Written Statement of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform on H.R. 1788 The False Claims Act Correction Act of 2009

By

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Thank you for the opportunity to present the views of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform today. I have been asked to testify with respect to the False Claims Correction Act of 2009.[1]

In my private practice, I am a partner in a law firm where, among other things, I defend companies involved in civil False Claims Act ("FCA") actions, assist companies and other entities to develop and implement compliance programs with respect to their government contracts and programs, and assist companies and other entities in audits and internal investigations. I am a past chair of the American Bar Association Section of Public Contract Law. From 2005 – 2007, I chaired the Acquisition Advisory Panel (sometimes known as the SARA Panel), a federal advisory commission created by Congress and appointed by OMB. Our Panel studied the vulnerabilities in the Federal acquisition system and made over 100 findings and 80 recommendations to improve the system – many of which have been either enacted into law or implemented in regulation during the past two years.

At the outset, let me emphasize that the Chamber is very cognizant and supportive of the ongoing role of the Department of Justice and the agency Inspectors General to detect, investigate, and prosecute fraud involving taxpayer funds. The Chamber agrees that the False Claims Act is an important tool to fight fraud involving Federal contracts and programs. The recovery of more than $21.6 billion since 1986 is evidence that the existing statute is working. The Chamber believes, however, that the proposed amendments to the statute are not needed, and recent developments have reinforced that view. Furthermore, with regard to the other pieces of legislation being considered by the Committee today, the Chamber believes that the Congress needs to carefully assess any unintended consequences that those bills may have before adding more criminal laws in this area.

The question before the Committee is whether more incentives to encourage private *qui tam* plaintiffs (known as "relators") to file additional cases are necessary, either to enhance the

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[1] The text of H.R. 1788 was not yet available at the time this testimony was prepared, however, the reported version of H.R. 4854 from the 110th Congress was available.

existing law or to clarify its original intent. Importantly, numerous changes in the Government's oversight capabilities and resources, including the enactment of other legislation as well as the promulgation of new regulations since the 2008 version of the legislation was reported out of this Committee, raise serious questions about whether further incentives to *qui tam* plaintiffs (i) are warranted, (ii) would impede the Government's ability to investigate fraud, waste, and abuse in its programs, and (iii) would inappropriately siphon off recoveries which should accrue to the Government. While the FCA – *when deployed by the Government* – has been effective in targeting fraud, the use of *qui tam* actions to detect and deter fraud has not. The DOJ's own numbers tell the story. According to DOJ's most recent statistics, of the more than $21.6 billion recovered since the 1986 amendments became effective, only 2 percent was recovered in cases where DOJ did not intervene. *See* Fraud Statistics – Overview, October 1, 1986 – September 30, 2008, Civil Division, U.S. Department of Justice, *available at* http://www.taf.org/statistics.htm (copy attached).

The Chamber provided detailed testimony to the Committee last year concerning H.R. 4854 – The False Claims Correction Act of 2007. You have that testimony and analysis, and the Chamber stands by that testimony. Thus, it is not my intention to repeat those points at this time. However, since the Committee reported its bill last year, there have been several developments that should impact the Committee's consideration of the proposed legislation. Those include promulgation of the Mandatory Disclosure Rule under the Federal Acquisition Regulation ("FAR"), and the adoption of similar rules for assistance instruments under the guidance issued to implement the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"), as well as for transactions under the Emergency Economic Stabilization Act of 2008 for the Troubled Asset Relief Program ("TARP"). In addition, Congress has provided new investigative authorities and tools for the Inspectors General and the Government Accountability Office, and created entire new organizations to detect and deter fraud – including the appropriation of hundreds of millions of dollars for these new efforts. In light of these new rules and new capabilities, the federal Government is in a position to uncover and investigate potential frauds and false claims on its own, without creating yet more generous provisions to benefit *qui tam* plaintiffs.

Congress also should take into account the further alienation of commercial companies. Many commercial firms, particularly technology firms, give a wide berth to the high risk Federal market. Accordingly, the Government loses the benefits of affordable goods and services that have been vetted and refined through private competition. The Government recognizes the value such firms have to offer, and has periodically attempted to refine the regulatory scheme (as it did in the mid 90's with the Federal Acquisition Streamlining Act and the Federal Acquisition Reform Act) to reduce the risks to commercial companies. *See* FAR Part 12. However, uncertainties associated with potential FCA actions are a significant deterrent to commercial companies.

I. The Proposed Amendments Expand Liability Dramatically To Include Matters Far Outside The Federal Purview

Under the existing statute, the basic term "claim" is defined 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 contractors, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

Section 2 of H.R. 4854, as reported, includes sweeping new definitions that will expand the reach of FCA liability into matters well beyond what is customarily understood to be the reasonable interest of the Government. The reported legislation includes a new extremely broad definition of "Government money or property" 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 term "administrative beneficiary" introduces a wholly new concept. It 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."

These new definitions disconnect a fundamental linkage underlying the statute since its inception – the act of seeking funds from the Government. The existing law creates liability for actions aimed at obtaining Government funds for which the defendant is not eligible or entitled. Without that linkage, the FCA potentially will reach many persons and transactions who have only a loose connection to the purpose for which the funds were provided.

This redefinition is unnecessary given the Supreme Court's decision in *Allison Engine.* At the time this legislation was drafted and considered in 2007 and 2008, the apparent purpose was to overcome the D.C. Circuit's holding in *Totten* requiring presentment to the Government based on a concern that the FCA could be avoided by having false claims submitted to a grantee. However, the decision in *Allison Engine* addressed this concern by removing any requirement for direct presentment under 31 U.S.C. § 3729(a)(2) and (a)(3). The analysis of the statute by the Supreme Court preserves the linkage between a false claim and payment by the Government in its holding that the defendants must have the intent "to get" their claims paid by the Government. Without this connection, the Court noted that federal funds are in everything and any other interpretation would make the FCA "boundless" and turn it into an "all-purpose" fraud statute. While it may take time for the Court's ruling to be implemented in further cases, the decision establishes the basic principles and there is no need for a wholesale revision of the statute.

II. The New Government Approach To Protecting Federal Contracts And Programs Renders the Proposed Changes Unnecessary

A. A "Sea Change" – Mandatory Disclosure

In a highly significant regulatory development in late 2008, the Council that administers the FAR responded to urging by the DOJ and Congress (P.L. No. 110-252, Title VI, Chapter 1) and promulgated a new rule that requires Federal contractors to disclose *potential* violations of certain Federal criminal laws related to procurement (violations involving fraud, conflict of interest, bribery or gratuity statutes under Title 18) and violations of the False Claims Act, as well as the existence of "significant" overpayments. 73 Fed. Reg. 67074 (Nov. 12, 2008). This approach was quickly adopted for new initiatives. Similar mandatory disclosure provisions were made applicable to grants and cooperative agreements, as well as to subgrants funded under the Recovery Act, by OMB's February 18, 2009 implementing guidance. The Treasury Department also adopted a mandatory disclosure provision that is similar to the FAR rule when it promulgated its TARP Conflicts of Interest rule on January 21, 2009. 74 Fed. Reg. 3431, 3435 (31 C.F.R. 31.31.213(d)).

The Preamble to the FAR rule characterized mandatory disclosure as a "sea change." 73 Fed. Reg. at 67070. The mandatory disclosure rule has two parts. First, companies (other than small businesses and commercial item contractors) with contracts or subcontracts valued at over $5 million and a performance period of 120 days or more are required to have a written "Contractor Code of Business Ethics and Conduct." Such companies also are required to have an ongoing business ethics awareness and compliance program, and an internal control system. FAR 52.203-13. Although many of the major defense contractors have had such programs for 20 years or more, many mid-size companies and smaller businesses previously did not have elaborate ethics and compliance programs.

The rule creates a new mandatory contract clause which requires, among other things, timely written disclosure to the agency IG (with a copy to the Contracting Officer) whenever, in connection with the award, performance or closeout of the contract or any subcontract thereunder, the contractor has "credible evidence" that a "principal," employee, agent or subcontractor has committed a violation of the specified criminal laws or the False Claims Act. The contractor's internal control system is required to provide for timely disclosure. The internal control system also is required to provide for "[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective actions," and "full cooperation" includes providing access to employees with information. 73 Fed. Reg. at 67901-92. This clause is required to be flowed down to subcontractors that meet the thresholds.

Second, under the new rule, a contractor can be suspended or debarred for a "knowing failure" by a "principal" to timely disclose to the Government credible evidence of the specified criminal violations, or violations of the False Claims Act, or a "significant" overpayment. FAR 9.406-2 and 9.407-2. The disclosure obligations exist until three years after final payment on any government contract awarded to the contractor. For purposes of suspension or debarment, the disclosure obligations apply to subcontractors, small businesses, and commercial item contractors.

This new mandatory disclosure regime imposed on contractors and grant recipients is a "sea change" that should have a significant effect on the Committee's consideration of the False Claims Act Correction Act. As a result of the mandatory disclosure requirements imposed over the last three months, the Government has a dramatically increased capability to identify and investigate potential fraud – and this Committee is considering legislation today that would provide even more resources.

The problem driving the *qui tam* provisions of the False Claims Act was described in 1986 as follows: "perhaps the most serious problem plaguing effective enforcement is the lack of resources on the part of Federal enforcement agencies." S. Rep. No. 99-562 at 7 (1986) (*reprinted in* 1986 U.S.C.A.A.N. 5272). In other words, the Government lacked resources to pursue fraud given the amount of dollars and the number of government programs. It also was viewed as necessary to have the assistance of insiders – "private individuals who could break the current 'conspiracy of silence' among Government contractor employees." S. Rep. No. 99-562 at 14 (1986) (*reprinted in* 1986 U.S.C.A.A.N. 5279).

With the new *mandatory* requirement that contractors and grantees adopt and maintain internal control systems designed to identify abusive practices and fraud *within their own organizations* early and the *mandatory* requirement that contractors timely report *potential* violations to the IG, the Government has enlisted the contractors, subcontractors, grantees, and other recipients of Federal funds as its agents to identify and report potential fraud and abuse in contracts and other Federally funded programs. The additional requirements that reports be "timely" and that "full cooperation" be afforded assure that the contractor or grantee will work to assist and support the investigative authorities. Because the penalty for nondisclosure is suspension or debarment from all government contracting, contractors and subcontractors will have a tremendous incentive to disclose credible evidence of any False Claims Act violations. The concern for resources has been substantially mitigated by relying on those who know the contractor or grantee's operations best – their own people.

In addition, the concern that insiders be encouraged to come forward to break the perceived 1986 "conspiracy of silence" is directly addressed by the rule's specific requirements for business ethics and awareness compliance programs and controls – with detailed requirements set out in the regulations. The specific obligations to timely disclose when the contractor or grantee has credible evidence assures that reporting will be prompt and that internal investigations will be diligently pursued. Failure will result in suspension or debarment. The rule requires contractors and grantees to function as the agents of the IGs to identify and root out fraud and abuse early.

The provisions of the proposed legislation designed to make it easier for *qui tam* relators to bring and maintain *qui tam* actions, *i.e.*, weakening the public disclosure bar, relaxing the standard of Federal Rule of Civil Procedure 9(b), extending the statute of limitations to 8 years, expanding the anti-retaliation provisions, and permitting DOJ to share information obtained from Civil Investigative Demands (CID) with relators, become highly questionable in light of the Government's ability under the regulations to obtain information directly. The existing FCA is sufficient – perhaps even more than sufficient – to pick up any possible failures in the mandatory disclosure net.

B. The Public Disclosure Bar

1. The Existing Statute Strikes The Right Balance

In the 1986 amendments, Congress sought to resolve the tension between the circumstance where a plaintiff brought no new information in an action (as in *United States ex rel Marcus v. Hess*, 317, U.S. 537 (1943)), but was allowed to recover, and the circumstance where a relator was the original source of information used in his action. S. Rep. No. 99-562 at 10-13 (*reprinted in* U.S.C.A.A.N. 5275-5278). Current law bars a court from jurisdiction over actions "based upon the public disclosure of allegations or transactions [as defined]" unless "the person bringing the action is an original source of the information." 31 U.S.C. 3730(e)(4)(A). The existing statute defines the term "original source" to mean "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . ." *Id.* § 3730(e)(4)(B). Congress' 1986 solution weeds out parasitic cases where the person bringing the action does not contribute new information. "The goals of the 1986 Amendments Act were (1) to encourage those with information about fraud against the government to bring it into the public domain; (2) to discourage parasitic *qui tam* actions by persons simply taking advantage of information already in the public domain; and (3) to assist and prod the government into taking action on information that it was being defrauded." *Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8^{th} Cir. 2002).

Currently, either the United States or a defendant may seek dismissal of a *qui tam* action on the basis that it fails to meet the requirements of the public disclosure bar. Also, because the requirement is jurisdictional, a court may determine for itself that a case should be dismissed on public disclosure grounds.

2. Eliminating Or Diluting The Jurisdictional Public Disclosure Bar Is Inconsistent With The Government's Interest

The proposed legislation in several versions has removed the ability of defendants to raise the public disclosure bar and provides instead that only the DOJ may move for dismissal. Such an approach precludes both defendants and the courts from raising the public disclosure bar, which as a practical matter will permit many *qui tam* lawsuits to go forward that are based on public disclosures of information. This is inconsistent with the Government's interest in ensuring that the rewards of a *qui tam* suit only go to those relators who provide new information to the Government.

In addition, other versions of the legislation would require the DOJ to meet a much higher standard. For example, under H.R. 4854, as previously reported, the DOJ would have to demonstrate that the relator's "allegations relating to *all essential elements of liability* of the action or claim are based exclusively on a public disclosure," and that the relator "derived his knowledge of *all essential elements of liability*" from the public disclosure. The legislation also narrowed the definition of what is "public" to mean only information revealed in Federal proceedings, hearings, audits or investigations – state proceedings would be excluded. Further, a "public disclosure" is defined by that legislation to include only disclosures that are made on the "public record" or otherwise "disseminated broadly to the general public." This redefinition of what constitutes "public disclosure" is unduly narrow and highly ambiguous. The proposed changes obviously did not anticipate the advent of mandatory disclosure requirements and create particular problems in light of that approach.

3. Intersection With Mandatory Disclosure Requirements

Contractors and grantees that make a disclosure to the IG and the Government face the possibility that the disclosure will become the source of a *qui tam* action. The preamble to the rule recognized that even under current law the disclosure of a potential FCA violation presents the risk that a *qui tam* action will follow. 73 Red. Reg. at 67082. This possibility exists even though the disclosure has been made to the Government authority responsible for investigating fraud and even though the party making the disclosure is required to "cooperate fully" in the investigation.

Under the proposed legislation, there is a significant risk that a relator will be able to file an action and intrude upon the Government's review and investigation of the disclosure. Because of the "exclusivity" standard, a relator who has any additional information, regardless of its materiality, will be able to proceed. The relator would be able to go forward with the *qui tam* action and discovery even as the IG and agency Suspension and Debarment Officials are attempting to determine whether a disclosure requires further action. This poses the real possibility that the relator will interfere with or otherwise impede the Government's ability to investigate the matter and determine the appropriate course of action. Of course, such overlapping and duplicative activities also pose additional costs on the defendants, and upon the Government.

Furthermore, the definition of what constitutes a "public disclosure" is opaque and it is unclear whether an IG's review of a mandatory disclosure under the rule would qualify as an "audit" or "investigation" sufficient to have the action dismissed. The language suggests that it may be insufficient even if conduct has been reported to and is known by Federal officials with responsibility for investigating it directly – a result that would be perversely at odds with the announced purpose of the legislation to detect fraud early. Resolution of this question is likely to require an answer from the courts – an answer that will take years of litigation to obtain. Such an approach thus creates the real prospect that a relator may use the Government's own mandatory disclosure program to obtain a share in any recovery – even though the Government is aware of the violation and is reviewing, investigating, prosecuting, or negotiating a resolution. Indeed, one could read the definition in the proposed legislation as creating a preference to have the relator bring an action, rather than investigation by the appropriate Federal authorities.

The Committee should consider carefully whether it is in the Government's interest to allow a relator to disrupt the Government's own efforts to obtain early disclosure of violations and its ability to pursue or timely resolve such violations. Moreover, it seems particularly at odds with the basic purpose of the statute and the Government's interests to allow a relator to claim a share of any recovery when it was the Government's regulation that required the disclosure for the purpose of allowing the Government to address the violation at an early stage.

C. Exempting Relators From Compliance With Rule 9(b) Will Interfere With The Government's Ability To Investigate

The proposed legislation also relaxes the pleading standard under Rule 9(b) only for relators – as in last Congress' H.R. 4854. This cannot possibly be justified as assisting DOJ in pursuing fraud. Given the mandatory disclosure rule, relators would be encouraged to plead shallow speculative claims, knowing that the potential exists to obtain more information if the case can survive to the discovery stage. As a practical matter, at the same time the Government is attempting to investigate and assess whether a case should be pursued, the relator may well be interfering by using the discovery process in a manner that disrupts the Government's investigation of the case. Once a disclosure is made by a contractor or grantee, the Government should determine whether a case exists and whether to pursue the case. Relators should not be encouraged to fish for the disclosure reports with a relaxed 9(b) standard and disrupt the Government's investigation process.

D. Sharing Government-Obtained Information Improperly Rewards Relators Contrary To The Purposes Of The FCA

Under current law, the Attorney General is given authority to issue CIDs in advance of commencing an FCA action to obtain documents, answers to interrogatories, and testimony concerning potential FCA violations. 31 U.S.C. § 3733(a). The Attorney General may not delegate this authority. *Id.* Furthermore, the current statute precludes anyone other than an authorized DOJ employee/attorney or a false claims investigator from access to information obtained under a CID. This extends to other Federal agencies, who may obtain such information only upon a request by the Attorney General to a U.S. district court. 31 U.S.C. § 3733(i)(2)(C).

The proposed legislation would expand the use of CIDs and would permit DOJ (the Attorney General or a designee) to share the results of this pre-discovery material with other governmental personnel, including state officials, and relators.

Because this information is for the purpose of allowing the Attorney General to determine whether to file an FCA action, it is appropriately restricted to DOJ. This information should not be shared with relators. A fundamental purpose of the *qui tam* provisions is to reward whistleblowers who bring information to the Government. If relators are provided with *Government-developed information* before a *qui tam* complaint is unsealed, such relators will no doubt amend their complaints in non-intervened cases to take advantage of the Government's material.

However, in addition to the above concerns, the establishment of mandatory disclosure requirements adds a further concern about sharing of information with relators. Pursuant to the requirements for mandatory disclosure, IGs and Government officials will have early notice of potential FCA violations based upon timely disclosures of credible evidence. Government investigators and agency officials will then need to determine whether to pursue a false claims action. These officials will have information at an earlier stage than previously. The regulations also require "full cooperation" with the Government's investigation. The regulations thus may, as a practical matter, result in Federal agencies bringing information to the attention of DOJ. It is possible that the need for CIDs may decrease, but even where they are used, there is a greater likelihood that they will be used to follow up on information already disclosed by the contractor, grantee, subcontractor or subgrantee.

Relators should not be provided the information that the Government already has obtained through a mandatory disclosure of credible evidence or that the Government is developing with CIDs as a result of such a disclosure. If the proposed legislation is enacted, it likely will expose information obtained by the Government through mandatory disclosures. It is fundamentally inconsistent with the purposes of the FCA to allow a purported whistleblower to obtain a bounty based upon such information, thereby profiting from the fact that the Government's rule required disclosure of the information in the first place.

E. The "Relation Back" Feature In The Proposed Change To The Statute Of Limitations Will Impose Unjustifiable Burdens On Defendants And Will Unjustly Enrich Relators

In addition to extending the statute of limitations for filing *qui tam* cases from 6 to 8 years, the proposed legislation contains a "relation back" feature that allows the Government to intervene and raise new claims. This provision allows the Government, at the time it intervenes in a *qui tam* case, to assert additional claims arising out of the same "conduct, transactions, or occurrences" and such additional claims relate back to the date of the original *qui tam* complaint, even if they would otherwise have been time barred.

This relation back will impose unreasonable burdens in the context of a provision of the mandatory disclosure rule. The mandatory disclosure rule added a "look-back" requirement to the suspension and debarment regulations (FAR 9.406-2 and 9.407-2). The new regulation creates a new cause for suspension or debarment based on "knowing failure" by a principal to timely disclose credible evidence of procurement-related criminal violations, FCA violations, or "significant" overpayments under existing contracts. This obligation exists until three years after final payment on "any Government contract awarded to the contractor" and is in connection with "the award, performance, or closeout of the contract or a subcontract thereunder." FAR 9.406-2(b)(i)(vi) and 9.407-2(a)(8). The Government's contract closeout process after performance is complete is lengthy and typically involves a final audit. Such audits may take several years to even schedule, let alone resolve. As a practical matter, contracts for which performance has been completed for years may still be awaiting closeout and final payment. The rule then extends the period for potential disclosure to three years after the final payment.

In light of this provision, the relation back aspect change to the statute of limitations will create a huge and unfair burden on all contractors, including small businesses and non-profits, to maintain records and gather information from employees who have left or are retired. If a contractor discovers a potential violation in a final review of a contract for closeout and discloses it out of an abundance of caution, the Government may use that information to add claims to a *qui tam* action regarding that contract ("transaction") that are many years past the 8 year statute of limitations. For example, there are many contracts under which performance has been completed for 5 years and for which final payment has not been made. Given the three year post-final-payment disclosure requirement, it may be more than a decade after the completion of performance before such contracts are closed out and disclosure requirements have lapsed.

It should be noted here that a Federal agency whose contract is at issue also will bear part of this burden. Such an agency will be required to produce documents and personnel who are familiar with the contract and the issues raised. If the agency cannot locate its documents or its personnel have moved or retired, the Government may have difficulty ascertaining the validity of its own claim.

Contractors and subcontractors who knowingly fail to make a timely disclosure of credible evidence in connection with a contract are subject to suspension or debarment. That remedy should be sufficient for the Government's purposes.

III. New And Powerful Government Resources Render the Proposed Changes Unnecessary

A. Important Additions To The Government's Investigative Resources

A number of very recent enactments have added provisions and significant resources to the Government's own anti-fraud machinery. In light of these provisions, it is questionable whether further changes to the FCA that encourage relators make sense.

Arguments have been raised that the large sums provided by Congress pursuant to the Recovery Act and the TARP warrant the proposed FCA amendments. Given the additional resources and authorities provided by both statutes and the adoption of mandatory disclosure requirements for both programs, such arguments are questionable.

First, the Recovery Act created a new Recovery Accountability and Transparency Board ("Board") "to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse." Pub. L. No. 111-5 § 1521. The Board is comprised of 10 IGs, who already have existing authority and responsibility to detect and prevent fraud, waste, and abuse. The Recovery Act states specifically that the Board has the authorities provided under section 6 of the Inspector General Act of 1978 and that the Board may use the IG subpoena powers. *Id.* § 1524(c). In addition, the Board may hold public hearings and compel testimony from non-Federal (contractors, subcontractors, grantees, subgrantees – including units of local government) individuals at such hearings. *Id.* § 1524(d). Significantly, while $84 million is provided for the Board itself, over $220 million more in appropriations is provided to increase IG staffing levels at the agencies with Recovery Act responsibilities. Large agencies such as DOT, HHS, Agriculture, EPA and others are receiving substantial sums.

Adding more oversight, the Recovery Act also created a "Recovery Independent Advisory Panel" ("Panel") to recommend actions that the Board could take to prevent fraud, waste, and abuse relating to Recovery Act funds. The Panel has separate authority to hold hearings, take testimony, and receive evidence. *Id.* § 1543. Both the Board and the Panel are authorized to obtain information from Federal agencies. *See id.* §§ 1525(b)(1), 1543(b).

Second, and importantly, with respect to audits and investigations involving Recovery Act funds, the IGs and the Comptroller General both are given new authority to interview, *i.e.*, take testimony from, any officer or employee of contractors, subcontractors, grantees and subgrantees. *Id.* §§ 902(a) and 1515(a). This is another "sea change" in the powers of the Government's auditors and investigators. Such authority to take testimony has been on the IGs' wish list since the IG statute was enacted.

In addition to the Recovery Act, the Emergency Economic Stabilization Act of 2008, which authorized the TARP, includes a number of special measures directed at identifying and addressing possible fraud, waste, and abuse in the Program. For example, Section 121 of the Act establishes a Special Inspector General just for the Program, who has the investigative authorities provided in the Inspector General Act of 1978. Section 104 of the Act calls for establishment of a Financial Stability Oversight Board. The Board's responsibilities include "reporting any suspected fraud, misrepresentation, or malfeasance" to the Special Inspector General. Section 116(c) of the Act requires establishment of an internal control system for the Program. Section 116(a) directs that GAO provide oversight of "the activities and performance of the TARP and of any agents and representatives of the" Program as related to activities on behalf of or under the authority of the Program. The oversight encompasses the internal controls of the Program, efficiency of operations of the Program in the use of appropriated funds, compliance with all applicable laws and regulations by the Program and its agents and representatives, and the efficacy of contracting procedures, among other matters. The Act specifies a broad right of access by GAO to financial and other records related to the Program. As noted above, the TARP regulations have adopted a mandatory disclosure requirement.

B. Anti-Retaliation Provisions Overlap With New Whistleblower Provisions, And Will Add Unnecessary Costs To Companies And Local Governments

It is not clear why current law is considered inadequate to protect whistleblowers who have real information about violations. The proposed changes appear only loosely connected to uncovering and pursuing fraud, and they are so vague that they will result in a protracted period of litigation to sort them out. The cost/benefit analysis of these provisions appears especially weak.

The legislation proposes to change the definition of protected parties who may be a plaintiff from "employees" to include "any person." This would appear potentially to include consultants, independent contractors, third-party agents, or other non-employees who periodically are involved with the contractor. This appears unnecessary since such individuals have protections for breach of contract or tortious interference.

The legislation also proposes to change the definition of "employer" to "any person" that discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against the plaintiff. This language is so broad that it could potentially encompass a number of persons or entities who have only a very casual or even no relationship to the employer. In either of these instances, it is not clear what the value is in terms of identifying fraud or having useful potential information if the individual plaintiff or potential defendant is only tangentially connected or wholly unconnected to the employer.

Current law requires that the plaintiff's efforts have been "in furtherance" of a *qui tam* action. The proposed change would potentially allow actions for retaliation if the plaintiff claimed that he or she was attempting to "stop" an FCA violation, even though the person never intended to file a *qui tam* action.

The vagueness and lack of direct benefit of the proposed legislative changes is of special concern due to recent enactment of other whistleblower provisions – creating redundancy and unnecessary potential confusion.

The Recovery Act contains a new provision for state and local, as well as contractor whistleblowers. It provides that an employee of any "non-Federal" employer receiving

Recovery Act funds may not be discriminated against as reprisal for disclosing information that the employee reasonably believes is evidence of "a gross waste of covered funds," or "a violation of law, rule, or regulations related to an agency contract . . . or grant awarded or issued relating to covered funds." *Id.* §1553(a). A person who believes that he or she has been subjected to reprisal may complain to the IG who, subject to certain exceptions, must investigate and submit a report. Within 30 days of receiving such a report, the agency head must determine if relief is warranted and, if so, may order reinstatement and compensatory damages. *Id.* § 1553(b) and (c). Additionally, complainants are authorized to bring an action in U.S. district court against the non-federal employer (after exhaustion of administrative remedies) seeking damages. Such actions are authorized without regard to the amount in controversy and are subject to jury trial under a *de novo* standard of review.

Other whistleblower protections have been authorized recently as well. In language similar to that contained in the Recovery Act, section 846 of the FY 2008 National Defense Authorization Act increased whistleblower protections under 10 U.S.C. § 2409. This section provides that contractor employees may not be discriminated against as reprisal for disclosing information that the employee believes is evidence of "gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract or grant." *National Defense Authorization Act for Fiscal Year 2008,* Pub. L. No. 110-181, 122 Stat. 3 (2008). A whistleblower may complain to the IG who must investigate and determine either that the complaint is frivolous or submit a report. Within 30 days after receiving the report, the agency head must determine if relief is warranted, and if so, may order reinstatement and compensatory damages. *Id.* Complainants are authorized to bring an action in US district court after exhaustion of administrative remedies without regard to the amount in controversy and obtain a jury trial under a *de novo* standard of review. *Id.*

It is not clear why any new legislation is necessary to address the same conduct. When Congress creates redundant laws directed at the same conduct, it imposes unnecessary burdens and costs on companies, local governments, agencies, and the courts.

CONCLUSION

Although the stated objective of the legislation is to enhance the FCA as a tool in the fight against fraud, waste, and abuse, the amendments are not focused on how the Government's abilities to fight fraud, waste, and abuse can be improved, but rather appear directed toward the questionable objective of making it easier for *qui tam* relators to bring and maintain FCA actions to enrich themselves and their lawyers. Such aims are quite visible in the proposed changes to the public disclosure bar, rule 9(b), the proposed requirement to provide CID information to relators, the change in the statute of limitations, and the vague adjustments to the anti-retaliation provisions.

However, there has been a dramatic change in the Government's own initiatives to detect and correct potential fraud, waste, and abuse at an earlier stage. The inescapable data regarding the low success rate of non-intervened *qui tam* cases, the promulgation of mandatory disclosure requirements, and the increase in the Government's own authorities and financial resources raise serious questions about any further delegation of a function as inherently governmental as investigating and correcting the misuse of the Government's own funds.

Thank you again for allowing me to testify and I am happy to answer any questions that the Committee may have.