addition to the Court's textual reading of the statute, it reasoned that eliminating the intent requirement would expand the False Claims act "well beyond its intended role of combating 'fraud against the Government."[28] If history is any indication, disputes about the meaning of the False Claims Act will continue to arise and parties will seek a final solution from the Supreme Court.

### B. Investigation

The Attorney General has the power and duty to investigate possible violations of the False Claims Act.[29] Prior to prosecuting any civil enforcement action, the Attorney General has the ability to issue a written "civil investigative demand."[30] The demand may be served upon any person if the Attorney General has reason to believe that person has possession, custody, or control of documentary material or information relevant to a false claims investigation.[31] The demand can request, in any combination, documentary materials for inspection and copying, written answers to interrogatories, and oral testimony about those documents and information.[32] Prior to FERA, only the Attorney General could issue civil investigative demands and the disclosure of the responses to those demands were more limited.

### C. Civil Prosecution

#### 1. Enforcement Actions By Government <u>or</u> Private Citizens

Violations of the False Claims Act give rise to the potential for a civil action by the Attorney General or, utilizing the qui tam provision, by private citizens in the name of the government.[33] There are, however, bars to certain types of actions.

| **Jurisdictional Bars:** |
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| actions by a former or present member of the armed forces against another member of the armed forces arising out of such person's services; |
| actions against a member of Congress, the judiciary, or any senior executive branch official if based on evidence or information known to the government when the action would be brought; |

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| when based upon allegations or transactions which are the subject of a civil suit or administrative civil money penalty proceeding in which the government is already a party; or, |
| when based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional administrative, or GAO report, hearing, audit, or investigation, or from the news media, unless brought by the original source of the information.[34] |

**2. The Process to Determine Who Prosecutes Qui Tam Actions**

Actions by private citizens under the False Claims Act are subject to a highly malleable litigation process. At the outset, relators must serve their complaint on the government pursuant to the Federal Rules of Civil Procedure, and file their complain with the relevant court in camera.[35] The complaint then remains under seal for 60 days.[36] That 60 day period enables the government to review the merits of the complaint.[37] Time extensions are possible.[38] Following its review, the government may either elect to intervene, in which case it has primary responsibility to prosecute the action, or decline, in which case the private citizen may conduct the action at its own expense.[39] Adding some difficulty to the defense of a qui tam suit, the Government may intervene at a later date upon a showing of good cause.[40]

**3. Consequences for Retaliation**

In light of the potential consequences faced by whistleblowers, the False Claims Act includes a right of action for certain retaliatory actions.[41] If "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" for investigating, initiating, or assisting in a civil enforcement action under the False Claims Act, whistleblowers may bring a separate retaliation claim to seek relief.[42] Prior to FERA, the right to bring a retaliation claim was limited to employees that suffered backlash from their employers.

**D. Civil Penalties & Damages Under False Claims Act**

Violations of the False Claims Act result in a severe civil penalties and damages. For each false claim, there is a penalty of $5,500 to $11,000, plus three times the amount of damages sustained by the government.[43]

**E. Criminal Prosecution is Possible**

The type of conduct that gives rise to scrutiny under the civil False Claims Act often provides a basis for federal criminal prosecution.[44] When under investigation or engaged in the defense of suits for violations of the civil False Claims Act, potential criminal liability must be considered. Up to five years imprisonment is possible for making or presenting claims to federal departments or agencies when it is known that such claims are false, fictitious, or fraudulent.[45] Up to five years imprisonment is also possible for whoever "knowingly and willfully" either: "falsifies, conceals, or covers up" any "material fact" through a "trick, scheme, or device;" or "makes a materially false, fictitious, or fraudulent statement or representation;" or "makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry."[46]

For the health care providers facing scrutiny under civil False Claims Act, there are several potential sources of federal criminal prosecution within the confines of the Anti-Kickback Statute.[47] For example, in addition to potential fines of up to $25,000, up to five years imprisonment is possible for "knowingly and willfully" making "any false statement or representation of a material fact in any application for any benefit or payment under a Federal health care program," such as Medicare or Medicaid, or "in determining rights to such benefit or payment."[48] The civil False Claims Act and the assortment of pertinent federal criminal statutes supply the government with an arsenal of tools for purposes of prosecution.

### F. Civil Monetary Penalties

In spite of the broad application of the False Claims Act and relevant federal criminal statutes, scrutiny for suspected false or fraudulent claims may arise from yet another source that is particularly relevant to health care providers. The U.S. Department of Health and Human Services, through the Office of Inspector General, may impose civil monetary penalties upon any person that presents claims to a federal health care program, such as Medicare or Medicaid, and knows or should know the item or services was not provided as claimed or are false or fraudulent.[49] The penalty is $10,000 for each claim, with damages up to three times of the amount wrongly claimed.[50]

### G. The Colossal Financial Impact

From 1986 to 2008, the U.S. Department of Justice ("DOJ") has recovered almost $22 billion in settlements and judgments pursuing allegations of fraud against the federal government.[51] Almost $14 billion was recovered under the qui tam provisions of the False Claims Act.[52] According to the DOJ, the "lion's share" of settlements and judgments in recent years arise in the health care industry,[53] which comes as no surprise considering the vast amount of reimbursements paid through Medicare and Medicaid.

## III. The Post-FERA Era of Doing Business With Uncle Sam

### A. Increased Risk of Liability

The thrust of changes to the False Claims Act are contained within language detailing the acts that give rise to liability. While these provisions have been narrowly interpreted by courts over the past 20 years, with the passage of FERA, Congress has taken a very deliberate step that charts a very different course. The undeniable effect is to broaden the risk of liability, yet in a manner that warrants the attention of everyone doing business with the federal government, not merely bad actors.

| **[Redline of Old vs. Current Version: 31 U.S.C. § 3729(a)(1)]** |
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| ~~(1)~~ **(A)** knowingly presents, or causes to be presented, [~~to an officer or employee of the United States Government or a member of the Armed Forces of the United States~~] a false or fraudulent claim for payment or approval; |
| ~~(2)~~ **(B)** knowingly makes, uses, or causes to be made or used, a false record or statement **material** to [~~get~~] a false or fraudulent claim [~~paid or approved by the Government~~]; |
| ~~(3)~~ **(C)** conspires to [~~defraud the Government by getting a false or fraudulent claim allowed or paid~~] **commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)**; |
| ~~(4)~~ **(D)** has possession, custody, or control of property or money used, or to be used, by the Government and [~~intending to defraud the Government or willfully to conceal the property~~] **knowingly** delivers, or causes to be delivered, less [~~property than the amount for which the person receives a certificate or receipt~~] **than all of that money or property**; |
| ~~(5)~~ **(E)** **is** authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; |

~~(6)~~ **(F)** knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge [~~the~~] property; or

~~(7)~~ **(G)** knowingly makes, uses, or causes to be made or used, a false record or statement **material** to [~~conceal, avoid, or decrease~~] an obligation to pay or transmit money or property to the government, **or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,**

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

**1. Reverse False Claims & Retained Overpayments**

The most significant expansion of liability under the False Claims Act is found in the "reverse false claims" provision.[54] FERA expands liability for reverse false claims to any person that "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[55] The implications of this addition are staggering. Historically, the False Claims Act has been more focused on affirmative actions for purposes of assigning liability. The new amendments cause it to encompass more.

For recipients of federal dollars, including health care providers billing Medicare or Medicaid and other government contractors, the mere retention of overpayments made by the government provides a new basis for liability under the False Claims Act. The change is significant, and poor drafting presents several additional challenges. Among the more onerous of tasks is determining what is meant by "knowingly," and what constitutes an "obligation." In the health care industry, providers are often compelled to appeal what are believed to be incorrect overpayment demands by government auditors and contractors. The breadth and complexity of billing, coding, and the litany of related policies often engender disputes over gray matters.

The False Claims act defines "knowingly" to include actual knowledge and deliberate ignorance, but also the "reckless disregard" for the truth or falsity of information.[56] Health care providers and their legal counsel will need to think critically when determining what might represent such "reckless disregard" in the context of more complex issues. Perhaps even more troubling is the uncertainty that arises in determining what constitutes an "obligation." The False Claims Act defines "obligation" as "an established duty" that arises from "an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."[57] The complex disputes that arise between providers and the government often concern distinctive interpretations of established policies.

The prudent approach is to proceed with extreme caution. In addition to internal monitoring for overpayment issues, concerned parties should think carefully about erring on the side of explanation and disclosure when dealing overpayment and complex issues.

**2. Removal of Intent and Presentment Requirements**

Several of the FERA's amendments specifically overturn more narrow interpretations of the False Claims Act. As a consequence, a fairly substantial body of case law no longer applies and qui tam suits under the False Claims Act will likely proliferate. The most prevalent example is the elimination of the intent requirement that arose from the Supreme Court's decision in *Allison Engine*. In *Allison Engine*, the Supreme

Court held that for certain types of actions under the False Claims Act, plaintiffs had to prove there was an intent to induce government payment.[58] FERA deleted language that provided a textual basis for the Supreme Court's holding. Congress also made those amendments retroactive, "as if enacted on June 7, 2008."[59] The retroactive application of the amendment directly impacts the outcome of the *Allison Engine* case, and probably others.

In *Allison Engine*, the Supreme Court reasoned that its interpretation was necessary to confine the False Claims Act to its purpose of combating fraud against the government. Congress decided to broaden what it considers to be fraud against the government, and the False Claim Act has a more extended reach as a consequence. There is no longer a requirement that false or fraudulent claims be presented to an officer or employee of the government.[60] Under the amended definition of a "claim," liability for false or fraudulent claims is now possible for claims submitted to private contractors, grantees, and others, so long as "any portion" requested or demanded is provided by the government.[61]

**3. Addition of Materiality Requirement**

While FERA's amendments to the False Claims Act are fairly consistent, there is an outlier of sorts. It is a violation of the False Claims Act to create or use a false record or statement in connection to a false or fraudulent claim or an obligation to pay or transmit money or property to the Government.[62] After FERA, those records or statements must be "material," which is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[63] While the strength of that standard is certainly questionable, particularly when compared to the former intent requirement, it is an addition that may be of use under the facts of certain cases.

**4. Conspiracy Provision Expanded**

Conspiracy is a type of act that gives rise to liability under the False Claims Act. Prior to FERA, liability for conspiracy was limited to those instances where the conspiracy was undertaken to "defraud the Government by getting a false or fraudulent claim allowed or paid."[64] After FERA, conspiracy liability is possible in relation to any violation of the False Claims Act.[65]

**B. Relation Back for Government Interventions**

The False Claims Act includes a statute of limitations that prevents overly stale claims from being filed.[66] One of FERA's amendments presents a new challenge for those defending qui tam suits. A new provision allows the government, upon choosing to intervene, to amend the complaint of the relator that brought the claim in order to clarify, add details, or bring additional claims.[67] For "statute of limitations purposes, any such Government pleading" will now relate back "to the filing date of the complaint," so long as it "arises out of the conduct, transactions, or occurrences set forth" in the earlier complaint.[68] The new relation-back provision will enable to the government to file certain actions that previously might have been barred by the statute of limitations.

**C. Broadened Retaliation Claims**

The right of whistleblowers to seek relief from retaliation is no longer limited to employees vis-à-vis their employers, but is now a right available in other common arrangements between contractors, or principals and their agents. Under the amended provision, any "employee, contractor, or agent" is "entitled to all relief necessary to make that employee, contractor, or agent whole."[69]

**D. Expanded Investigative Powers**

With the passage of FERA, the government's power to investigate potential violations of the False Claims Act is more expansive. The Attorney General may now delegate the authority to issue civil investigative demands,[70] and there are more potential uses of the of responsive information and documents. For example, the amendments allow the government to share responses "with any qui tam relator," so long as the "Attorney General or designee determine it necessary as part of any false claims act investigation."[71] There is also a new definition of "official use," which increases the likelihood that responses to civil investigative demands must be shared in relation to a broader array of other investigations or prosecutions.[72]

**III. Conclusion**

The Madoff scandal and rise in federal assistance flowing through TARP and the economic stimulus justified a close and thoughtful analysis of whether our public dollars are adequately protected from outright fraud. Yet, while the policy is well-founded, FERA's amendments to the civil False Claims Act likely go too far and raise too many questions even for the most seasoned attorneys. Individuals, businesses, professionals, and legal counsel are wise to give pause. There is increased risk of investigation and liability, even for those that remain honest in their dealings with the federal government.

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[1] 31 U.S.C. § 1329, et. seq.
[2] T.J. Halstead, Constitutional Aspects of Qui Tam Actions: Background and Analysis of Issues in Vermont Agency of Natural Resources v. United States ex rel. Stevens, CRS Report for Congress RL30463 (Mar. 8, 2000).
[3] See Fraser, Eric M., Reducing Fraud against the Government: Using FOIA Disclosures in Qui Tam Litigation, 74 University of Chicago Law Review 1 497, 501 (2008) (citation omitted).
[4] Halstead, supra note 2, at 1.
[5] Fraser, supra note 3, at 501.
[6] Id. at 502 (citation omitted).
[7] Act of March 2, 1863, ch. 67, § 6, 12 Stat. 698.
[8] Id.
[9] Fraser, supra note 3, at 502–03.
[10] Id.
[11] Id. at 503.
[12] Id.
[13] Act of December 23, 1943, ch. 377, 57 Stat. 608.
[14] Id.
[15] Fraser, supra note 3, at 503.
[16] Id. at 503–04.
[17] Id. at 504.
[18] 31 U.S.C. § 3729(a).
[19] Id. at § 3730(d).
[20] Id.
[21] Id. at § 3730(h).
[22] Id. at § 3730(d)(4).
[23] Id. at § 3733.
[24] For a reputable survey of such precedents, see Randy J. Sutton, Construction and Application of False Claims Act–Supreme Court Cases, 37 A.L.R. Fed.2d 543 (2009).
[25] Allison Engine, 128 S.Ct. at 2127–28.
[26] Id. at 2130.
[27] Id. at 2126.
[28] Id. at 2128 (citation and emphasis omitted).
[29] 31 U.S.C. § 3730(a).
[30] 31 U.S.C. § 3733(a)(1).
[31] Id.
[32] Id. at § 3733(a)(1)(A)–(D).
[33] 31 U.S.C. § 3730(a)–(b).

[34] Id. at § 3730(e)(1)–(4).
[35] 31 U.S.C. § 3730(b)(2).
[36] Id.
[37] Id.
[38] Id. at § 3730(b)(3).
[39] Id. at § 3730(b)(4).
[40] Id. at § 3730(c)(3).
[41] 31 U.S.C. § 3730(h).
[42] Id.
[43] 31 U.S.C. § 3729(a). These numbers account for an inflation adjustment.
[44] For a more detailed outline of potentially relevant federal criminal statutes, see Ronald Clark, Arent Fox LLP: A Brief Primer on Pertinent Federal Criminal Statutes Related to Health Care Fraud (Dec. 11, 2002), available at http://www.arentfox.com/publications/index.cfm?content_id=868&fa=legalUpdateDisp.
[45] 18 U.S.C. § 287.
[46] 18 U.S.C. § 1001.
[47] 42 U.S.C. § 1320a-7b(a).
[48] Id. at § 1320a-7b(a)(1)–(2). There are several other related actions that give rise to the same liability, found in § 1320a-7b(a)(3)–(6).
[49] 31 U.S.C. § 1320a-7a(1)(A)–(B).
[50] Id. at § 1320a-7a(1). To get a feel for the types of conduct giving rise to civil monetary penalties, visit http://oig.hhs.gov/fraud/enforcement/cmp/false_claims.asp.
[51] Press Release, U.S. Department of Justice, More Than $1 Billion Recovered By Justice Department in Fraud and False Claims Cases Since 1986 (Nov. 10, 2008), available at http://www.usdoj.gov/opa/pr/2008/November/08-civ-992.html.
[52] Id.
[53] Id.
[54] 31 U.S.C. § 3729(a)(1)(G).
[55] Id.
[56] Id. at § 3729(b)(1).
[57] Id. at § 3729(b)(3).
[58] Discussed above.
[59] Pub.L. 111-21 § 4(f), 123 Stat. 1625 (May 20, 2009).
[60] 31 U.S.C. § 3729(a)(1)(A).
[61] Id. at § 3729(b)(2).
[62] Id. at §§ 3729(a)(1)(A), (G).
[63] Id. at §§ 3729(b)(4).
[64] Formerly codified at 31 U.S.C. § 3729(a)(3).
[65] 31 U.S.C. § 3729(a)(1)(C).
[66] 31 U.S.C. § 3731(b). Such actions cannot be brought more the six years after the date of the violation, or more than three years after the date that material facts related to the violation became known or reasonably should have been known, but in no event more than ten years after the violation. Id.
[67] Id.
[68] Id.
[69] 31 U.S.C. § 3730(h).
[70] 31 U.S.C. § 3733(a)(1).
[71] Id. at § 3733(a)(1)(D).
[72] Id. at §§ 3733(i), (l)8).