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False Claims Act

It's Time to Re-Think the False Claims Act

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The federal False Claims Act (FCA) is one of the government's primary weapons in combating fraud by federal contractors, federal grantees and recipients of federal benefits. Since 1986, when the FCA was restructured into its current configuration, total recoveries under the Act amount to almost $39 billion. Recoveries during the last three fiscal years alone total almost $12 billion. Approximately two-thirds of all recoveries since 1986 have resulted from suits initiated by whistleblowers pursuant to the unique *qui tam* provisions of the FCA which enable private citizens to file suit on behalf of the government and reward them with 15-30% of any resulting recovery. The number of such whistleblower suits been rising and, during the last three fiscal years a record number of suits was filed each year: 635 cases in 2011, 652 cases in 2012, and 753 cases in 2013. Significantly, however, almost all of the recoveries from whistleblower-initiated cases were obtained in the small minority of those cases in which the government intervened to take over the action.

It is difficult to identify and measure all the relevant costs and benefits arising from FCA enforcement. As a result, there has been a tendency to focus on metrics that are easy to quantify — the number of FCA cases brought and the amount of money recovered as a result of those cases. Fundamental policy decisions concerning the FCA and its enforcement have tended to be based on assumptions, ideology, or political appeal. Clearly, the FCA creates some notable benefits for the government and the public. The FCA has been used to recover substantial amounts of money and to deter fraud; without a strongly enforced FCA, contractors, grantees and program participants likely would engage in more fraud than now occurs. The question, however, is not whether the existing FCA yields some significant benefits, but whether it is optimal in light of alternatives.

We believe that certain important aspects of the FCA are ineffective, inefficient, and/or inequitable — they detract from the public interest rather than promoting it. The time has come to re-examine and revise the FCA in order to ensure that it better serves the interests of the government and the public. As explained below, we recommend a major revamping of the role of whistleblowers that would preserve their vital function in uncovering fraud while eliminating their ability to instigate costly and unproductive litigation. We also recommend changes to the FCA that would strengthen incentives for contractors, grantees and program participants to self-police and report wrongdoing — because such self-policing is the most important tool for preventing fraud in government contracts and programs.

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The FCA is politically popular as it currently exists. In recent years Congress has repeatedly amended the FCA in ways that expand its coverage and enhance the ability of whistleblowers to bring suits. We recognize that our recommendations run counter to this tide and that there is not yet the political will, much less a consensus, to substantially reconsider the FCA and how it is enforced. Nonetheless, we hope in this article to draw attention to some of its shortcomings and to lay the ground work for future changes.

I. Change The Role Of Qui Tam Relators. The *qui tam* provisions of the FCA empower private persons (called relators) to initiate litigation in the name of the United States. Under the current *qui tam* provisions, a relator files an FCA suit under seal and presents his/her evidence to the Department of Justice (DOJ) for review and investigation. The suit remains under seal while the DOJ investigates the case and decides whether to intervene and take control of the action or, instead, to decline intervention and let the relator proceed with the suit. Relators and their counsel are incentivized to file FCA actions by awarding them a share of any recovery plus their attorney's fees and costs. Relators are incentivized to continue the action when the DOJ declines to intervene by giving them a greater share of any recovery: 25-30% vs. 15-25% where the DOJ does intervene. Although the DOJ can seek dismissal of an action when it declines to intervene, it rarely does so—no matter how little merit DOJ finds in the action.

Qui tam provisions that permit private parties to enforce federal statutes and receive a share of the recovery are very rare. In 2000, the Supreme Court identified four contemporary federal qui tam statutes: the FCA, the Patent Act, and two Indian protection laws, one of which has since been changed. Of these, the FCA is by far the statute most often invoked by private parties. The FCA *qui tam* provisions are a product of history and were cobbled together over the course of 125 years. When the FCA was first enacted, during the Civil War, the DOJ did not exist; federal law enforcement fell to the Attorney General and his small staff in Washington, D.C., as well as to the then-independent U.S. Attorneys in each federal judicial district. As originally enacted, the FCA authorized relators to file and prosecute suits in the name of the United States; there was no provision for the government to take over the suit. In 1943, the FCA was amended to enable the government to review *qui tam* suits and intervene in ones it selected. The seal provision was added in 1986, when the FCA was restructured into its current form.

We submit that the utility and efficiency of the *qui tam* provisions has not been given sufficient scrutiny, especially in light of their *ad hoc* development. A close look at the current system demonstrates that whistleblowers play a needed and critical role in uncovering fraud and bringing it to the attention of the government. But the provisions that enable whistleblowers to initiate and conduct FCA suits on behalf of the United States are actually counterproductive - their costs exceed their benefits.

A. Relators should not prosecute FCA cases which the government declines to pursue. According to DOJ statistics (http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf), nearly 70% of all FCA recoveries since 1986 result from *qui tam* actions. But these same data indicate that, where the DOJ investigates a *qui tam* case and decides not to intervene to take over the action, the continued prosecution of that case by the relator is rarely successful. For every ten cases filed by relators, the DOJ intervenes in only two. The 80% of qui tam cases in which the DOJ declines to intervene ultimately prove to be meritless almost all of the time. Of the $3 billion recovered in *qui tam* actions during fiscal year 2013, only $109 million — 3.6% — was obtained from actions in which the DOJ declined to intervene. This is typical. Over the past 27 years, the recoveries from cases in which the DOJ declined to intervene have averaged only 3.6% of the total recovery from all *qui tam* cases. On average, 96.4% of the monies ultimately recovered comes from the 20% of *qui tam* cases that the DOJ decides are worthy of its attention.

This data shows that (1) whistleblowers play an important role in alerting the government about potential violations of the FCA; and (2) the DOJ does a good job of evaluating *qui tam* suits and selecting those suits in which it will intervene. The data also shows that the prosecution of FCA cases in which the DOJ declines to intervene is an extraordinarily inefficient device for remedying fraud. Of course, a few of the cases in which the DOJ declines to intervene ultimately prove to be meritorious and result in recoveries, sometimes in the millions of dollars. The question is whether these occasional successes justify the costs to the courts, the litigants, and the public of litigating hundreds of meritless cases.

If the DOJ had to prosecute all *qui tam* cases, rather than being able to decline involvement in those that it decides are not worthwhile, the public would surely question why taxpayer dollars are being squandered on prosecuting 80% of the cases which yield only 3.6% of the ultimate recoveries. But, because the government does not shoulder the cost of prosecuting *qui tam* cases in which it declines to intervene, there is a tendency to view those cases—wrongly—as costless to the government and the public. Under this view, there is no downside to allowing relators to prosecute ''declined'' *qui tam* cases and there is some potential upside because those cases might (albeit rarely) bear fruit. This perspective is mistaken. There are substantial societal costs to allowing *qui tam* cases to proceed after the DOJ declines to intervene.

First, the hundreds of *qui tam* cases filed each year impose a significant burden on the federal courts and consume substantial tax dollars in that process. The cases typically are complicated, date back years, involve numerous issues, and implicate arcane and highly technical statutes, regulations or contract requirements. Furthermore, the cases are filed under seal and remain under seal for months or even years, which increases the management burden on the courts.

Second, the *qui tam* cases impose significant costs of defense. The cost of defending against a *qui tam* suit commonly runs into the hundreds of thousands of dollars (or more). While the public does not care about these costs in cases where the defendant is culpable, the public should care about the costs imposed by meritless claims. Such costs are ultimately borne by the innocent defendant (and its employees and owners) or else they are passed on to the defendant's customers in the form of higher prices. The government, itself, is the customer which is most likely to end up bearing a significant share of such defense costs in the form of higher prices. Moreover, the perceived risk and cost of defending

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against meritless *qui tam* cases tend to affect the pricing of all government contracts, not only those which actually generate such a claim. Given the billions of dollars worth of goods and services that the government procures each year, even a slight uptick in prices could offset all of the recoveries from meritorious FCA actions.

While the impact of higher prices on the government is indirect and difficult to measure, some of the costs of defending meritless *qui tam* cases are shifted directly to the government and potentially can be measured. Under the provisions of the Federal Acquisition Regulation (FAR), the government in certain circumstances must reimburse contractors for up to 80% of the legal fees and litigation expenses incurred in successfully defending a FCA action. Exactly how much the government spends on such reimbursements is unknown, but there is reason to believe the amount is substantial. During the past five fiscal years, 288 *qui tam* suits were filed in cases involving the Department of Defense (DOD) where the cost reimbursement provisions of the FAR potentially could apply. On average, the DOJ would have intervened in 58 of these cases, and declined to intervene in the remaining 230. Assuming (generously) that 10% of the declined cases will result in some recovery, that leaves 207 in which the defendant-contractor ultimately will prevail. If we assume an average cost of defense of $150,000 and that these cases involved contractors who could seek reimbursement, the government would have been obliged to pay reimbursements totaling $24,840,000. Yet, during this five year period, the total amount recovered in meritorious *qui tam* cases that were prosecuted by relators after the DOJ declined to intervene was only $9,863,700. Under this analysis the government might have suffered a net loss of $15 million by permitting all of these *qui tam* suits to proceed after it declined to intervene.

The validity of this analysis does not change even if the government is not suffering an actual loss with respect to all *qui tam* cases in which it declines to intervene. (The largest single category of *qui tam* cases involves health care, which are not subject to the FAR and do not require the government to reimburse defendants for their legal fees where the claim proves to be groundless). The costs and benefits of *qui tam* suits must be measured from a societal perspective, not simply the government's pocketbook. In terms of the public interest, if the cost of litigating meritless *qui tam* suits substantially exceeds the recoveries obtained from meritorious cases, then the system is counterproductive. In any event, a system in which 80% of the cases produce a mere 3% of the recoveries is grossly inefficient. It wastes money that would be better spent or invested elsewhere.

Beyond being inefficient, it is unjust to structure the FCA in a manner that forces a large number of innocent parties to defend themselves against fraud charges in order to catch a few more wrongdoers. An effective anti-fraud program must seek not only to maximize the number of culpable parties who are detected and sanctioned, but also to minimize the number of innocent parties who are wrongly pursued. Imagine, for the sake of comparison, that 80% of the civil tax fraud cases that the IRS brought each year yielded only 3.6% of the total recoveries and that most of the taxpayers in those cases were eventually exonerated. The public outrage would be immense—and justifiably so.

These problems can all be solved by permitting only the DOJ to prosecute FCA suits. Enforcement of the FCA should be limited to those cases that the DOJ finds worthy of its attention. The resulting system would be far more efficient — it would recover 96.4% of the monies currently being recovered through *qui tam* cases but with far fewer cases (up to 80% fewer cases). And this new system would be much fairer because it would drastically reduce the number of innocent parties who are forced to defend against FCA suits.

The new system would also substantially lighten the burden that FCA cases impose on federal courts. There would be far fewer FCA cases for the courts to process. And those cases would not be cluttered with vexing procedural issues that apply only to suits prosecuted by relators: disputes involving the public disclosure bar, whether the relator was an ''original source'', and whether the relator was the ''first to file.''

Furthermore, this new system would promote better outcomes in individual cases and better development of FCA case law. *Qui tam* relators and their counsel are ''bounty-hunters'' who are primarily motivated by personal economic reward—not by shaping the law, pursuing larger policy interests or protecting the government or the public. As a result, they are inclined to ''push the envelope'' in terms of stretching the FCA to cover as much conduct as possible. They also are motivated to take whatever litigation positions maximize their chance of recovering money. The DOJ, in contrast, does not receive a share of the FCA recoveries it obtains, and its objective is not simply to maximize the amount of those recoveries. Rather, the DOJ's goal is to obtain a just outcome in the FCA cases it prosecutes and to discourage future misconduct. Although the DOJ does pay attention to the recoveries it obtains, it also pays attention to policy considerations and shaping the law so as to protect the interests of the government and the public.

B. Relators should not file FCA suits. The current procedure under which relators file *qui tam* suits only makes sense based upon the assumption that the relators are going to end up prosecuting some number of those cases by themselves, without assistance from the DOJ. Once that premise is eliminated - if relators can no longer prosecute FCA cases that the DOJ declines to pursue - it is senseless to have relators frame complaints and initiate suits which then must be sealed while the DOJ investigates their merit. Instead, the appropriate role of the whistleblower would be to provide information to the DOJ. In turn, the DOJ would evaluate the evidence and decide whether to file a (regular, unsealed) FCA suit and, if so, determine exactly what claims it will bring.

This revision would cure the significant problems associated with the current process of filing *qui tam* complaints under seal to enable the government to investigate their merits confidentially. The FCA provides that complaints are sealed for an initial period of 60 days, but the government may seek extensions from the court. In practice, the seal period has ended up being far longer than 60 days. An October 2009 Federal Judicial Center report found that nearly half of the cases filed during the previous year were still sealed and approximately 15% of cases filed between 2000 and 2003 remained under seal. The U.S. Attorney's Office in Philadelphia has stated that most intervened or settled *qui tam* cases in that district are under seal for *at least* two years. And the ACLU has reported that cases typically remain sealed for 2 to 3 years, and have been sealed for as long as 9 years. A divided federal court of appeals has ruled that the seal provisions do not violate the public's First Amendment right of access to judicial proceedings. Nonetheless, the current system—where complaints routinely remain under seal for a period of years—is inconsistent with fundamental American values that courts should conduct their business publicly and expeditiously. And it is inconsistent with due process concerns that defendants be apprised in timely fashion of allegations against them so that they can prepare their defense while relevant records are still available and witness memories are still fresh.

Furthermore, taking whistleblowers out of the case-filing process would generate other significant benefits as well. The prosecution of FCA cases would become far more uniform and effective—and in line with the handling of all other federal causes of action—if the role of whistleblowers were limited to submitting information to the DOJ and the DOJ was given sole responsibility for deciding whether and how to proceed with cases. The DOJ would be better able to establish its own priorities and strategically allocate its enforcement resources, rather than having to respond to any and all cases that relators decide to file and being constrained by how much time different federal judges are willing to allow for case investigation before the seal is lifted. Instead of constantly being reactive, the DOJ could more easily develop its own proactive enforcement programs aimed at particular practices or programs.

The current *qui tam* procedure forces the allocation of considerable resources by the DOJ and the federal courts to any matter deemed by a particular relator and his/her counsel to warrant suit. Each case filed by a relator becomes part of the court's active docket and must be properly managed. The DOJ must investigate the case and then formally advise the court whether it will intervene. During that process, motions to continue the stay period must be filed and ruled upon. This system creates docket management problems for courts and consumes time and attention that could be more productively spent elsewhere. Under a revised system where the DOJ has sole responsibility to initiate FCA cases, DOJ can better control how much of its resources it devotes to the allegations of a particular relator. And the courts will not have to devote any resources to cases that the DOJ concludes are not worthwhile.

C. Relators should not participate in the prosecution of FCA cases which the government does pursue. Under the current law, the DOJ's intervention in a *qui tam* case does not oust the relator. Although the DOJ assumes primary responsibility for prosecuting the action, the relator can remain involved in the litigation. The relator can continue to pursue claims that the DOJ declines to adopt and can participate in the claims which the DOJ does adopt. The relator and his/her counsel can continue to earn legal fees and recover costs from the proceeds of the action. The relator can object to any proposed settlement of the case, and the relator's objections can be overridden only if the court determines, after a hearing, that the settlement is fair. Likewise, the relator can object to a dismissal of the action and must be given a hearing. The government or the defendant can ask the court to limit the relator's participation in the litigation, but this seldom happens.

The notion of having two sets of prosecutors—the DOJ and the relator—pursuing the government's claims in the same case makes little sense. It is a historical anomaly that results from the evolution of the FCA, as discussed above. There is no justification for continuing this anomaly if the FCA is revamped. In no other cases does the government permit whistleblowers to become co-prosecutors with it. The DOJ does not need litigation assistance, and the litigation process becomes more cumbersome whenever another party is added to the mix. There is no reason to believe that allowing the relator to participate in the prosecution and settlement of an FCA suit improves the outcome from the public's perspective. To the contrary, it likely detracts from the outcome because the relator has a self-interest in maximizing his/her share of any recovery and the relator's counsel has a self-interest interest in maximizing recoverable attorney's fees.

D. The role of whistleblowers under a revamped FCA. Accordingly, we recommend that whistleblowers should no longer be accorded standing to file FCA actions on behalf of the United States, or to participate in such actions as a party. The DOJ alone should be authorized to bring and maintain actions for violation of the FCA, just as it is exclusively responsible for enforcing other federal statutes. There is nothing unique about FCA cases that requires that private persons be given standing to sue in the name of the United States. The whistleblower, after submitting information to the DOJ, should have no rights regarding the prosecution of the matter except the right to share in any ultimate recovery.

Our proposal does not address how large a reward whistleblowers should receive for their information except that it would eliminate their ability to receive the higher award range (25-30% of any recovery) currently provided in cases where the government does not intervene. Under the current statute, a relator is entitled to receive between 15-25% of the recovery in a case in which the government intervenes ''depending upon the extent to which the [relator] substantially contributed to the prosecution of the action.'' The exact amount awarded to the relator is determined by the court. This existing system could be retained or it could be altered so that the amount of the award is determined by the DOJ rather than the court. The court is largely dependent upon the DOJ's input, in any event, in determining how substantial a contribution a relator has made to the prosecution of a particular case.

Our proposal would not affect the ability of a whistleblower to pursue a retaliation claim under the FCA. Such claims belong to the whistleblower as an individual, not to the United States, and they do not create the problems that we address.

II. Strengthen Incentives to Enforce the FCA Through Self-Policing The foremost interest of the public and the government is to prevent fraud from occurring in the first place. Close behind is the interest, when fraud does occur, in having it promptly detected, reported, and resolved. Further, the public interest is to accomplish these goals in the most cost-effective and efficient manner possible. Ideally, anti-fraud policies should align contractors and grantees with the government so that there is a shared interest in combating fraud.

It follows that government policies for fighting fraud should be designed to cause contractors and grantees to police themselves. After all, contractors and grantees

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are usually in the best position to prevent fraud, and to detect and correct fraudulent conduct when it does occur. Moreover, a system where the contractor or grantee detects and self-reports episodes of misconduct committed by its employees or agents is by far the most efficient and cost-effective from the perspective of the government and the public. Such a system minimizes the government's investigative costs and eliminates any need for litigation to establish liability. Furthermore, the government obtains the full amount of any financial recovery, without the need to pay a share to a third party. Accordingly, the provisions of the FCA should incentivize contractors and program participants to engage in self-policing by making it worthwhile for them to do so. We submit that the statute, as currently structured, provides insufficient incentives for self-disclosures of violations.

A party that violates the FCA is liable for treble the amount of the government's damages, plus a civil penalty of between $5,500 and $11,000 for each false claim. A defendant who self-reports a fraud to the government is liable for double damages, rather than treble damages, but no reduction in civil penalties, if: (1) the defendant discloses all information about the violation within 30 days after it first obtains the information, (2) the defendant fully cooperates with the government's investigation, and (3) the defendant did not self-report in an effort to mitigate the impact of a pending proceeding or investigation about the violation. If the self-disclosure was not made within 30 days, the defendant remains potentially liable for treble damages. Further, a self-disclosure does not cut off the rights of a *qui tam* relator who filed suit before the disclosure was made, or even after the disclosure was made if the relator qualifies as an ''original source.'' Under those circumstances, the self-reporting defendant would also be liable for the relator's attorneys fees and costs, in addition to double or treble damages and civil penalties. (These consequences flowing from a *qui tam* suit would be obviated if our proposal to revamp the role of relators is adopted).

Thus, as currently structured, the FCA provides a relatively weak incentive for contractors and program participants to step forward and disclose their own violations. Defendants who do not self-disclose generally can settle an FCA case with the DOJ for double (rather than treble) damages plus some amount for civil penalties and/or applicable costs. This DOJ settlement practice is reasonable—some concessions must be made in order to make obtain a settlement. But if the government is prepared to accept double damages from defendants who have not reported their own false claims, it ought to grant considerably better terms to those defendants who do self-report. The DOJ Antitrust Division, for example, has a highly successful Corporate Leniency Program that guarantees no criminal prosecution of a company that voluntarily reports an antitrust violation before the DOJ learns of it. Congress enhanced the attractiveness of this leniency program in 2004 by limiting the civil liability of such self-reporters to single damages, rather than treble damages. A similarly lenient approach commends itself here. We recommend the following changes to the FCA so that it better incentivizes contractors and program participants to engage in self-policing.

First, the sanctions imposed on defendants who self-report a violation should be reduced to single damages. According to the Supreme Court, double or treble damages under the FCA serve several purposes, including recoupment of the fraud, recovering the costs of detection and investigation to root out the fraud, rewarding whistleblowers in *qui tam* cases, providing a substitute for prejudgment interest, and punishment. In self-disclosure cases, however, most of these rationales are inapplicable. The Government still needs to recoup its loss and, perhaps, the time value of the money at issue. But it has no detection or investigative costs to recoup and no need to recover a bounty with which to reward a whistleblower. The need for a financial penalty for purposes of punishment and deterrence is at a minimum, particularly since it must be weighed against the countervailing need to reinforce the self-disclosure process. These considerations suggest that single damages (plus interest), with all civil penalties being waived, would be adequate to compensate the government in such cases and better calculated to encourage self-reporting in future cases.

Second, the 30-day time limit for disclosing all information about the violation in order to obtain a reduction in damages under the FCA is arbitrary and too short. In most instances a contractor does not uncover a fraud all at once. The outlines of a problem often emerge gradually and, almost always, an internal investigation is necessary in order to learn all the relevant details and confirm whether the problem rises to the level of reportable misconduct. For example, the FAR mandatory self-disclosure rule, which was promulgated in 2008, does not establish a fixed time limit for making the disclosures but instead requires that they be ''timely.'' The commentary to the rule explains that that a contractor is expected to investigate the evidence to determine its credibility before deciding to disclose a suspected violation, and the timeliness of a disclosure is measured from the date at which the evidence is determined to be credible. This more realistic and elastic concept of timeliness should be incorporated into the FCA. It makes no sense to have a timeliness requirement in the FCA that is unrealistic and out of synch with the related requirement in the FAR.

Third, companies should have an incentive under the FCA to establish and use an appropriate compliance system to prevent and detect misconduct. Under the FCA a defendant is liable if it submits a false claim with actual knowledge of its falsity *or* with deliberate ignorance or reckless disregard of the truth. Where a company or organization has implemented in good faith a reasonable compliance system that meets regulatory requirements, it should be entitled to a presumption that it did not act with deliberate ignorance or reckless disregard. (This presumption would not bear on whether the company acted with actual knowledge). Any dispute about whether the compliance system was adequate and implemented in good faith would be resolved by the court. This provision would provide a clear incentive to contractors and program participants to establish compliance systems which would help prevent fraud in all areas of the entity's operations. And it recognizes the reality that good compliance systems are worth having (and rewarding) even if they do not prevent or detect every instance of misconduct.

III. Eliminate the Mandatory Minimum Fine for Each Separate False Claim. A final area in which the FCA needs revision relates to civil penalties. Currently, a defendant who violates the FCA is liable for a mandatory civil penalty of not less than $5,500 or more than $11,000 for each false claim. Because each invoice that is tainted by a fraud constitutes a separate false claim, the civil penalties can become quite substantial. If the amount of the fraud is less than $5,500 per invoice, the amount of the civil penalties will exceed the amount of the actual damages and potentially even the trebled damages. In some cases, the amount of the civil penalties can become so disproportionate to the actual damages and to the wrongdoing at issue that it is unjust. In theory, the Eighth Amendment prohibition of excessive fines might provide relief in extreme situations, but the courts have been very reluctant to invoke the Eighth Amendment to invalidate civil penalties under the FCA. In one recent decision, a federal appeals court upheld penalties of $24 million based on thousands of separate false certifications in a case where no damages to the government had been proven and the defendant's total profit amount to some $150,000.

The remedy here is to eliminate the requirement of a minimum fine for each and every false claim, and instead let the court determine the appropriate amount of the fine up to the maximum of $11,000. There is no reason to worry that federal judges would abuse this expanded range of discretion and go ''soft'' on defendants when they set fines. To the contrary, it is a safe bet that courts will impose fines of less than $5,500 per claim only in situations where there is a good reason for doing so.

Although the issue of potentially excessive civil penalties arises only in a subset of FCA cases, it is nonetheless an important one because it affects the fairness of the FCA as a fraud remedy. The treble damages provision bears a direct relationship to the magnitude of the fraud, but the civil penalty provision does not and is likely to have the greatest impact precisely in those cases where it is disproportionately severe. Furthermore, the problem of excessive civil penalties affects not only the guilty but innocent contractors and program participants as well. For example, the largest single category of FCA cases involves healthcare. A frequent claim in such cases is that the defendant fraudulently manipulated or altered billing codes to maximize reimbursement from Medicare or Medicaid. This sort of alleged misconduct typically involves a relatively small amount of inflation on a large numbers of bills. In such cases, the mandatory minimum fine of $5,500 for each false bill has the effect of dramatically increasing the stakes far beyond the scope of the alleged fraud—the prospective fines may be 10, 20, or even 50 times the amount of the alleged loss to the government. Faced with the prospect of crippling liability in the event of an adverse verdict, even an innocent defendant may well choose to settle the claim rather than contest it.

From a systemic perspective, amending the FCA to let the court determine the amount of the fine would result in more evenhanded treatment of all FCA cases, including those cases that are settled. The stakes in every case would be tied to the size of the alleged fraud rather than having a subset where the stakes are distorted by disproportionate civil penalties. And the resolution of each case would turn on the magnitude of the wrongdoing, the amount of the loss, and the strength of the evidence, rather than the fortuity of mandatory fines that bear no relationship to those other factors.

IV. Conclusion. The FCA should be revised in several respects in order to enhance its effectiveness, efficiency, and fairness. First, its *qui tam* provisions should no longer permit private whistleblowers to file and prosecute FCA suits, but only to report suspected frauds to the DOJ for prosecution. Second, the statute should provide better, more realistic incentives for contractors and program participants to self-report their own violations. Finally, the mandatory minimum penalty for every false claim should be eliminated so that courts have greater discretion to set an appropriate penalty in each case. These reforms, we submit, would substantially improve the FCA so that it better serves the interests of the government and the public.

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