Written Statement of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform In Opposition to H.R. 4854 The False Claims Act Corrections Act of 2007

By
Peter B. Hutt II
Partner, Akin Gump Strauss Hauer & Feld LLP
Washington, D.C.

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I appreciate this chance to present my views on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposition to H.R. 4854.

For 20 years I have analyzed, written on, and advised clients about the False Claims Act ("FCA") and its qui tam provisions. I have also defended individuals and companies both small and large in many qui tam lawsuits.

The Chamber supports the Department of Justice in its ongoing efforts to root out and eliminate instances of fraud against the federal fisc. The Chamber recognizes that the False Claims Act has provided the government with an effective tool to combat fraud against the federal Treasury. The $20 billion returned to the federal Treasury over the past two decades is a testament to the reach of the statute, and the hundreds of qui tam actions filed every year show that the statute already provides sufficient incentives for whistleblowers to come forward. Accordingly, the Chamber strongly believes that no amendment to the statute is necessary or desirable.

The current proposed amendments would not assist the Department of Justice in its efforts to protect the federal Treasury. Rather, they would encourage private qui tam plaintiffs ("relators") to file baseless and derivative actions that are not in the interests of the government or the taxpayers of the United States.

Most significantly:

- The bill would unwisely turn the FCA into an all-purpose anti-fraud statute, by expanding liability to situations where companies and individuals submit claims for payment to any private entities or persons that have received government funds – situations that currently are governed by state tort and contract laws, not the federal FCA.

- The bill would permit the government and relators to realize unjustified windfall recoveries, by allowing recovery of treble damages sustained by third party "administrative beneficiaries," even when no loss is suffered by the government.

- The bill would virtually eliminate the FCA's "public disclosure" bar that safeguards against parasitic qui tam lawsuits, opening the door to huge financial recoveries for relators who bring no new information to the government.

- The bill would create conflicts of interest within the federal workforce and undermine public trust in government by permitting current and former government employees to file qui tam actions and thereby use information learned in government service for their own personal gain.

- The bill would invite baseless qui tam lawsuits by exempting relators, but not the Department of Justice, from the requirement that all federal court litigants plead with particularity all elements of claims sounding in fraud.

- The bill would extend the six-year statute of limitations to ten years, allowing stale claims and encouraging relators to delay filing their claims in order to maximize the government's financial loss and thereby increase their own recovery.

- The bill would unnecessarily and confusingly expand the anti-retaliation provisions of the statute.

- The bill would expand the use of Civil Investigative Demands and allow relators to review and piggyback off pre-discovery information obtained by the Department of Justice.

In sum, the real effect of the package of amendments in H.R. 4854 would not be to assist the Department of Justice in its fight against fraud on the federal Treasury, but to assist qui tam plaintiffs in bringing unfounded and parasitic actions that benefit no one but the plaintiffs themselves and their lawyers.

I. H.R. 4854 IS DESIGNED TO STRENGTHEN THE HAND OF QUI TAM PLAINTIFFS AT THE EXPENSE OF THE GOVERNMENT AND DEFENDANTS

There are several important facts about the FCA and qui tam enforcement that serve as an important backdrop to consideration of H.R. 4854.

First, it is crucial to recognize that although the FCA has overall been an effective fraud-fighting tool, qui tam enforcement without DOJ intervention does not result in large recoveries for the Federal treasury. To the contrary, of the $20 billion recovered under the FCA since the 1986 Amendments, less than 2 percent was recovered in qui tam cases in which the DOJ declined to intervene. *See* Fraud Statistics – Overview, October 1, 1986 – September 20, 2007, Civil Division, U.S. Department of Justice, *available at* http://www.taf.org/statistics.htm (copy appended as Ex. 1). In other words, non-intervened qui tam actions are rarely meritorious, and secure a very low return to the United States.

Second, the cost to defendants of defending against qui tam actions is very high and sometimes debilitating. A great number of the defendants to qui tam actions are non-profits, local governments, universities, hospitals, individuals, small businesses, and other entities that receive federal funding. A sample of defendants from the last few years, as compiled by John T. Boese in his written testimony in opposition to S. 2041, includes:

Arkansas
Game and Fish Commission

California
Santa Clara County Office of Education
Old Baldy Council of Boy Scouts of America

Georgia
Augusta-Richmond County
Providence Missionary Baptist Church of Atlanta

Illinois
Village of River Forest
Board of Education of Chicago
Pekin Memorial Hospital

Michigan
Oakland Livingston Legal Aid

Missouri
City of St. Louis

New York
State Division of Housing and Community Renewal
Erie County Medical Center

North Carolina
Easter Seals UPC

Ohio
Cuyahoga Falls General Hospital

Pennsylvania
Mercy Hospital of Pittsburgh
Tyrone Hospital
Lavender Hill Herb Farm

Tennessee
St. Jude's Children's Research Hospital
Memphis Baptist Hospital
Valley Milk Products, LLC

Texas
Dallas-Forth Worth Int'l Airport Board
Hudson Independent School District
Ector County Hospital

Vermont
City of South Burlington

Washington
Housing Authority of Seattle

Even under existing law, these non-profit institutions and public entities are often very hard-pressed to defend themselves against allegations asserted by qui tam plaintiffs under the FCA. To avoid a massive loss under the FCA – which allows for recovery of treble damages as well as statutory penalties – these institutions have little choice but to devote valuable and scarce resources to their defense, often degrading their ability to meet their core missions. By expanding the scope of FCA liability and reducing available defenses, the effect of the amendments proposed in H.R. 4854 would disproportionately fall on non-profits, local governments, universities, and small businesses, who are least able to afford the high cost of defending against qui tam actions. In assessing H.R. 4854, it is crucial to keep firmly in mind the very high cost the proposed amendments would exert on these entities.

II. H.B. 4854 WOULD UNWISELY TURN THE FCA INTO AN ALL-PURPOSE ANTIFRAUD STATUTE BY EXTENDING LIABILITY TO CLAIMS THAT IMPLICATE NO FEDERAL INTEREST

Summary. H.R. 4854 includes new definitions of "government money or property" and "administrative beneficiary" that would transform the FCA into an all-purpose antifraud statute. Ten days ago, the Supreme Court issued a decision in the *Allison Engine* case that cautioned against precisely such an expansive interpretation of the FCA. *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 2008 WL 2329722 (2008). At the same time, the Court's opinion effectively reversed the D.C. Circuit's decision in the *Totten* case, removing one of the principal justifications for the current proposed language in H.R. 4854. In light of the *Allison Engine* decision, there is now little reason to enact the expansion of liability found in H.R. 4854, and good reason to heed the Court's unanimous warning against transforming the FCA into an expansive all-purpose antifraud statute.

The expansive new language in H.R. 4854 would impose liability on claims between private entities, as long as any portion of the funding used to pay the claims derived at some time from the federal Treasury. Moreover, H.R. 4854 would also impose liability on claims not even involving any federal funds, such as claims for private money held by a federal Bankruptcy Trustee. The current requirement for some nexus between a claim for payment and the interest of the United States Treasury would be severed. The proposed bill would effectively displace state contract and tort laws, imposing treble damages and penalties on claims between private entities that currently are addressed by state law. The expansion of liability envisioned by H.R. 4854 would reach far into the nation's economy and federalize routine disputes between private parties. This expansion is entirely unnecessary, and will impose substantial burdens and costs on a broad panoply of non-profits, universities, hospitals, small businesses, and other entities ill-equipped to deal with the enforcement regime of the FCA.

Current Law. As currently drafted, the three principal liability sections of the FCA impose liability on a person who submits a false or fraudulent claim, who makes or uses a false record or statement to get a false or fraudulent claim paid or approved, or who conspires to defraud the government by getting a false or fraudulent claim paid or approved. 31 U.S.C. §§ 3729(a)(1)-(2). The current law defines the crucial term "claim" as "any request or demand which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

Under this structure, the FCA does not impose liability when federal interests are not implicated, such as when false claims are submitted to private entities or false claims are presented for funds that are not U.S. government funds. *See, e.g., United States ex rel. Hutchins v. Wilentz, Goldman and Spitzer*, 253 F.3d 176 (3d Cir. 2001). Thus, the FCA generally has not imposed liability on claims for payment seeking private or foreign funds that the United States holds as custodian for the owner. *E.g., United States ex rel. DRC v. Custer Battles LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2006) (the FCA does not apply to claims submitted for funds belonging to the Coalition Provisional Authority in Iraq.) Historically, such conduct has been actionable under other provisions, including state tort or contract laws, not under the FCA.

Current law also makes clear that false claims made upon funds belonging to federal employees do not fall within the ambit of the FCA, even though the funds ultimately derive from the federal government. As one court stated, "it would indeed be an illogical result if any time a federal employee spent her federal wages, she was considered to be expending federal funds and therefore protected from fraud by the FCA." *United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc.*, 2000 WL 690250 (N.D. Ill. May 25, 2000).

Finally, the Supreme Court's decision in the *Allison Engine* case makes clear that, at least under sections (a)(2) and (a)(3) of the FCA, the current FCA imposes liability even when false claims for payment are "presented" to intermediaries, rather than directly to the United States. In so holding, the Supreme Court effectively overruled the case of *United States ex rel. Totten v. Bombardier*, 380 F.3d 488 (D.C. Cir. 2004), which had held to the contrary. The Supreme Court further clarified that under section (a)(2), "a defendant must intend that the Government itself pay the claim," and a defendant must further "intend[] that the false record or statement be *material* to the Government's decision to pay or approve the false claim." In other words, the FCA does not require that a claim be submitted directly *to* the government, but it does require that the defendant intended for a claim to be paid *by* the government.

The Proposed Amendments. Section 2 of the bill includes a new definition of "Government money or property" and other provisions that would represent a dramatic expansion of the scope of FCA liability into areas now covered by state contract and tort law. The bill defines "Government money or property" broadly as:

(a) money belonging to the United States Government;

(b) money or property the United States Government provides, has provided, or will reimburse to a contractor, grantee, agent, or other recipient to be spent or used on the Government's behalf or to advance Government programs; or

(c) money or property belonging to any 'administrative beneficiary.'

The phrase "administrative beneficiary" in turn is defined broadly as any "natural person or entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, collects, possesses, transmits, administers, manages, or acts as custodian of money or property."

A. Unwise Removal of the Nexus Between a Claim and the Government's Interests.

This expansion unwisely disassociates FCA liability from the act of seeking funds from the federal government. As currently drafted, the FCA subjects to liability a concrete act that is targeted at the federal government: namely, a defendant's attempt to have the government pay money to which the defendant is not entitled. By focusing on defendants who fraudulently seek payment from the government, the FCA properly combats "fraud *against* the Government." *Rainwater v. United States*, 356 U. S. 590, 592 (1958) (emphasis added). But Section 2 of H.R. 4854 softens the sharp focus of the FCA and transforms it into a general antifraud statute that has only a tenuous connection to the government's interests. Suppose, for example, that a nonprofit institution receives a general grant from a federal agency for its daily operations. Under the proposed bill, *any activity* paid for with those funds could be subject to a qui tam lawsuit simply because the original source of the funds was the federal government – even though the government has no articulable interest in the specific purposes for which those funds were expended. H.R. 4854 thus expands FCA liability to the broadest extent of federal funding, without regard to how attenuated or even nonexistent the government's interests may be at such a remove.

Further, Section 2 of H.R. 4584 is even less necessary today in light of the Supreme Court's decision in *Allison Engine*. One of the apparent purposes of H.R. 4584 was to eliminate *Totten*'s requirement of direct "presentment"; such a requirement, it was feared, would allow defendants to avoid FCA liability while still raiding the public fisc by submitting their false claims to a grantee and having that grantee use federal funds to pay those claims. But there is no longer any need for a statutory amendment to achieve this purpose; *Allison Engine* made clear that direct "presentment" is not a requirement for liability under subsections (a)(2) or (a)(3) of the FCA

However, despite removing any "presentment" requirement for section (a)(2) and (a)(3), the Supreme Court in *Allison Engine* crucially preserved the FCA's nexus between a false claim and a payment by the federal government by requiring that defendants at least have the *intent* of having claims paid by the government, as opposed to paid from private funds. This rule properly correlates the government's interest in protecting its funds with those activities that most threaten that interest. Although the precise details of the ruling in *Allison Engine* will have to be fleshed out by the lower courts in the years to come, there is no need for the dramatic revisions that Section 2 of H.R. 4584 would make to the FCA.

B. <u>The Broad Sweep of the Proposed Amendments</u>.

The proposed new definition of "Government money or property" would sweep broadly, potentially encompassing a broad range of conduct that has never been thought within the ambit of the FCA. The statute would encompass claims for money "to be spent or used on the Government's behalf," and even more broadly, money used "*to advance Government programs*." Relators can reliably be expected to argue for expansive interpretations of that language, and, contrary to current law, the language could conceivably encompass claims for virtually any funds that at some point derived from the U.S. government. For example:

- A false claim that a supplier submitted to a university laboratory that previously received a grant of federal funds could be actionable under the FCA, with the potential for treble damages and penalties.

- A disputed claim submitted to a building contractor that received federal money and commingled these funds with non-government money could fall within the scope of the FCA, even if the claim related to the contractor's commercial activities, and there is no federal interest whatsoever.

- Given the breadth of the language in the bill, conceivably any false claim submitted to a federal employee or other recipient of federal government benefits (such as Social Security) would be actionable under the statute, including, for example, claims from landscapers, telephone companies, hairdressers, and internet providers.

Indeed, the proposed bill could have the effect of displacing state laws, by imposing treble damages and penalties on fraud claims between private persons that are currently addressed by state contract and fraud laws. H.R. 4854 would dramatically expand the treble damages and penalties regime of the FCA into many facets of normal commercial activity. This expansion of federal liability is particularly unwarranted when state tort, contract, and antifraud laws already provide adequate protection against such alleged false claims. The fifty states have diverse and comprehensive regimes – including state-specific statutes and regulatory agencies – to police fraud within their borders. But Section 2 of H.R. 4584 would effectively supplant these regimes and unnecessarily replace them with a broad, generalized federal antifraud law.

Moreover, the broad new definition of "administrative beneficiary" would mean that the FCA encompasses claims made for non-U.S. funds that are in the possession of the U.S. government, contrary to the decision in *Custer Battles*. Under this language, all foreign government and private party funds the U.S. holds as a custodian would fall within the ambit of the FCA. Moreover, for example, claims against various trust funds administered by the United

States but funded with non-U.S. funds (such as environmental remediation trusts) could also be actionable under the FCA. There is no justification for these expansions of the statute, since the FCA's purpose is to protect the federal Treasury from fraudulent claims, not to protect monies of foreign governments or other third parties.

C. Effect of the Expansion of Liability.

Given the broad reach of federal funds, the scope of the proposed expansion of liability is truly breathtaking. As Justice Breyer recognized during the oral argument for the *Allison Engine* case, "government money today is in everything. So if it's in everything, then everything is going to become subject to this False Claims Act." Oral argument in *Allison Engine v. United States ex rel. Sanders*, US Supreme Court, No. 07-214 (Feb. 26, 2008, at 36 ll. 3-8). The Supreme Court's unanimous decision also acknowledged this point: if FCA liability extended to any false claim for "Government money or property," then the scope of the FCA would be "'almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants – as most of them do.'" *Allison Engine*, 2008 WL 2329722, at *5 (quoting *Totten*, 380 F.3d at 496). The Court expressly warned against interpretations that would "transform the FCA into an all-purpose antifraud statute." *Id.* Congress should heed this warning.

III. H.R. 4854 WOULD PERMIT THE GOVERNMENT AND RELATORS TO REALIZE WINDFALL RECOVERIES WHERE NO LOSS IS SUSTAINED BY THE GOVERNMENT

Summary. As a corollary to its expansion of liability to cover moneys belonging to third-party administrative beneficiaries, H.R. 4854 would permit the government to recover treble the amount of damages sustained by such administrative beneficiaries. Contrary to current law, this would permit the government and relators to recover substantial damages even where the government has suffered no loss at all. Permitting the government and relators to realize such pure windfalls is irrational, and underscores the folly of the proposed expansion of liability to protect moneys of third parties, rather than the federal Treasury.

Current Law. The current FCA provides that a person who violates the statute is liable "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." 31 U.S.C. § 3729(a). "Damages" are meant to represent compensation for an actual loss or injury suffered by the government. The Supreme Court has stated that the purpose of the damages provision is to "afford the government complete indemnity for the injuries done it" and to make the government "completely whole." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549-52 (1943).

Courts have thus routinely refused to award damages where they have concluded the government suffered no actual loss. *See, e.g., United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 923 (4th Cir. 2003); *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994). In such cases, however, a defendant found liable must still pay statutory penalties (now increased to the range of $5,500 to $11,000).

The Proposed Amendments. H.R. 4854 would upset the basic principle of the FCA that defendants are liable to pay damages only when the government sustains an actual loss. Instead, Section 2 of H.R. 4854 would permit trebling of "damages which the Government *or its administrative beneficiary* sustains." The bill defines an "administrative beneficiary" as "any entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, serves as custodian or trustee of money or property owned by that entity."

This change unnecessarily unmoors the statute from its stated purpose for almost 150 years – guarding against fraud to the federal treasury, rather than fraud against third parties. Third party administrative beneficiaries can already avail themselves of tort, contract, and fraud remedies if their funds are subjected to fraudulent claims.

Moreover, this proposed amendment would allow both the government and qui tam plaintiffs to obtain windfall recoveries in situations where third parties, but not the government, have suffered losses. The bill contemplates that, after any relator's share is paid, the government would return to the injured third party the amount of its "financial losses." H.R. 4854 section 3(f). But, because the FCA provides for treble damages and statutory penalties, this would mean that in most cases the government and any qui tam relator would realize a sizeable windfall. Assume, for example, the government recovers $3 million in trebled damages because of a $1 million loss sustained by a third party, plus $1 million in statutory penalties. After returning the $1 million to the injured party, the government would retain $3 million – even though it had suffered no loss whatever. In qui tam cases, some portion of the $3 million windfall would be shared with the relator. There is no justification or rationale for permitting the government and relators to recover windfalls in cases where the government suffers no loss itself.

Furthermore, H.R. 4854 inappropriately seeks to protect the interests of relators at the expense of the injured third parties. If the goal of this revision were to protect injured administrative beneficiaries, any FCA award would be applied first to compensate the financial losses of the beneficiaries. But section 3(f) of the bill makes clear that any FCA recovery will go *first* to pay any award due the qui tam plaintiff, and only afterward to compensate the administrative beneficiary for its losses. Because of the relator's prior right to payment, the administrative beneficiary may never recover the full amount of its loss. And even if the administrative beneficiary is fully compensated, the relator will in many cases recover more than the administrative beneficiary that suffered the loss. These are unjustifiable results.

In yet another sign of the priority that H.R. 4854 gives to qui tam plaintiffs, section 3(f) further provides that if the injured third party seeks to avail itself of alternative remedies to make itself whole for its losses, relators will be able to claim a share of any amounts recovered directly by the third party through these separate, unrelated proceedings. This is truly perverse, and seems unjustifiably aimed at strengthening the hand of the relator at the expense of the government and the third party that actually suffers the loss. Under this provision, a relator could seek to recover as part of his statutory "share" of the proceeds amounts far in excess of the amounts recovered by the injured third party, and these amounts would all come out of amounts that otherwise would remain in the federal treasury. For example, building on the example above, assume that the administrative beneficiary recovers an additional $1 million in alternative remedies. The relator would then have a claim for 25 to 30 percent of this amount from the government, although the government would not have any right to seek any portion of the alternative remedy from the administrative beneficiary. This result is bizarre and amounts to a gratuitous "windfall-sharing" scheme set up for the benefit of relators.

In short, H.R. 4854 sets up a scheme that is fundamentally irrational and operates to the benefit of relators, not the government or the third parties that have suffered losses.

IV. H.R. 4854 WOULD EVISCERATE THE FCA "PUBLIC DISCLOSURE" BAR THAT HAS EFFECTIVELY SAFEGUARDED AGAINST PARASITIC QUI TAM LAWSUITS

Summary. H.R. 4854 would upset the delicate and effective balance of the qui tam provisions in the current FCA by severely curtailing the "public disclosure" bar that safeguards against parasitic qui tam actions that are of no value to the United States. In 1986, Congress developed the public disclosure bar and its original source exception, 31 U.S.C. § 3730(e)(4), in an effort to balance the need to encourage true whistleblowers while at the same time preventing parasitic suits brought by relators who had nothing new to offer. The public disclosure bar has thus ensured that the incentives of the FCA's qui tam provisions – namely, a share of any recovery – would be given to those who genuinely deserved such a reward – whistleblowers who were aware of fraud and brought that information to light.

This statutory bar has worked effectively for 20 years to permit the government and defendants to seek dismissal of lawsuits filed by individuals who are motivated by the prospect of a potential bounty, but who offer no new information of fraud to the government. In fact, the public disclosure bar has been one of the most effective means for smaller defendants to have meritless and parasitic lawsuits dismissed without engaging in expensive discovery or protracted litigation.

However, by stripping defendants of the ability to seek dismissal of parasitic suits under the public disclosure bar, and by weakening the provisions of the bar, H.R. 4584 will encourage parasitic lawsuits and upset the sensible structure of the qui tam provisions of the FCA.

Current Law. The purpose of the qui tam provisions of the Act is to "enhance the Government's ability to recover losses sustained as a result of fraud," by encouraging whistleblowers to come forward with fresh information concerning such fraud, in exchange for a percentage of the government's ultimate recovery. S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5266. As one court aptly noted, the qui tam enforcement mechanism essentially allows the Government to "purchase" from private citizens the information they may have about fraud on the U.S. Treasury. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

In the 1986 Amendments, Congress enacted the current public disclosure bar in an effort to ensure that the rewards of a qui tam action are afforded only to individuals who assist the government by providing valuable information, not to those who merely echo public information. Its core purpose is to safeguard against "parasitic exploitation of the public coffers

[by] . . . opportunistic plaintiffs who have no significant information to contribute of their own," while rewarding "whistle-blowing insiders with genuinely valuable information." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

As currently drafted, the public disclosure bar in the FCA deprives a court of jurisdiction over qui tam actions that are "based upon the public disclosure of allegations or transactions," unless the qui tam relator is the "original source of the information." 31 U.S.C. § 3730(e)(4)(A). An original source is a person with "direct and independent knowledge" of the information who "voluntarily provided the information to the Government" before filing an action. *Id.* § 3730(e)(4)(B). Both the United States and defendants are able to seek dismissal of a qui tam lawsuit that fails to meet the requirements of the public disclosure bar. In addition, because the bar is jurisdictional in nature, a court can also dismiss a qui tam lawsuit *sua sponte* on public disclosure grounds.

The public disclosure bar has worked effectively, by deputizing defendants to determine if relators have the type of fresh information that Congress intended to reward and to move to dismiss actions where relators do not. Although several aspects of the current public disclosure bar have been subject to varying interpretations, courts agree on its basic purpose and utility, and they have been converging on the specific details of the law as they flesh out the meaning of the statutory language. Just last year, for example, the Supreme Court decided its first case construing the public disclosure bar, in *Rockwell International Corp. v. United States ex rel. Stone,* 127 S. Ct. 1397 (2007), which addressed the scope of knowledge that a relator must possess to qualify as an "original source." Defendants have come to rely upon the public disclosure bar to protect themselves from meritless and parasitic lawsuits. In fact, for smaller defendants that do not have sufficient resources to engage in lengthy discovery or trial litigation – such as nonprofits and similar entities – the public disclosure bar has proven essential to protecting their interests.

The Proposed Amendments. Section 3 of H.R. 4854 would eviscerate the public disclosure bar and open the door to the most egregious types of "parasitic" lawsuits that the statute since 1986 has effectively eliminated.

A. Stripping Defendants' Ability to Seek Dismissal.

The bill would provide that only the DOJ may seek to dismiss relator claims on public disclosure grounds. Defendants would not be able to seek dismissal of parasitic qui tam suits, nor would a court be able to raise the issue sua sponte as a jurisdictional matter. This change would have the effect of gutting any enforcement of the public disclosure provision. As a practical matter, the defendant to an FCA lawsuit, not the DOJ, has the incentive to investigate whether a relator based his lawsuit on public disclosures, and if so to seek dismissal. Although the DOJ may in obvious and egregious cases decide to seek dismissal, in most non-intervened matters it will have little incentive to do so.

Giving the DOJ the exclusive burden of "policing" all qui tam actions to winnow out the parasitic suits places a huge additional burden on the DOJ. There are hundreds of new qui tam actions filed every year. As a practical matter, the DOJ will likely devote its limited resources to investigating qui tam allegations and prosecuting meritorious cases, rather than further investigating qui tam matters in which it has already decided not to intervene.

The end result of H.R. 4854 is apparent – parasitic lawsuits that are now routinely dismissed will be permitted to go forward. The better policy, by far, is that embodied in the current structure of the public disclosure provision – deputize defendants and empower courts to ensure that only true whistleblowers, rather than parasitic plaintiffs, go forward with qui tam actions.

B. Weakening the Public Disclosure Standard.

Moreover, even where the DOJ might seek to dismiss a parasitic case under the proposed bill, it would need to meet a much higher threshold than under the current statute. Under H.R. 4854, the DOJ would need to establish that the relator's "allegations relating to all essential elements of liability of the action or claim are based *exclusively*" on a public disclosure. The DOJ would also need to establish that the relator "derived his knowledge of *all* essential elements of liability" from the public disclosure. In practice, parasitic qui tam relators would easily be able to evade these standards, making it very difficult for the DOJ to dismiss on public disclosure grounds. Relators and their counsel in most cases will be able to add a scrap of new information to the publicly disclosed information that underlies most of their allegations, and argue that their case is therefore not based "exclusively" on the public disclosure, or that they did not derive "all" information from the public disclosure. The result would be a flood of cases in which relators take publicly disclosed information of fraud and add minor and inconsequential details to evade the public disclosure bar. This flouts the policy behind the qui tam provisions, which are intended to reward only qui tam plaintiffs who bring fresh information to the government.

In addition, H.R. 4854 further dilutes the public disclosure bar by defining "public disclosures" as disclosures that are "made on the public record or have otherwise been disseminated broadly to the general public." This language is hopelessly unclear and will inevitably lead to a great deal of litigation. It is unclear under this language, for example, whether publication of allegations of fraud in certain types of the news media would meet this standard. Thus publication of allegations in newspapers of limited circulation might, arguably, not qualify as "public disclosures." It is also unclear whether a public disclosure in an administrative audit or investigation – particularly in an industry that is obscure to the "general public," if not to participants in and regulators of that industry – would qualify as being made "on the public record" or being "disseminated broadly to the general public."

H.R. 4854 would also unjustifiably limit "public disclosures" to information revealed in *federal* – and not state – proceedings, hearings, reports, etc. There is no basis for this limitation. The source of a parasitic lawsuit's information has no effect on its lack of justification. A relator that does no more than parrot information derived from state or local investigations or audits is not providing "fresh" information to the federal government. To the contrary, the states and local governments routinely cooperate with the federal government on investigations of potential fraud, and it would be perverse to permit relators to file qui tam lawsuits based on information from state or local investigations that might soon be provided to federal investigators. In such cases, the relator has provided no benefit whatever to the federal government.

In sum, the purpose and likely effect of H.R. 4854 is clear: to kill the public disclosure provision altogether. Although the DOJ in theory would be able to seek dismissal of parasitic lawsuits, in practice it does not have the resources or inclination to do so, particularly in light of the far more restrictive language in H.R. 4854. Relators and their attorneys will have no reason to fear dismissal, and, as the history of the qui tam provisions teaches, there will be a flood of cases asserting claims based largely, and sometimes exclusively, on information already known to the government or reported in the news media. H.R. 4854 would thus destroy the core purpose of the public disclosure bar – to safeguard against parasitic qui tam suits that bring no value to the government in its fight against fraud.

V. H.R. 4854 WOULD ENCOURAGE GOVERNMENT EMPLOYEES TO PROFIT PERSONALLY FROM INFORMATION LEARNED IN GOVERNMENT SERVICE

Summary. The House should not under any circumstances pass Section 7 of H.R. 4854, which would permit current and former government employees to "cash in" on information they learn in the course of government employment, by filing qui tam actions based on such information. This section of the bill represents terrible public policy. The DOJ has for two decades opposed qui tam lawsuits filed by government employees, and in its letter to the Senate Judiciary Committee concerning S. 2041 it expressed its continuing strong opposition to the parallel provision in that bill. For the same reasons expressed by the Department of Justice, the Chamber strongly opposes Section 7.

Current Law. The current FCA does not include any express prohibition on government employees serving as qui tam plaintiffs. But investigators and auditors – the government employees most likely to learn of potential false claims – are often barred from filing qui tam actions by the "public disclosure" bar of the statute, 31 U.S.C. § 3730(e)(4)(A). Several courts have held that after a public disclosure of information, such employees cannot qualify as "original sources" of information because they do not have "independent" knowledge of the false claims, *e.g., United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990) or because they have an obligation to report such information to the government and thus cannot be deemed to have "voluntarily" provided information to the government. *E.g., United States ex rel. Biddle v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 147 F.3d 821, 829 (9th Cir. 1998); *United States ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740 (9th Cir. 1995) (en banc). Although several courts have permitted government employees to serve as qui tam plaintiffs, most have done so while recognizing that there are serious policy arguments against permitting such actions. *E.g., United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1212 (10th Cir. 2003).

The Proposed Amendments. Section 7 of the proposed legislation would, in practice, allow virtually all current and former government employees to profit from their employment by filing qui tam actions. Although the proposed bill sets up certain apparent hurdles that a government employee would need to clear, these hurdles would not deter many cases from going forward as a practical matter. The likely effect – indeed, the intended effect – of the legislation would be a dramatic increase in the number of qui tam cases filed by current and former government employees.

The proposed bill provides that current employees could act as qui tam plaintiffs if the DOJ failed to move to dismiss the action within 60 days of service of the suit. Moreover, the bill would permit the DOJ to seek dismissal only in limited circumstances – essentially, where: (1) "all the necessary and material allegations" were derived from an "open and active" government fraud investigation; or (2) the allegations were derived from the person's employment, the employee failed to disclose the evidence to the Inspector General, a supervisor, and the Attorney General, and the Attorney General failed to file an action within 12 months. For most government employees who are would-be relators, these threshold disclosures will be relatively simple to make, and it is doubtful that the DOJ will be successful in dismissing many actions.

These difficulties are exacerbated by the practical obstacles imposed by the proposed bill. Given its limited resources, it is unlikely that the DOJ will be able to seek dismissal of many cases filed by government employees. The DOJ will rarely have sufficient information within 60 days of receiving a qui tam suit to determine whether it has grounds to dismiss the relator. Passage of this bill would likely lead to a dramatic increase in the number of qui tam cases filed by government employees, further taxing DOJ resources and making it even more unlikely that the DOJ would be able to investigate the propriety of such cases adequately.

There is simply no justifiable policy reason to enact this change to the statute and encourage government employees to become qui tam plaintiffs in derogation of their job responsibilities and to the detriment of the federal treasury. The proposed bill would provide perverse incentives for every government auditor, investigator, and other employee to seek to profit from government employment by filing a qui tam suit. Any government employee who identifies a potential false claim as part of his job would have an incentive to file a qui tam lawsuit. Investigators within DOD, DHS, HHS, and elsewhere would have an incentive to retain for themselves any information about fraud so that they could later capitalize on this information for personal gain, making at best minimal disclosures to the Inspector General, Attorney General, and supervisors, and hoping that the DOJ would *not* file any action in response. Government investigators and auditors would also have an incentive to race to the courthouse before a case is fully developed, undermining the potential effectiveness of the case. Fraud recoveries that the government would have recouped in full under the current FCA would be reduced by up to 30 percent – the amount that a government employee could receive as a relator.

As the government has argued, and as the Ninth Circuit has recognized, government employees who are given an opportunity to gain privately from the use of information discovered during the course of their employment would be motivated:

> [t]o spend work time looking for personally remunerative cases . . . rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain; to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, thus prematurely tipping off the target, undermining the likely effectiveness of the case, and diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal financial interests.

Fine, 72 F.3d at 745 (quoting Amicus Brief of the United States in Support of Defendants-Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc at 8-9).

Moreover, encouragement of government employee relators runs directly contrary to the policy of the government to encourage voluntary disclosures of potential wrongdoing. Contractors and others receiving federal funds will have little incentive to make voluntary disclosures if they know that the government employees receiving these disclosures can turn around and file a qui tam action based upon the disclosure.

The proposed bill would potentially also provide incentives for government employees learning of fraud to quit their government service, rather than face any restrictions on their ability to file suit. The restrictions set forth in H.R. 4854 appear to apply only to *current* employees of the Federal Government. Thus, it appears that the legislation may impose no restrictions on *former* government employees, who could act as qui tam plaintiffs without restriction, even where their information is derived from their government service.

The inevitable result of these disastrous amendments would be a decrease in public confidence in the integrity and impartiality of government employees. The public trusts the government only when it believes that government officials are acting objectively and impartially in the public interest. But that belief is unsustainable if government employees have a powerful monetary incentive to pursue their private interests at the expense of their public duties. *See Fine*, 72 F.3d at 748 (Trott, J., concurring) ("Such an abuse could only cause the public to distrust government officials even more than the public already does."). As Justice Jackson prophetically noted in his dissent in *United States ex rel Marcus v. Hess*, 317 U.S. 537, 560 (1943), referring to the initial qui tam legislation passed in 1863:

> To accept the view of 1863 to mean that today law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one. . . . If we were to add motives of personal avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation.

VI. H.R. 4854 WOULD ENCOURAGE UNFOUNDED QUI TAM LAWSUITS BY EXEMPTING RELATORS FROM COMPLIANCE WITH RULE 9(b)

Summary. H.R. 4854 would exempt relators, but not the DOJ, from the requirement that federal court litigants plead with particularity all elements of claims sounding in fraud. Contrary to the requirements of Rule 9(b), the bill would permit relators to allege facts that provide merely a "reasonable indication" of a violation of the FCA. This is a dramatic weakening of the standard imposed by Rule 9(b), and would allow relators with little or no knowledge of fraud to assert speculative, unfounded allegations. This special relaxation of the Federal Rules of Civil Procedure for qui tam plaintiffs would flout the central purposes of Rule 9(b) – to ensure that defendants do not suffer serious public accusations of fraud unless plaintiffs have specific information about the fraud, and to put defendants on notice of the crucial facts so they can prepare a defense.

Moreover, there is no basis whatsoever for relaxing the standard of Rule 9(b) for relators, but holding the DOJ to compliance with Rule 9(b) when it files a complaint. The purpose of H.R. 4854 is evident: To allow relators an exemption from the pleading rules every other litigant in federal court is required to meet. The result of H.R. 4854 will be a torrent of qui tam cases asserting speculative, baseless claims of the sort that now are dismissed under Rule 9(b).

Current Law.

Rule 9(b) of the Federal Rules of Civil Procedure provides that "in alleging fraud . . . , a party must state with particularity the circumstances constituting fraud." Virtually every court has agreed that actions asserted under the False Claims Act sound in fraud, and therefore must comply with the requirements of Rule 9(b). A complaint that fails to comply with Rule 9(b) is subject to dismissal under Rule 12(b)(6).

Courts are generally in agreement as to the important purposes served by Rule 9(b). As the Fourth Circuit has stated:

> First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of. . . . Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (citations omitted); *see also* 5A Wright & Miller, *Federal Practice and Procedure* § 1296 (noting that "Rule 9(b) is necessary to safeguard potential defendants from lightly made claims charging the commission of acts that involve some degree of moral turpitude. . . . [T]he pleading rule is for the protection of the defendant's reputation and goodwill."). Moreover, as one court noted, it is particularly inappropriate to relax Rule 9(b) for qui tam complaints, since the very purpose of the qui tam provision is to permit suits by individuals who "have independently obtained knowledge of fraud . . . A special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate." *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

Although courts differ in how they characterize the pleading standards of Rule 9(b), most courts have stated that a complaint must allege "the who, what, when, where, and how: the first paragraph of any newspaper story." *United States ex rel. Garst v. Lockheed Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003). Other have stated that the DOJ and relators must allege with particularity "'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999).

Many courts have recognized that the alleged "false or fraudulent claim" is the lynchpin for liability under the FCA, and therefore require that details concerning the claims allegedly submitted must be pleaded with particularity. *E.g., United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301 (11th Cir. 2002); *Sanderson v. HCA*, 447 F.3d 873 (6th Cir. 2006); *United States ex rel. Rost v. Pfizer, Inc.*, 446 F. Supp. 2d 6 (D. Mass. 2006).

The Proposed Amendments.

Section 4(c) of H.R. 4854 would add a provision entitled "Notice of Claims" to the FCA:

> "In pleading an action brought under section 3730(b), a person shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made."

This provision would gut the requirement of Rule 9(b) that qui tam plaintiffs plead claims under the FCA with the degree of specificity required of every other person asserting fraud claims in federal court. This provision would allow qui tam plaintiffs to assert speculative, baseless claims of the sort that are routinely dismissed under current law, and go forward to discovery.

H.R. 4854 would run directly contrary to the central purposes of Rule 9(b) - to ensure that defendants do not suffer serious public allegations of fraud unless plaintiffs have specific information about the fraud, and to put defendants on notice of the crucial facts so they can prepare a defense. One of the most critical factual allegations for a defendant is often what claims are allegedly false. Defendants typically need to know what claims are at issue, so they can identify the statements made in the claims or the associated documentation that are allegedly "false or fraudulent." Knowing merely the alleged "course of misconduct" is frequently insufficient to put a defendant on notice of the alleged fraud, especially "when the defendant is a business entity that engages in a high volume of transactions and might have difficulty in identifying the one that is being challenged." 5A Wright & Miller, *Federal Practice and Procedure* § 1296. Particularity as to the specific claims at issue is also important because the FCA imposes penalties of $5,500 to $11,000 for each false claim. Without a clear sense of the claims that a relator is targeting, a defendant may have little idea about the extent of its potential liability.

Moreover, even if a relaxation of the Rule 9(b) standards were justified, the standard proposed in H.R. 4854 is very unclear and will lead to extensive litigation. First, it will be very difficult to determine what sorts of allegations "provide a reasonable indication" that violations are "likely" to have occurred. Second, it will be difficult to determine whether the allegations provide "adequate" notice to the government and defendants. By contrast, existing case law applying Rule 9(b) is fairly well-developed and provides standards that litigants can understand in assessing the pleading requirements for qui tam complaints.

Finally, as drafted, the provision only applies to actions brought under the qui tam provision of the FCA, 31 U.S.C. § 3730(b). Thus it would not apply to actions brought directly by the government under section 3730(a). There is no basis whatsoever for holding relators to a lower standard than the government in pleading their cases. The purpose of H.R. 4854 is thus clearly *not* to assist the DOJ in its fight against fraud. Rather, its purpose is to relax for relators alone the pleading rules by which every other litigant in federal court must abide, so that relators can proceed to discovery with cases that otherwise would be subject to dismissal for lack of particularity.

VII. H.R. 4854 WOULD ENCOURAGE STALE CLAIMS BY EXTENDING THE STATUTE OF LIMITATIONS TO AN UNJUSTIFIABLE 10 YEARS

Summary. Section 4(a) of H.R. 4854 would dramatically lengthen the time period for filing qui tam cases, from 6 to 10 years. This would be longer than almost all other federal limitations periods, and in practice would subject defendants to claims concerning events as old as 12 to 15 years. This unwarranted extension of the limitations period would allow lawsuits to be asserted long after crucial documents have been lost, and after witnesses' recollections have dimmed or vanished. Defendants will be unfairly prejudiced by such a long period. Moreover, businesses and other entities receiving money from the government would need to retain records for ten years or longer, imposing substantial costs that, ultimately, will be borne in part by the government and the taxpayer.

Current Law. The current FCA prohibits actions that are brought either (1) more than 6 years after the date on which the FCA violation is committed, or (2) more than 3 years after the date when facts material to the right of action are known (or reasonably should have been known) by the relevant government official, but in no event more than 10 years after the date on which the violation is committed. 31 U.S.C. § 3731(b). The 3-year "tolling" provision sensibly allows the government time to uncover fraud and bring an FCA action, while the 10-year limit just as sensibly prevents defendants from being subjected to overly stale fraud actions. Most courts have ruled that the 3-year tolling provision does not apply in non-intervened qui tam actions because otherwise relators would delay filing lawsuits in order to maximize their potential recovery. *E.g., United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 2006 WL 3491784, at *6, *15 (10th Cir. Dec. 5, 2006).

The Proposed Amendments. Section 4(a) of the proposed bill would lengthen the statute of limitations applicable to *all* FCA actions from 6 years to 10 years. Moreover, the practical effect of this amendment would be to extend the limitations period for qui tam actions for several years longer than 10 years – up to 15 years or more. This is because qui tam cases typically remain under seal for 1-2 years, and often up to 5 years, while DOJ investigates the allegations. Thus, when the case is finally unsealed, the defendant could be facing allegations that are 12 or even 15 years old.

Briefly put, 10 years is too long, let alone 15 years. It is difficult to determine any legitimate need for this extension. The existing 6-year statute is already more generous than almost all other federal statutes of limitations. By comparison, Clayton Act antitrust actions must be asserted within 4 years, *see* 15 U.S.C. § 15b; civil RICO claims within 4 years, *see* 18 U.S.C. § 1961; and Fair Labor Standards Act claims based on "willful" conduct within 3 years, *see* 29 U.S.C. § 255(a). Perhaps most analogous is the 5-year statute of limitations applicable to private rights of action involving claims of fraud concerning the federal securities laws. *See* 28 U.S.C. § 1658(b) It is impossible to explain why the FCA's existing 6-year statute, with a "tolling" provision of up to 10 years, is insufficient to protect the government's interests.

Such a lengthy limitations period would be fundamentally unfair to defendants, by subjecting them to claims involving events that took place 10 or more years ago. Inevitably, recollections will have dimmed. Witnesses will have died or otherwise become unavailable. Documents in the defendant's files will be misplaced, lost, or destroyed. Crucial documents in the hands of the government or third parties, which are often essential to establishing a defense, will be missing.

The proposed extension of the already generous statute of limitations is evidently designed to permit qui tam plaintiffs to increase the size of their recovery, by reaching 4 years further back in time than the FCA currently permits. The bill would provide a further incentive for would-be relators to delay filing suit as long as possible, to increase the financial harm to the government and therefore increase their potential qui tam recovery.

Moreover, section 4 of the proposed bill provides that when the government intervenes in a qui tam case, any additional claims it asserts arising out of the same "conduct, transactions, or occurrences" relate back to the date of the original qui tam complaint, even if those claims would otherwise be barred. The bill would thus allow the government to revive stale claims by adding otherwise time-barred claims to qui tam cases, potentially including breach of contract claims and other claims that otherwise would have been barred for many years.

The proposed change would impose substantial costs on American nonprofits, small businesses, and others receiving government funds. The potential for punitive liability under the FCA will force all responsible entities and individuals to maintain their records for to 15 years so that they can defend themselves against stale allegations of fraud. These added costs imposed on nonprofits, businesses, and others will in part be borne by the government and by taxpayers. These added costs could far outweigh any benefit to the government in extending the limitations period.

Finally, it is impossible to justify any government need for the extension of the limitations period. Where the DOJ truly needs more time to investigate the merits of a qui tam action filed under seal, it has the ability to enter into a tolling agreement with the defendant, and it routinely does so.

VIII. H.R. 4854 WOULD UNNECESSARILY AND CONFUSINGLY EXPAND THE ANTI-RETALIATION PROVISIONS OF THE STATUTE

Summary. Section 3(e) of H.R. 4854 would expand the FCA anti-retaliation provision, 31 U.S.C. § 37830(h), in ways that are both unnecessary and confusing. First, there is no evidence that the proposed expansions of the provision to encompass new types of plaintiffs and new types of protected conduct are necessary to safeguard actual or would-be qui tam plaintiffs from retaliation. Second, the proposed expansions are poorly drafted, confusing, and will open the door to lawsuits that are based on conduct unrelated to actual or proposed qui tam actions.

Current Law. The current FCA includes an anti-retaliation provision that provides employees with the right to bring claims against their employers if they are discriminated against because of "lawful acts" taken "in furtherance of" a qui tam action, "including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section." 31 U.S.C. § 3730(h). Courts have generally agreed that only an "employee" can assert a claim, and that the claim lies only against the employee's employer, not a third party or employees of the corporate employer. *E.g., Vessell v. DPS Assocs. of Charleston*, 148 F.3d 407, 412-13 (4th Cir. 1998); *Mruz v. Caring*, 991 F. Supp. 701 (D.N.J. 1998). Courts also agree that a plaintiff must establish that (1) the employee engaged in protected conduct, (2) the employer was aware of the employee's protected conduct, and (3) the employee was discriminated against wholly or in part because of that conduct. *E.g., Robertson v. Bell Helicopter*, 32 F.2d 948, 952 (5th Cir. 1994): *Norbreck v. Basin Elec. Power Coop.*, 215 F.3d 848, 851 (8th Cir. 2000). The statute provides for remedies including reinstatement, double the amount of backpay, interest, and litigation costs and attorneys' fees. Relators frequently file qui tam cases that not only assert substantive violations of the FCA, but also include claims seeking redress for alleged retaliation.

The Proposed Amendments. Section 3(e) of H.R. 4854 would make several changes to the language of the anti-retaliation provision to expand its reach. First, the proposed bill would expand the class of potential plaintiffs beyond merely "employees" to include "any person." Although the proposed language is not clear, it seems designed to expand the class of plaintiffs to include, *inter alia*, independent contractors, third-party agents, or others. It does not appear that this expansion of liability is necessary, since independent contractors and others that experience "discrimination" causing economic harm ordinarily can bring actions asserting breach of contract or tortious interference. The class of potential plaintiffs identified in H.R. 4854 is hopelessly vague and potentially expansive. At the least, the bill should carefully define the types of individuals who are within the class of potential plaintiffs.

Second, the bill would expand the class of potential defendants beyond "employers" to include "any other person" that "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" the plaintiff. Whereas the current statute imposes liability for actions done to the plaintiff "by his or her employer," the proposed legislation includes no such limiting language – instead, actionable retaliation could come from "any other person."

Under this bill, disgruntled employees might be able to sue not only their employers, but also their supervisors and others they blame for alleged retaliation. Plaintiffs might also be able to sue individuals and corporations that are unconnected to their employers. For example, a disgruntled subcontractor employee might attempt to sue a prime contractor or its employees for engaging in alleged retaliatory acts. Again, it does not appear that this expansion of liability is necessary, and at the least the bill should define with care the types of individuals and entities that are within the class of potential defendants.

Third, the bill would greatly expand the type of protected conduct to include any "efforts to stop one or more violations" of the FCA. Plaintiffs would no longer have to prove, as they do under the current statute, that their efforts were "in furtherance of" a qui tam action. This murky language could burden the federal courts with broad new classes of claims that are unconnected to FCA disputes. For example, a subcontractor that is disappointed at its treatment by a prime contractor in a routine contract dispute could allege "retaliation" in an attempt to achieve leverage in the contract dispute. Employees of government contractors, Medicare and Medicaid providers, and others that receive federal funding could assert liability by claiming they were attempting to stop a "violation" of the FCA, even if they never intended to file a qui tam lawsuit.

In sum, there is no need to expand the anti-retaliation provisions of the FCA. Relators who believe they were subjected to retaliation have been able to assert claims under the existing statutory language, and if the statute did not afford relief would be able to vindicate their interests through state law actions for breach of contract, tortious interference, or other claims. There is no substantial reason for the proposed amendments. And the murky, confusing language of the proposed amendments would guarantee years of litigation over its meaning.

IX. H.R. 4854 WOULD UNNECESSARILY EXPAND USE OF CIVIL INVESTIGATIVE DEMANDS AND IMPROPERLY PERMIT RELATORS TO PIGGYBACK OFF INFORMATION RECEIVED THEREBY

<u>Summary</u>. The current FCA gives the Attorney General the ability to issue Civil Investigative Demands ("CIDs") to investigate potential violations of the FCA. Section 6 of H.R. 4854 would expand the use of these CIDs and permit the DOJ to share information obtained from CIDs with relators. This is completely unwarranted and perverts the structure of the FCA. Under H.R. 4854, qui tam plaintiffs would be afforded access to information gained from government investigations, presumably so the qui tam plaintiffs can strengthen their cases in the event the government declines to intervene. This runs directly counter to the purpose of the qui tam provisions, which envision that relators will bring information of fraud to the government, not piggyback off government information.

<u>Current Law</u>. The current FCA gives the Attorney General the ability to issue CIDs to investigate potential violations of the FCA. 31 U.S.C. § 3733. This CID provision gives the Attorney General broad powers to seek documents, answers to written interrogatories, and oral testimony concerning potential violations in advance of commencing an FCA suit.

The statute expressly forbids any individual other than a DOJ employee or a government false claims law investigator to examine any documents, answers to interrogatories, or transcripts of oral testimony provided in response to a CID. 31 U.S.C. § 3733(i)(2)(C). Thus, neither relators nor their attorneys are permitted to review any information provided to the DOJ in response to a CID.

The Proposed Amendments. Section 6 of H.R. 4854 would change the statute to allow relators and their counsel access to the information obtained by the DOJ under a CID, if the DOJ "determine[d] it is necessary as part of any false claims act investigation."

There is no need for this change to the CID provisions of the FCA. First, the existing statute is fully effective at providing the DOJ with the means to collect information it needs to investigate potential false claims. The purpose of the CID provision is to afford the government an investigative tool that will permit it to investigate potential FCA violations, and determine whether there is sufficient evidence to file suit. There is no reason to allow CID materials to be shared with relators or their attorneys.

Second, the proposed change runs completely counter to the purpose of the qui tam provisions. The FCA contemplates that relators are whistleblowers who are bringing information to the United States. It is for that reason alone that relators are afforded a recovery under the FCA. Permitting relators to piggyback off the DOJ's investigative efforts in furtherance of their own interests is completely is at odds with the purpose of the qui tam provisions. The proposed change is simply designed to allow relators and their counsel an advance look at evidence they would otherwise not be able to review. Sharing CID information with relators before a qui tam suit is unsealed will mean that in cases the DOJ does not join, relators will be able to amend their complaints with information that they did not bring to the table – thus rewarding them despite the absence of any contribution to the elimination of fraud. Relators who receive CID materials will be piggybacking off the government's efforts, not their own information, which is directly contrary to the purpose of the FCA.

CONCLUSION

The ostensible goals of the proposed legislation are to improve the FCA so that it can be a more effective tool in the fight against waste, fraud, and abuse. But the proposed amendments, unfortunately, do nothing to clarify the statute or make it any more effective. Instead, the amendments unjustifiably expand the rewards for qui tam plaintiffs and their attorneys, while making it more difficult for defendants and the government to dismiss meritless suits. If enacted as written, these amendments will create intolerable conflicts of interest within the federal workplace, will virtually guarantee a dramatic increase in parasitic lawsuits asserted by bounty-hunters, will impose the spectre of treble damages and penalties on commercial transactions far afield from the government marketplace, and will make a potpourri of other ill-considered changes. These amendments will disproportionately impose costs on non-profits, universities, and small businesses, and discourage them from further participation in government programs. These amendments should not be enacted.

Exhibit 1

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2007

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
	NON QUI TAM	QUI TAM	NON QUI TAM[2]	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	340	31	86,479,949	0	0	0	**86,479,949**	0	0	0
1988	210	43	173,287,663	2,309,354	33,750	2,343,104	**175,630,767**	88,750	8,437	97,187
1989	221	88	197,202,180	15,111,719	1,681	15,113,400	**212,315,580**	1,446,770	200	1,446,970
1990	240	75	189,564,367	40,483,367	75,000	40,558,367	**230,122,734**	6,590,936	20,670	6,611,606
1991	234	84	270,445,467	70,384,431	154,500	70,538,931	**340,984,398**	10,667,537	18,750	10,686,287
1992	285	113	137,358,206	134,549,447	994,456	135,543,903	**272,902,109**	24,196,648	259,784	24,456,432
1993	304	138	181,945,576	183,643,787	6,078,000	189,721,787	**371,667,363**	27,576,235	1,766,902	29,343,137
1994	279	219	706,022,897	379,018,205	2,822,323	381,840,528	**1,087,863,425**	69,453,350	838,896	70,292,246
1995	232	269	269,989,642	239,024,292	1,635,000	240,659,292	**510,648,934**	45,162,296	465,800	45,628,096
1996	186	344	247,357,271	124,361,203	13,390,011	137,751,214	**385,108,485**	22,119,619	3,731,978	25,851,597
1997	187	546	465,568,061	621,919,274	6,021,200	627,940,474	**1,093,508,535**	65,857,419	1,658,485	67,515,904
1998	118	467	151,435,793	438,834,846	30,248,075	469,082,921	**620,518,714**	70,264,372	8,486,645	78,751,017
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	**693,382,773**	63,018,064	1,374,487	64,392,551
2000	95	363	367,887,197	1,208,715,188	1,688,957	1,210,404,145	**1,578,291,342**	183,682,977	375,143	184,058,120

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2007

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
			NON QUI TAM[2]	QUI TAM						
	NON QUI TAM	QUI TAM	TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL	TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
2001	86	311	492,196,974	1,167,531,786	128,587,151	1,296,118,937	**1,788,315,911**	186,908,812	30,701,881	217,610,693
2002	62	318	119,598,292	1,077,375,794	25,786,140	1,103,161,934	**1,222,760,226**	160,914,076	4,582,319	165,496,395
2003	92	334	703,003,368	1,512,457,284	5,185,911	1,517,643,195	**2,220,646,563**	331,873,857	1,382,741	333,256,598
2004	120	431	115,656,023	557,080,136	9,261,879	566,342,015	**681,998,038**	110,113,220	2,376,128	112,489,348
2005	107	406	276,914,983	1,148,057,102	7,081,143	1,155,138,245	**1,432,053,228**	168,409,043	1,911,560	170,320,603
2006	85	384	1,714,824,081	1,482,048,337	22,493,863	1,504,542,200	**3,219,366,281**	218,392,497	5,598,336	223,990,833
2007	128	356	559,255,115	1,436,468,132	15,370,120	1,451,838,252	**2,011,093,367**	173,221,033	4,169,498	177,390,531
TOTAL	**3,751**	**5,813**	**7,621,383,590**	**12,332,298,469**	**281,976,663**	**12,614,275,132**	**20,235,658,722**	**1,939,957,511**	**69,728,640**	**2,009,686,151**

NOTES:

1. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
2. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - HEALTH & HUMAN SERVICES[1]

October 1, 1986 - September 30, 2007

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]			
	NON QUI TAM	QUI TAM	NON QUI TAM[3] TOTAL	QUI TAM TOTAL	QUI TAM RELATOR SHARE[4]	TOTAL QUI TAM AND NON QUI TAM
1987	12	3	11,361,826	0	0	**11,361,826**
1988	8	5	2,182,675	355,000	88,750	**2,537,675**
1989	20	16	350,460	5,099,661	50,000	**5,450,121**
1990	27	11	10,327,500	903,158	119,474	**11,230,658**
1991	22	12	8,670,735	5,420,000	861,401	**14,090,735**
1992	29	15	9,821,640	2,192,478	446,648	**12,014,118**
1993	22	38	12,523,165	151,760,404	22,946,101	**164,283,569**
1994	42	76	381,470,015	6,520,815	1,185,597	**387,990,830**
1995	26	87	96,290,779	85,681,789	14,803,782	**181,972,568**
1996	20	179	63,059,873	51,576,698	9,374,568	**114,636,571**
1997	50	274	351,440,027	579,079,581	58,872,855	**930,519,608**
1998	35	275	40,107,920	258,638,736	47,822,301	**298,746,656**
1999	28	315	38,000,792	408,128,379	45,492,385	**446,129,171**
2000	36	210	208,899,015	725,011,203	115,759,246	**933,910,218**
2001	35	177	433,549,179	900,260,345	147,318,543	**1,333,809,524**
2002	24	194	74,567,427	960,450,528	153,825,657	**1,035,017,955**
2003	26	219	536,834,879	1,287,796,031	279,770,601	**1,824,630,910**
2004	28	275	34,816,447	475,370,142	97,434,278	**510,186,589**
2005	34	271	204,821,548	911,972,558	122,597,758	**1,116,794,106**
2006	18	223	1,047,745,714	1,239,957,154	166,506,405	**2,287,702,868**
2007	22	196	461,582,993	1,084,809,242	153,138,241	**1,546,392,235**
TOTAL	**564**	**3,071**	**4,028,424,609**	**9,140,983,902**	**1,438,414,591**	**13,169,408,511**

NOTES:

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - DEPARTMENT OF DEFENSE[1]

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]			
	NON QUI TAM	QUI TAM	NON QUI TAM[3] TOTAL	QUI TAM TOTAL	QUI TAM RELATOR SHARE[4]	TOTAL QUI TAM AND NON QUI TAM
1987	236	22	27,897,128	0	0	**27,897,128**
1988	122	28	149,136,213	33,750	8,438	**149,169,963**
1989	119	32	154,588,297	10,002,058	1,394,770	**164,590,355**
1990	74	41	117,715,978	21,743,463	3,804,470	**139,459,441**
1991	78	44	227,813,245	57,327,000	8,636,300	**285,140,245**
1992	73	61	62,003,695	129,294,456	23,874,784	**191,298,151**
1993	93	53	83,742,840	29,707,641	4,951,923	**113,450,481**
1994	62	82	226,083,266	370,666,206	68,163,879	**596,749,472**
1995	54	87	111,424,866	140,563,237	28,348,711	**251,988,103**
1996	44	81	78,085,099	61,833,653	12,522,473	**139,918,752**
1997	46	82	33,723,347	36,528,913	6,392,620	**70,252,260**
1998	29	62	71,063,139	150,180,185	20,511,801	**221,243,324**
1999	33	70	30,522,711	15,859,646	2,863,936	**46,382,357**
2000	10	46	53,007,693	96,287,825	15,812,059	**149,295,518**
2001	10	42	17,715,878	116,188,794	25,067,682	**133,904,672**
2002	16	44	15,017,365	19,407,658	2,957,196	**34,425,023**
2003	10	36	107,337,000	205,124,468	48,640,795	**312,461,468**
2004	16	50	10,098,491	17,684,000	3,031,610	**27,782,491**
2005	16	49	19,049,935	102,234,052	21,649,855	**121,283,987**
2006	13	74	586,430,385	48,809,599	10,488,996	**635,239,984**
2007	22	66	16,400,000	32,035,609	1,681,419	**48,435,609**
TOTAL	**1,176**	**1,152**	**2,198,856,571**	**1,661,512,213**	**310,803,717**	**3,860,368,784**

NOTES:

1. The information reported in this table covers matters in which the Department of Defense is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD)[1]

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]			
	NON QUI TAM	QUI TAM	NON QUI TAM[3] TOTAL	QUI TAM TOTAL	QUI TAM RELATOR SHARE[4]	TOTAL QUI TAM AND NON QUI TAM
1987	92	6	47,220,995	0	0	**47,220,995**
1988	80	10	21,968,775	1,954,354	0	**23,923,129**
1989	82	40	42,263,423	11,681	2,200	**42,275,104**
1990	139	23	61,520,889	17,911,746	2,687,662	**79,432,635**
1991	134	28	33,961,487	7,791,931	1,188,586	**41,753,418**
1992	183	37	65,532,871	4,056,969	135,000	**69,589,840**
1993	189	47	85,679,571	8,253,742	1,445,113	**93,933,313**
1994	175	61	98,469,616	4,653,507	942,770	**103,123,123**
1995	152	95	62,273,997	14,414,266	2,475,603	**76,688,263**
1996	122	84	106,212,299	24,340,863	3,954,557	**130,553,162**
1997	91	190	80,404,687	12,331,980	2,250,430	**92,736,667**
1998	54	130	40,264,734	60,264,000	10,416,915	**100,528,734**
1999	79	108	126,866,982	74,004,263	16,036,231	**200,871,245**
2000	49	107	105,980,489	389,105,117	52,486,815	**495,085,606**
2001	41	92	40,931,918	279,669,798	45,224,468	**320,601,716**
2002	22	80	30,013,500	123,303,748	8,713,542	**153,317,248**
2003	56	79	58,831,489	24,722,697	4,845,202	**83,554,186**
2004	76	106	70,741,084	73,287,873	12,023,461	**144,028,957**
2005	57	86	53,043,500	140,931,636	26,072,989	**193,975,136**
2006	54	87	80,647,982	215,775,447	46,995,431	**296,423,429**
2007	84	94	81,272,122	334,993,400	22,570,872	**416,265,522**
TOTAL	**2,011**	**1,590**	**1,394,102,410**	**1,811,779,018**	**260,467,847**	**3,205,881,428**

NOTES:

1. The information reported in this table covers matters in which the primary client agency is neither the Department of Health and Human Services nor the Department of Defense.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS
***QUI TAM* INTERVENTION DECISIONS & CASE STATUS**
As of September 30, 2007

Civil Division, U.S. Department of Justice

	ACTIVE	SETTLEMENT OR JUDGMENT	DISMISSED	UNCLEAR	TOTAL
U.S. Intervened	93	947	52	2	1,094
U.S. Declined	363	212	3,170	7	3,752
Under Investigation					967
					5,813