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THE WHITE HOUSE

WASHINGTON

FEBRUARY 22, 1993

MEMORANDUM FOR BRUCE REED

FROM: TOM EPSTEIN, POLITICAL AFFAIRS

SUBJECT: FALSE CLAIMS ACT

As I mentioned to you in the communications meeting this morning, reinvigorating the federal government's commitment to the False Claims Act would fit well into the President's planned assault on waste in government.

The False Claims Act protects and compensates whistleblowers who identify fraud against the government. A bipartisan Congressional effort (Congressman Berman, Senator Grassley) strengthened the law in 1986 to encourage private citizens to bring false claims actions either on their own or in cooperation with the Justice Department. For whatever reason, the Bush Justice Department was openly hostile to whistleblowers and their attorneys, greatly reducing the effectiveness of the act. **If the President were to instruct the Justice Department to vigorously enforce the False Claims Act and to work cooperatively with whistleblowers, it is likely billions of dollars in fraudulent billings could be saved, primarily in health and defense.**

Attached for your information are two memoranda from attorneys who represent whistleblowers summarizing the key issues, a memo to the transition team from Congressional staff on this subject, an Op-Ed by Senator Grassley, and a news article about a recent $111 million settlement paid by a Medicare contractor pursuant to a whistleblower lawsuit. Please let me know if you need any additional material.

cc: Rahm Emanuel

MEMORANDUM

TO: Mr. Tom Epstein

FM: John R. Phillips

DATE: February 22, 1993

RE: FALSE CLAIMS ACT - WHISTLEBLOWER PROVISIONS

1. How the False Claims Act Whistleblower Provisions ("Qui Tam") work.

   - Anyone with knowledge of fraud against the Government may initiate a case in federal court against the wrongdoer.
   - The Act provides for treble damages and penalties to the United States.
   - Once the case is filed, the Department of Justice investigates. The Government may decide to join the case and lead the prosecution effort, or it may decide to allow the whistleblower to proceed alone.
   - The Act protects a whistleblower who sues his or her employers from retaliation.
   - The whistleblower is entitled to a minimum 15% of any recovery to the Treasury.

2. History of the False Claims Act.

   - The Act was initially passed in Abraham Lincoln's first Administration to deal with Civil War profiteers, so it has been commonly referred to as the "Lincoln Law".
   - In 1986, Congress was very concerned with explosion of fraud resulting from Reagan defense build up and the inability of Department of Justice to combat that fraud.
   - Congress strengthened and modernized the old Lincoln Law with 1986 amendment package authored by Representative Howard Berman and Senator Charles Grassley.

- These 1986 amendments had three primary objectives:

  (i) To encourage whistleblowers to come forward with information of fraud against the Government that would otherwise be difficult, if not impossible, to detect.

  (ii) To expand the Government's capacity to prosecute fraud without expanding bureaucracy by encouraging the private bar to commit its time and resources to recovering money for the United States Treasury.

  (iii) To ensure that allegations of fraud are taken seriously and fully investigated by the Federal Government.

3. How successful has the law been and what is its potential?

- Despite lack of support for whistleblowers by the Department of Justice, the law has begun to recover hundreds of millions of dollars for U.S. taxpayers. Almost a quarter of a billion dollars has been recovered in the last seven months alone, including $100 million paid by one company for defrauding the Medicare program.

- These record recoveries to the Government and the whistleblowers are undoubtedly deterring other potential wrongdoers, saving vastly greater sums to the taxpayers.

- By 1992, whistleblower false claims suits (as distinct from false claims suits initiated by the Government itself) recovered more to the Treasury than false claims suits initiated by the Department of Justice. The gap between whistleblower suit recoveries and Government initiated suits will continue to grow as more people are encouraged to take the risks inherent in being a whistleblower and stepping forward.

4. How the Department of Justice has thwarted the potential of the False Claims Act.

- Refused to defend whistleblower provisions against constitutional challenges by the defense industry. As a result, House and Senate legal counsel have been forced to defend law in courts around the country. Thus far, all challenges have been unsuccessful and the law has been upheld.

- Refused to permit highly qualified counsel representing whistleblowers to assist actively in prosecution of cases. As a result cases have languished virtually unprosecuted for years.

- Instead of supporting and encouraging whistleblowers, Department of Justice has sought to diminish and discourage recoveries to whistleblowers after successful case settlements. This prompted a federal judge recently to state:

> "[The] pattern of behavior in these cases by the Department of Justice has always been a mystery. The use of a [whistle-blower] is nothing new.... In view of their widespread use, it is worthy of note that the Department of Justice has considered such individuals as adversaries rather than allies. This is not the first case where this court has noted the antagonism of the Justice Department to a whistle-blower. The reason continues to be unknown, but the attitude is clear."

- Bush administration's Justice Department repeatedly sought to undercut whistleblower provisions with proposed amendments and by advocating legal positions in court directly counter to congressional intent.

M E M O R A N D U M

TO: Peter Edelman
Bernard Nussbaum
Victoria Radd

FROM: Bari Schwartz (Rep. Berman)
Melissa Patack (Sen. Grassley)
Christopher Brown (Sen. Grassley)

RE: The False Claims Act, 31 U.S.C. § 3729 et seq.

DATE: December 11, 1992

We write to give you some background on an important issue in which Sen. Chuck Grassley and Rep. Howard Berman have had a long-standing interest -- the False Claims Act -- and in an effort to change the posture of the Department of Justice on this issue. In 1986, Grassley and Berman succeeded in getting amendments passed which revitalized this important law. The False Claims Act Amendments of 1986 (P.L. 99-562) provide an extremely effective tool in deterring fraud against the United States government by allowing individuals who have evidence of fraud committed by government contractors to sue those contractors on behalf of the government and share in the government's recovery.

The law has proved very successful, and its importance is underscored in this era of strained fiscal resources. To date, more than a quarter-billion dollars in damages have been collected through qui tam lawsuits. Another $100 million is likely to be recovered before the end of the year in a case under seal. That will bring the total qui tam recoveries in the past six years to nearly a half billion dollars.

RE- The $100 million was recovered in the Dowden case JB

Approximately half of the total recoveries to date were the result of just two settlements this past summer. In July, General Electric agreed to pay the United States $59.5 million in a civil settlement for a conspiracy between GE executives and an Israeli general to charge the U.S. for goods and services never provided. This fraud was brought to light by Chester Walsh, a GE employee in Israel who recognized the fraud conspiracy between his U.S. superiors and the Israeli general, and sued on behalf of the United States. A week before the GE settlement, the successor to the Singer Corporation agreed to pay $55.9 million for overbilling on more than $1 billion worth of contracts for flight simulators. This money would never have been recovered without the whistleblower lawsuit of auditor Christopher Urda.

The continued effectiveness of the Act is, however, undermined by the almost adversarial stance the Department of Justice has taken toward qui tam relators. In many cases, the Department raises issues better left to defendants, arguing for dismissal of the qui tam relator's claim on jurisdictional

grounds.[1] If this is unsuccessful, the Department generally tries to limit as much as possible the relator's recovery in the case. The Department routinely attempts to reduce the total amount available for derivation of the relator's share, urges relators to take a lower share than they are statutorily entitled to as part of settlement agreements, and urges the Court to give relators the minimum possible reward. The Department also strictly limits the relator's role in the case, and is slow to disclose information about the case to a relator.[2] The Department conducts cases in this manner, despite the reality that but for the relator's great personal risk, the Department would not even have the information about the fraud.

This history of DOJ hostility to qui tam relators was discussed by Chief Judge Rubin of the Southern District of Ohio in a recent order in the GE case. Ruling against GE's argument that the relator's share in the case should be reduced based on factors not enumerated in the statute (a position that was supported by DOJ in pleadings and press releases), Judge Rubin noted that

> [t]he pattern of behavior in these [whistleblower] cases by the Department of Justice has always been a mystery. The use of a qui tam plaintiff is nothing new. ... In view of their widespread use, it is worthy of note that the Department of Justice has considered such individuals as adversaries rather than allies. This is not the first case

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[1] See, e.g., United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 320 (2d Cir. 1992); United States ex rel. Williams v. NEC Corp., 931 F.2d 493 (11th Cir. 1991); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991); United States ex rel. LeBlanc v. Raytheon Corp., 913 F.2d 17 (1st Cir. 1990); United States ex rel. Weinstein v. CAC-Ramsay, Inc., 744 F. Supp. 1158 (S.D. Fla. 1990).

[2] For discussion of these and other adversarial practices by the Department, see Hearing on H.R. 4563: Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, 102d Congress, 2d Session, April 1, 1992; False Claims Act Implementation: Hearing before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, 101st Congress, 2d Session, April 4, 1990, Ser. 74; Correspondence between Sen. Charles Grassley and Assistant Attorney General Stuart Gerson, May 21-July 6, 1992; "Whistle-blower blues," Los Angeles Daily News, June 28, 1992, B-1; "Popularity of Qui Tam Grows Despite Significant Obstacles," Inside Litigation, March 1991; "Anti-Fraud Law's Merits Debated," Los Angeles Times, August 21, 1989, p.3 (Discussing desire of lawyers in Frauds Section of Civil Division's Commercial Litigation Branch to have Act held unconstitutional).

TE- I can get this material for you, if you want JJG

where this Court has noted the antagonism of the Justice Department to a whistleblower.[3] The reason continues to be unknown, but the attitude is clear.[4]

The adversarial stance toward whistleblowers who expose fraud that would otherwise likely go undetected is not limited to litigation. The Department also takes an anti-whistleblower stance in its positions on False Claims legislation. In the 102d Congress, Rep. Berman and Sen. Grassley advocated legislation, H.R. 4563, to clarify the law regarding qui tam suits by government employees and suits based on publicly disclosed information.[5] The Department took what we considered an unreasonable position on both issues, arguing for a complete ban on suits based on information acquired in government employment and pushing for a rollback of the parasitic suit bar to pre-1986 law.

The qui tam provisions of the False Claims Act are among the taxpayers' most effective weapons for recovering money stolen from the United States by public contract fraud. To best utilize this weapon in a time of fiscal strain, it is necessary to have leaders in the Justice Department -- especially the Civil Division -- who make constructive use of qui tam, rather than taking such an adversarial stance that future qui tam plaintiffs are deterred.

We hope you will keep this important issue in mind as you consider Justice Department policy on this issue under the Clinton Administration. We would be happy to discuss this issue further.

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[3] See Gravitt ex rel. United States v. General Electric, 680 F. Supp. 1162 (S.D. Ohio 1988).

[4] United States v. General Electric, No. C-1-90-792, Dec. 4, 1992 (S.D. Ohio), 8-9.

[5] We believe clarification of the ban on suits based on publicly disclosed information (the "parasitic suit" bar) is necessary to correct a number of clearly erroneous judicial decisions which undermine Congressional intent in the '86 amendments. E.g., Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992); United States ex rel. Precision Company v. Koch Industries, Inc., 971 F.2d 548 (10th Cir. 1992); United States ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992); United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149 (3rd Cir. 1991); United States v. Rockwell International Corp., 730 F.Supp. 1031 (D.Colo. 1990).

Memorandum

To: Tom Epstein
From: Janet Goldstein
Date: February 22, 1993
Re: Effectiveness of the False Claims Act in combatting health care fraud.

The "whistle-blower" provisions of the False Claims Act, which authorize private citizens to prosecute fraud claims on behalf of the United States, promise to be an effective tool to combat the rising cost of health care to the Government. This promise is made clear by a recent settlement in which National Health Laboratories ("NHL") agreed to pay over $100 million to the government to settle claims brought forward by a whistle-blower, who gave information to the government that NHL defrauded Medicare, Medicaid and the Civilian Health and Medical Program.[1] This $100 million plus settlement alone more than quadrupled the $24 million in health care fraud recoveries that the Civil Division of the Justice Department achieved during a two year period (fiscal years 1990 and 1991).[2]

It is not surprising that a single recovery in a lawsuit filed by a whistle blower could so dramatically exceed two years of efforts by the Justice Department alone. The False Claims Act's effectiveness stems from enlisting the support of private citizens who have access to information about corrupt practices that could never be discovered through traditional

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[1] See "How a Whistle-Blower Found Blood-Test Fraud," New York Times, Monday, December 21, 1992, at A13.

[2] See "Report to Attorney General on Enhanced Health Care Fraud Initiative," February 3, 1992, at 7.

government investigations, because these individuals often are asked to participate in the very fraudulent schemes they reveal to the government. Moreover, the False Claims Act brings the resources of private attorneys to bear in the fight against dishonest contractors; this use of the private bar to aid the Justice Department ensures that the government can match the litigation resources of defendants in major fraud actions.

Despite the recent promise and success of some whistle-blower suits, the full effectiveness of the False Claims Act has not yet been realized. The Justice Department under the Bush Administration failed to work cooperatively with many whistle-blowers and their counsel. Indeed, Senator Charles Grassley of Iowa has documented numerous instances of the Justice Department blatantly stifling the will of Congress and working against rather than with whistle-blowers.[3] Specifically, the Justice Department has refused to publicize the False Claims Act, thereby failing to inform citizens that there is a tool available for individuals to help the United States combat fraud;[4] the Justice Department has attempted to cut whistle-blowers out of cases from the outset or refused to keep them informed of case progress, thereby depriving the

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[3] See "Abe Lincoln vs. the Justice Department," New York Times OP-ED page, Saturday, January 16, 1993. See also Memorandum from Offices of Senator Grassley and Representative Berman to DOJ Transition Team, December 11, 1992.

[4] See supra n.1.

government of the help of private attorneys;[5] and, the Justice Department has attempted to limit whistle-blower rewards below their statutorily mandated share, thereby sending the message to future whistle-blowers that bringing a False Claims Act suit may not be worth the personal sacrifice of blowing the whistle on a major corporation.[6]

The False Claims Act will result in increasingly large government recoveries and will deter future fraud as soon as the Justice Department shows that it is serious about working with private citizens. The Justice Department must work with whistle-blowers, must fully utilize the resources of private attorneys and must reward private citizens in the manner dictated by Congress. Such efforts will not only substantially lessen the serious cost of health care fraud, but also will go a long way towards stopping the rampant fraud and abuse in all arenas of the federal government.

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[5] See supra n.3.

[6] See supra n.3.

The New York Times

THE NEW YORK TIMES **OP-ED** SATURDAY, JANUARY 16, 1993

Abe Lincoln vs. the Justice Department

By Charles E. Grassley

WASHINGTON

One of America's largest medical companies, National Health Laboratories, agreed last month to pay the Government $110 million to settle a lawsuit for unnecessary medical tests billed to Medicaid and Medicare. In July, General Electric agreed to pay a $59.5 million civil settlement stemming from a conspiracy between G.E. executives and an Israeli general to charge the U.S. for goods and services that were never provided. In June, the successor to the Singer Corporation, the CAE-Link Corporation, agreed to pay $55.9 million for overbilling the Pentagon on more than $1 billion worth of contracts for flight simulators.

These tax dollars were restored to the Treasury not because of any Justice Department prosecutorial zeal but in spite of the department's efforts. The cases were brought by courageous employees of the companies. Using a modern version of a law drafted in 1863 by Abraham Lincoln to combat war profiteers, they sued their employers on behalf of the United States in return for a share of the Government's reward.

Unfortunately, since Representative Howard Berman, Democrat from California, and I rewrote the whistle-blower provisions of the False Claims Act in 1986 to make them a better weapon against fraud during the defense buildup of the 1980's, the Justice Department has been consistently hostile to whistle-blowers. This attitude confirms the cynicism that brought Lincoln to make it possible for citizens to sue: you can't count on the bureaucracy to protect the taxpayer.

President-elect Clinton's nominee for Attorney General, Zoë Baird, may have a defense contractor's perspective on whistle-blowers. As counsel to General Electric, she lobbied for broader exemptions to the False Claims Act including a loophole for defense contractors that "police" themselves. She also helped argue that whistle-blower lawsuits are unconstitutional, claiming they infringe on the Government's "exclusive right" to protect tax dollars.

Despite the Justice Department's antagonism, the amendments have been a great success. Overall recoveries to the Treasury have increased from $35 million a year to $350 million a year since 1986 — a total of nearly one-half billion dollars. Last year, more money was recovered in whistle-blower suits than in all other suits brought by the Justice Department.

Even more money would come in if the Government had a better attitude. The Justice Department, which has a statutory right to join these suits by whistle-blowers as a co-plaintiff, regularly attempts to cut the whistle-blower out of the case. There is nothing the whistle-blower can do about it. Often the department argues at the outset for the whistle-blower's dismissal from the case. If that's unsuccessful, Government lawyers often try to limit the plaintiff's recoveries. Justice Department policy keeps the whistle-blower in the dark about the case's progress.

> Federal lawyers often undermine whistle-blowers.

This hostility was summarized by Federal District Judge Carl B. Rubin of Cincinnati last month. In a ruling against G.E., he wrote that the "pattern of behavior in these cases by the Department of Justice has always been a mystery. The use of a [whistle-blower] is nothing new .... In view of their widespread use, it is worthy of note that the Department of Justice has considered such individuals as adversaries rather than allies. This is not the first case where this court has noted the antagonism of the Justice Department to a whistle-blower. The reason continues to be unknown, but the attitude is clear."

One reason for the department's antagonism may be a legitimate concern that whistle-blowers take a share of the Government's award. Even so, the department cannot ignore Congress's findings: awarding a share of the damages is necessary to attract whistle-blowers who would otherwise remain silent.

Perhaps the Justice Department doesn't want to acknowledge Congress's conclusion that the department is unable to uncover all the fraud that taxpayers suffer. And perhaps the executive branch dislikes citizens interfering in the cozy relationships it has with defense companies and other public contractors. In October, Attorney General William Barr complained in a speech to the American Corporate Counsel Association that whistle-blower lawsuits "constitute a burden — and a severe burden we believe — on contractors who are defending them."

Obviously, Bill Clinton and his Attorney General need a new policy that aids whistle-blower lawsuits. If Ms. Baird is confirmed, she must resist any prejudice from her years at G.E. Her new clients, the taxpayers, expect vigorous prosecution of public-contract fraud.

Charles E. Grassley, Republican of Iowa, is a member of the Senate Judiciary Committee.

How a Whistle-Blower Found Blood-Test Fraud

By CALVIN SIMS
Special to The New York Times

LOS ANGELES, Dec. 20 — Three years ago, C. Jack Dowden, a former sales manager for a large California blood-testing concern, was under the gun: he was rapidly losing business to his main competitor, National Health Laboratories, which was offering doctors what seemed an incredible bargain.

For the price of a basic blood screening, National Health, one of the nation's largest diagnostic testing companies, would at no extra charge perform tests for cholesterol and serum ferritin, or iron in the blood.

Puzzled as to how National Health could offer the additional tests without charge, Mr. Dowden had a doctor take a sample of his own blood and send it to National Health. Mr. Dowden said that when he got the bill for his blood tests, National Health had charged him for one of the additional tests. He said this confirmed his suspicions that unbeknownst to doctors, National Health was charging some private customers and Government health insurance programs about $18 for each of the tests it claimed to be conducting for free.

2-Year Inquiry

Under pressure from his own company to engage in similar practices, Mr. Dowden went to the Federal authorities, who began a two-year investigation that on Friday resulted in a guilty plea by National Health to two charges of submitting false claims to Government health insurance programs. The company agreed to refund $111 million to Medicaid, Medicare and the Civilian Health and Medical Program.

Mr. Dowden, who stands to gain at least $15 million of the Government settlement under a Federal whistle-blower law, said in an interview today that he had notified the Government of National Health's practices mainly to prevent his own company, which he declined to identify, from also engaging in such practices. Prosecutors also refused to identify Mr. Dowden's former employer.

"I went to the Government investigators myself to stop my own company from doing it," said Mr. Dowden, who is 45. "I thought it was wrong. It's fraud. I had arguments with my supervisor that we would be crazy to do it."

But the supervisor ignored the warning, Mr. Dowden said, and sent doctors a letter offering blood testing deals similar to National Health's. Federal officials say fraudulent practices like those by National Health, based in La Jolla, Calif., are pervasive in the medical-testing industry and that other labs are under investigation. Mr. Dowden has left the blood-testing business.

It is unclear just how much money Mr. Dowden will receive for assisting the Government. Under the Federal False Claims Act, whistle-blowers may receive 15 to 25 percent of a settlement

But the Justice Department recently expressed reservations in cases in which it believed the whistle-blower might have delayed taking action in order to receive a larger award.

No one has suggested that Mr. Dowden had delayed coming forward in this case, but curiously, the Justice Department made no mention of Mr. Dowden in announcing the settlement last week.

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THE WHITE HOUSE

WASHINGTON

July 21, 1994

MEMORANDUM FOR BRUCE LINDSEY
BO CUTTER/JOHN GOODMAN
JOEL KLEIN
CHRISTINE VARNEY/JENNIFER O'CONNOR
BRUCE REED/JEREMY BEN-AMI
MICHAEL WALDMAN

FROM: STEPHEN NEUWIRTH
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: MEETING ON DOJ QUI TAM (WHISTLEBLOWER) PROPOSALS

We are scheduled to meet this Friday, July 22, at 1:00 p.m. in the Roosevelt Room, to discuss DOJ's draft proposed amendments to the qui tam provisions of the False Claims Act. Senior officials from DOJ and DOD will also attend.

* * *

The qui tam provisions of the False Claims Act permit private individuals -- whistleblowers, or "relators" -- to commence lawsuits in federal court, technically on behalf of the United States, against government contractors and other entities alleged to have committed fraud against the United States. The government can choose to pursue the claim itself, in which case the "relator" is generally entitled to a portion of any monies recovered. If the government chooses not to pursue the claim, the private "relator" may do so.

A relator is generally entitled to commence actions or participate in any monetary recovery only if he or she has provided new information to the government that has not already been provided from another source. The statute, for example, bars claims based on information included in a government contractor's voluntary disclosure of fraud, or information obtained from an ongoing government investigation or from the news media.

Approximately $697 million has been recovered in qui tam actions since enactment of the qui tam amendments to the False Claims Act in 1986. Approximately $688 million -- 99 per cent of the total -- has been recovered in cases in which DOJ obtained a judgment or entered into a settlement agreement with the defendant. Only $9 million has been recovered in cases that DOJ chose not to pursue and were litigated solely by private plaintiffs. Last year, recoveries from qui tam actions rose to record levels.

* * *

The current DOJ qui tam proposal was developed in response to legislation introduced by Senator Grassley in the Senate Judiciary Committee. The Grassley bill is intended to facilitate qui tam litigation by making it more difficult to dismiss qui tam suits and by expanding the circumstances under which private parties can become qui tam relators.

The current DOJ proposal has two especially significant features that reverse the position of the Bush Administration.

First, the proposal would take away from private defendants, and reserve to DOJ, the right to move to dismiss qui tam claims based on the source of the relator's information -- e.g., where information was voluntarily disclosed by the defendant, or was publicly available. DOJ has taken this position notwithstanding that almost all of the relators who have been dismissed on this basis to date have been dismissed on motions made by private defendants, not the government. Given DOJ's limited resources, and given that defendants normally are in the best position to assess the source of a relator's information, this proposal would be an obvious boon to qui tam relators and their attorneys. It is also reasonable to assume that defendants would be forced to assume substantial litigation costs in cases where a relator is not entitled to bring a claim, but where DOJ has not moved to dismiss the suit. Qui tam relators and their attorneys would thus have an economic incentive to bring "strike" suits that lack legal merit, but are filed with the goal of obtaining a settlement payment from a defendant that wishes to avoid the expense of litigating.

Second, DOJ proposes to agree for the first time that most government employees would be allowed to bring qui tam suits, although the DOJ proposal would place various restrictions on the type of employees who could make qui tam claims and under what circumstances. The current statute is silent on this issue, and the majority of appeals courts to have addressed the issue have ruled that federal employees may bring qui tam suits. Senator Grassley proposes that all federal employees be permitted to bring such suits; the DOJ proposal is intended to be a more reasonable approach that would, among other things, ensure that employees comply with existing obligations to disclose fraud and prohibit lawyers, inspectors general and contract officers from participating in qui tam suits.

It is, of course, still an option to seek legislation that would prohibit any federal employees from bringing qui tam claims. Historically, DOD has opposed federal employee qui tam suits on at least two grounds. First, government employees have an existing fiduciary duty to disclose fraud, and it is inappropriate to offer a monetary bounty for complying with that existing obligation. Second, the opportunity to bring a qui tam

claim can create perverse incentives -- for example, for a federal employee to let a fraud continue unreported so that damages will accumulate and the employee will gain access to a "pot of gold."

* * *

As you will see, several members of the Senate Armed Services Committee have expressed concern to Senator Biden about the DOJ proposals.

Attachments:
Draft DOJ letter to Senator Biden
Correspondence from Senators

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

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INITIALS: MA DATE: 8/16/13

Revised 7/15/94

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This provides the Department's views on S. 841, the False Claims Amendments Act of 1993, as reported by the Subcommittee on Courts and Administrative Practice. The Department supports the Act's goal of facilitating qui tam litigation to further augment the Government's war against fraud. We and the staff of the Subcommittee on Courts and Administrative Practice have been engaged in productive and worthwhile discussions aimed at reaching a consensus on this legislation. Our discussions have been productive, and we have candidly exchanged ideas to refine the areas of agreement and disagreement. We believe that those discussions have produced a markedly improved bill.

At the outset, let me reiterate this Administration's strong commitment to an effective and vigorous qui tam mechanism. In a clear break with the policies of previous Administrations, we have made a concerted effort to recognize the significant contribution of relators and whistleblowers to the Government's fight against fraud. We have encouraged the Department's litigators to make every effort to work cooperatively with relators to maximize the Government's recovery. We have scrutinized the legal arguments advanced to ensure that, in protecting the government's recoveries, we do not impair the incentives which are necessary to ensure that relators come forward, especially in light of the large personal hardships many must endure in bringing these suits. The Department and its client agencies have dedicated enormous resources to the investigation and prosecution of these cases.

Our success in acquiring the evidence to support these cases and in litigating them has been noteworthy. Ultimately our aggressive involvement -- through investigation, litigation and negotiation -- is the most important incentive for relators, because when we succeed, they share in that success. As a result of the 1986 amendments to the False Claims Act, the most important factors in determining the outcome of these cases are the government's active involvement in the development of the investigation, its resolution of cases before a formal election is made, and its decisions to intervene in matters and prosecute cases on behalf of the government and the relator.

Of the approximately $697 million recovered in qui tam actions since the enactment of the amendments to the Act in 1986, about $688 million (almost 99% of the total) has been recovered in cases which the Department of Justice pursued, by negotiating a settlement prior to intervention or obtaining a settlement or judgment after it intervened and prosecuted the case. To date, in fiscal year 1994, the Department of Justice is on the verge of recovering a record breaking $1 billion in False Claims Act cases. So far in fiscal year 1994, $278 million of the recoveries have come from qui tam actions. This follows a record breaking year in 1993 when the Department recovered $372 million in settlements and judgments in civil fraud cases, of which $180 million was obtained in qui tam cases. These results reflect the resources which the government has devoted to these cases, including the 43,112 attorney hours which just the Civil Division of the Department of Justice devoted to qui tam suits in 1993. This allocation of attorney resources was augmented by the vast array of other government personnel involved in these cases, including prosecutors and civil attorneys in the Offices of the United States Attorneys, and investigative, audit, and program personnel throughout the government's agencies.

In addition to the Administration's demonstrated resolve to give these cases the highest priority, in our discussions on pending legislation we have made two significant changes in the policies of the last Administration. First, we have agreed that motions to dismiss relators based upon the source of relators' information should be made only by the government. This is a major gain for relators. Under the current law, motions to dismiss on this basis can be made by defendants. In fact, as the current case law reflects, almost all of the relators who have been dismissed on this basis have been dismissed on motions made by defendants, not by the government.

We believe that the decision whether a relator should be allowed to participate in a suit and share in the recovery is a matter that is of primary concern to the government, and that, accordingly, it is the government that should decide whether such a motion should be made, based upon the statutory criteria. Under current law, defendants have too often made these motions simply as

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a routine litigation tactic to increase the expense and time required for a relator to bring these suits. We have agreed that this weapon needs to be removed from the defendant's arsenal. In doing so, we will measurably increase the incentives for relators to bring qui tam actions.

Second, we have agreed for the first time that most government employees should be allowed to bring qui tam suits as long as they follow the reporting procedures provided and the government is given a reasonable amount of time to act on the fraud first. This is a major reversal of the previous Administration's opposition to government employees bringing suit under any circumstances.

We believe, however, that there are certain classes of government employees whose duties are so integral to the decision making process in a fraud investigation that it is important to ensure that their decisions are made solely on the basis of the public's interest and that there be no taint of personal financial motivations. This policy concern is acknowledged in the pending legislation which prohibits qui tam suits by government employees who work for the Department of Justice and the Inspector General's Offices of the various agencies. We believe that this bar needs to be expanded to other limited classes of government employees who play an equally integral role in these decisions.

We believe that the Department's willingness to reverse the positions of previous Administrations on the two major issues discussed above amply demonstrates our agreement with the sponsors of this legislation on the overall goal of strengthening the ability of the government and private citizens to fight fraud against the government. There are certain aspects of the pending legislation, however, which we believe should be modified to improve the statutory qui tam process.

The qui tam provisions create a mechanism by which private citizens may not only assert claims against those who defraud the government, but also effectively assert monetary claims against the United States Treasury. The Department must assess and occasionally challenge these claims. A major component of the statutory scheme of the False Claims Act is to provide private financial incentives to individuals to bring these actions. While the interests of the United States in these actions obviously are at odds with those of defendants, they are also sometimes unavoidably in conflict with the private financial interests of the relators as well. While we are committed to working with and minimizing conflict with qui tam relators, it must be remembered that in the end only Department of Justice attorneys are legally and ethically charged with protecting the interests of the United States. Some of the provisions included in the pending legislation should be amended to better ensure that the interests of the taxpayers of the United States are kept paramount.

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Pursuant to our discussions with the Subcommittee, we prepared a substitute bill that proffered certain changes to the Subcommittee's draft proposal. We attach that substitute ("Substitute") (Attachment A), for your consideration and urge its adoption in lieu of S. 841.

1. Government Right to Dismiss Certain Actions:

We are particularly concerned with the amendment to the public disclosure bar (Sec. 3). We completely agree with the primary legislative goals that: 1) only the government may move to dismiss relators who have brought parasitic suits; and 2) such motions should be filed early to conserve time and money by relators whose cases will be dismissed so that other relators will be encouraged to come forward. Other provisions of the bill will have the opposite effect, however, and will undermine these goals: they will simultaneously discourage relators from coming forward, and will unnecessarily deplete the Treasury by paying rewards to individuals when the government would have taken action without a qui tam suit.

Under the bill in its current form, a relator could file suit and recover even if the relator had contributed nothing to an ongoing and active government investigation or audit of the same matter. Dismissal of the relator would be allowed only if the relator "first learned" all or substantially all the information from a governmental investigation or from the news media. (Sec. 3, (e)(6)(A)(i)). This provision unnecessarily disadvantages the government, and thus the taxpayer, in the recovery process. The government may be put in the unfair position of having to split the recovery with a private relator who has not contributed anything to the case.[1] We urge the Committee to adopt language that would bar

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[1] To illustrate, suppose that the government commences an investigation of a government contractor based on a tip, and that investigation proceeds as the government gathers evidence of fraud. The government prepares to indict and file suit against the company. However, before it is prepared to do so, either a news report is published discussing the government's allegations or the existence of the government's investigation otherwise becomes known (neither is an uncommon scenario where large contractors are under investigation). John Doe, who worked at the company and was aware of the wrongdoing when it occurred (but never reported it to the government) becomes aware of the investigation and realizes he can file a qui tam suit, charging the very same allegations as those already being investigated. He would not be dismissed under the bill because he did not "first learn" of the allegations from the investigation. Yet this opportunistic relator has in no manner contributed to the government's prosecution of the fraud.

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recovery in this situation, regardless of where the person derived the information, as suggested in the substitute bill.[2]

One specific example of such noncontributing suits is the qui tam action that virtually mirrors a company's voluntary disclosure to the government. Our proposed revision bars an action where substantially the same matters have been disclosed and accepted into an established voluntary disclosure program and are the subject of an active investigation or audit. These actions, which do nothing more than make the very allegations that a company has already disclosed and that the government is pursuing through an existing enforcement mechanism, add nothing to the government's anti-fraud effort.

We also suggest additional language at Sec. 3 (e)(4)(i) to protect relators who bring valuable new information to the government's active investigation or audit, which significantly increases the government's recovery. Such a relator should be authorized to recover where the new information provides substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation or audit. (Substitute, Sec. 3, (e)(4)(i)) The Substitute limits the relator's recovery to the "proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person." (Substitute, Sec. 4, (3)(C)) These safeguards would also apply to qui tam actions which go beyond the matters revealed in a company's voluntary disclosure. Thus, where the qui tam action alleges that the voluntary disclosure itself is false or fraudulent or the action provides additional facts that are not substantially the same as those disclosed, such a case would not be subject to dismissal under this section.

Additionally, we are concerned that the bill does not protect the person who reports fraud to the government before filing a qui tam suit, while permitting suits by other relators who file suit first but add nothing to the government's knowledge. We would correct this oversight with language to permit the relator who alerted the government to file suit, even if the government, as a result of the publicity of the fraud from the Congress or the news media, opens an investigation first. (Substitute, Sec. 3, (e)(4)(i))

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[2] In our view, mere information in the government's possession should not bar a qui tam suit. If the government was not utilizing that information in an active investigation or audit or had closed its consideration of a matter, a qui tam suit should be permitted. Ultimately, it would be up to the court to decide if the government's investigation was sufficiently active to bar the relator's suit.

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Thus, the Department proposes language to better accomplish several goals underlying this legislation. First, this language would reward those who are sources of information in the first place and voluntarily provide it to the Department or to a media or congressional source before they file a case. Second, our language would encourage those with information about fraud to report it to the government promptly, thus advancing the taxpayers' interests and maximizing our ability to develop and prosecute these cases. Without this encouragement, we are concerned that individuals would wait to file their own lawsuits instead of coming forward, relying on the argument that they did not "first learn of" the allegations as a result of the investigation but on their own. Third, it has been our experience that many relators and counsel find it in their interest to report their information to the government before they file to facilitate a working relationship and to validate the information. We think that the bill in its present form will discourage this process entirely, because it would allow witnesses who learn of the investigation to recover and displace the original source from recovery if they beat the original source to the courthouse door in filing these suits.

2. Other Aspects of Dismissal Provision:

a. Court's Dismissal: We believe that as currently drafted, the bill would improperly allow the court to exercise discretion in deciding whether or not to dismiss actions under (e)(6)(A) (where the relator obtained substantially all of the allegations from a government investigation or the news media or Congress). The bill should explicitly state that the court "shall dismiss" the actions under these circumstances.

b. Period to Move to Dismiss the Relator: We have agreed to limit the ability to file motions to dismiss the relator to the government, eliminating the possibility of defendants moving to dismiss. However, the 90 day period within which the government could file such a motion is insufficient. We understand that it is preferable for the motions to be filed early in the lawsuit rather than later, after the relator has participated in the suit. However, we urge the Committee to adopt a more workable limitation, as set forth in the Substitute, so that the government will have an opportunity to acquire essential evidence regarding the relator's status, e.g., whether the relator learned of the information from an active investigation, and, if not, whether he otherwise can proceed as a relator. Either investigation or discovery, or both, will be necessary. Such a procedure causes no prejudice because, during the early stage after filing a qui tam case, the relator typically does not invest significant resources in the litigation.

Moreover, the Department's time and limited resources following the filing of the complaint should be used to investigate whether the defendant has committed a fraud and whether the

government should intervene. Once those decisions are made, the government then can turn its attention to determining whether a motion to dismiss the relator is appropriate.

c. Basis for Dismissal: The current language of the bill would bar only relators who learned substantially all of the facts underlying the material allegations from active investigations or the news media. We suggest additional language to extend the bar to those who learned the "basis" for those allegations from the public sources listed. This is meant to clarify that relators' attorneys who simply fashion their claims in legal language that differs from that used by perhaps non-lawyer government investigators (or made public by non-lawyer reporters) cannot avoid the bar if the basis for those claims was learned from those sources. (Substitute, Sec. 3(4)(ii)) We urge you to include this language.

d. "Fraud" Investigation: In its present form, the bill would bar suits only where the relator learned of the facts from an active and ongoing "fraud" investigation, which is an unduly narrow provision. Investigations cannot be easily labeled "fraud" investigations at the early stages -- we investigate allegations that could give rise to a finding of fraud, depending upon the evidence developed. The touchstone should be whether a government inquiry into the matters alleged in the qui tam suit is pending, whether or not that inquiry is termed a "fraud" investigation.

Similarly, although the current language does not include "audit", the government's inquiry into allegations of fraud typically begin with a government audit. Whether a particular government action is called an "audit" or an "investigation" is often just a matter of nomenclature. Audit action without any separate inquiry termed an "investigation" often constitutes the entire basis for a False Claims Act case. Thus, an active audit is government action on the matter just as an investigation is government action (and, under the Substitute as well as the Senate bill, if the government does not take action and the audit is closed, a qui tam suit can be filed). We urge the Committee to add "audit" to the existing language in section (6)(A)(i)(I), as does the Substitute.

e. Proceedings to which the government is a party: Section 3 of the bill does not bar the relator who derives his information from a filed criminal indictment or information or other proceedings to which the United States is a party. This bar is necessary because there may be no formal investigations pending once criminal charges have been filed, even though the Government intends to proceed civilly once the criminal action is concluded. Moreover, a relator who derives his information from the government's proceeding but adds nothing to the government's case, has no legitimate basis for recovery. We suggest language to

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address this oversight. (Substitute, Sec. 3, (e)(4)(i)(a) and (e)(4)(ii)(I)).

f. Government Employees:

1. Exclusions of certain employees. As mentioned above, under the bill, only DOJ employees and employees of the Offices of Inspectors General are barred from becoming relators. (Sec. 3, (e)(6)(C)). This exclusion category should also cover federal employees whose responsibilities include the detection and investigation of fraud (investigators, auditors, agency contracting personnel and attorneys), as set forth in the Substitute at Sec. 2(5)(E). These employees are not confined to the Offices of Inspectors General but include auditors who are charged by law with the responsibility of auditing for potential fraud and abuse. For instance, the Defense Contract Audit Agency audits both DOD procurements and selected agencies' contracts, has subpoena authority as well as document inspection authority pursuant to contract, and conducts audits of government contracts, contract proposals, and other contract actions. DCAA, furthermore, is charged with the responsibility to report suspected fraud to the Office of Inspector General. Similarly, the General Accounting Office is charged broadly by statute to investigate "all matters relating to the receipt, disbursement, and use of public money" and assist the Congress in obtaining information about federal expenditures. 31 U.S.C. § 712.

The Substitute would also exclude agency contracting personnel from those eligible to file qui tam suits. Contracting personnel are the employees who are the most familiar with the award and administration of a contract, and thus often the government employees most familiar with a contractor's practices, including its negotiations, charging of costs, and production or delivery of the procured items or services. Thus, they are among those most likely to uncover procurement fraud and be responsible for deciding to initiate fraud investigations. Likewise, attorneys employed by government agencies also are charged with the responsibility to pursue, and to refer to the Department of Justice, allegations of fraud in connection with government contracts and programs. Attorneys, of course, are also under an ethical obligation not to profit personally based on information belonging to their clients.

Without the expanded exclusion, the same government employees who are given the responsibility to decide whether the government should open an investigation and pursue fraud claims could profit personally if they decide not to do so. This would create disincentives for the government to investigate fraud and obvious conflicts of interest. We also are concerned that criminal cases could be jeopardized because government employee witnesses would be subject to impeachment based on their financial interests in the outcome of the fraud investigation.

2. Suits based on information learned in the course and scope of government employment: The bill's current language does not correct a potential problem of the laundering of governmental employees' information to others outside the government. We urge the Committee to correct this significant loophole by barring suits based "in whole or in part, upon information obtained in the course and scope of federal employment." (Substitute, Sec. 3, (e)(5)(A))

3. Continuing obligation to disclose:
The bill requires full cooperation but does not provide for the continuing obligation of the government employee to disclose information obtained after reporting the fraud. (Sec. 3, (e)(6)(A)(ii)(II)). This provision, as set forth in the Substitute, is necessary to ensure that the employee does not withhold relevant information in order to pursue a personal claim. (Substitute, Sec. 3(5)(A)(2))

4. Extension of 12 month period:
The bill does not allow for any extension of the 12-month period in which the government may file suit after disclosure by the government employee. The Substitute reduces the extension period to 12 months upon notice to the relator. (Substitute, Sec. 3, (e)(5)(A)(B)) This extension period is necessary because it is very difficult to predict the complexity and duration of an investigation. A total period not to exceed 24 months is wholly reasonable.

5. Obligation of government employees to report fraud: We have added language to the Substitute to make clear that notwithstanding the ability of a government employee to file suit under section 3730 where that employee has satisfied the requirements of the statute and is not otherwise excluded, that nothing in the statute is intended to eliminate or lessen the employee's independent and existing obligations to report fraud. (Substitute, Sec. 3, (e)(5)(F)) For example, Executive Order 12674 (April 12, 1989) and federal regulations (5 C.F.R. § 2635.101) require that every government employee must disclose "waste, fraud, abuse and corruption to appropriate authorities." We would expect that the legislative history should clarify this point further.

g. Protection of Information in Support of Motions to Dismiss: The bill does not afford the government clear protection for its investigative information supporting its motions to dismiss a relator. Hence, our entire investigative file can be disclosed to a defendant, endangering a subsequent False Claims Act case. We suggest a revision to protect against such a disclosure by keeping the motion to dismiss and supporting information under seal. The motion itself may be disclosed to the relator, although the court, in its discretion and where the interests of justice require (for instance, where disclosure of investigative information would

compromise an active investigation or would reveal classified information), may limit disclosure of the supporting evidence. (Substitute, Sec. 3, (e)(6))

3. Extension of the Investigative Period to 120 Days: Although we appreciate the bill's extension of the investigative period from 60 to 90 days, we would urge an increase to 120 days. (Substitute, Sec. 2) In our experience, the 60 days is simply insufficient to conduct the investigation required in these typically complex, fact-intensive cases. For example, agency Inspectors General often issue Inspector General subpoenas for documents, or we issue Civil Investigative Demands. Depending upon the company's compliance, the process of obtaining and reviewing the documents can consume months. Witness interviews or testimony pursuant to CIDs are generally also necessary, which consume additional time. Significantly, many cases are delayed because of the pendency of a parallel criminal investigation and premature decisions on intervention caused by qui tam deadlines can seriously disrupt the criminal proceeding. While 90 days is an improvement over the current 60 day period, 120 days is not unreasonable and is a more realistic measure of the minimal time required to investigate a fraud case.

4. Provisions Relating to Actions Barred and Qui Tam Awards: The bill amends § 3730(d) to allow 15-25% of "all of the proceeds of the action or settlement", dropping "of the claim". (Sec. 4) Arguably, this would allow relators to obtain shares of non-fraud recoveries (where the government elects not to pursue the fraud claims, but resolves them as a matter of contract).

The qui tam statute and the diversion of federal funds to the private citizen have historically been justified by the compelling need for information about fraud against the government. There is no similar justification to allow the private plaintiff a share of taxpayer dollars for providing information about a contract dispute, where the government is entitled only to compensatory damages (as opposed to False Claims Act multiples and penalties) and will not be made whole if up to 30% of that must be diverted to a relator.

5. Waiver of Private Right of Action: Given the definition of "person" in section 5 of the bill, we do not think it is enough to rely on the legislative history to clarify that the waiver section deals only with private parties and is not intended to affect the rights of the Government. We propose a change in the language. (Substitute, Sec.4, (2))

6. "Person" Definition: Based upon discussions with subcommittee staff, we had understood that the relator's status should be defined by that of the person who provided the information. However, the bill does not amend the language accordingly. The Substitute would preclude a third party, for

example, recovery where the individual providing the underlying information is otherwise barred, as would be the case if that latter person were criminally convicted for the underlying fraud. 31 U.S.C. § 3730(d)(3). (Substitute, Sec. 6) We believe that this should be clarified in the bill.

7. Statute of Limitations: We support the equitable tolling of the six-year statute of limitations contained in the bill; this provision is consistent with the law providing for equitable tolling of fraud and other tort actions during the period when discovery of the fraud or tort has not occurred and is also consistent with the six-year equitable tolling of the general contract statute of limitations in Title 28 of the U.S. Code. The DOJ had obtained favorable case law under the pre-1986 6 year statute of limitations to the effect that the government had 6 years from its discovery of the fraud to file suit. The 1986 Amendments essentially cut this back to allow only a 3 year tolling period. The amendment will certainly improve the DOJ's ability to assert the government's claims and recover our losses. We do not object to the addition of the ten year statute of repose.

8. CID Authority: While we support the concept of amending the CID statute to extend the Attorney General's authority to other officials within the Department, we believe that the statute should provide that the Attorney General's authority may be exercised not only by an Assistant Attorney General, but officials above the Assistant Attorney General, that is, the Associate and Deputy Attorneys General. The Substitute accomplishes this result.

9. Retroactivity: We regret that the bill does not expressly make the 1986 and 1988 amendments retroactive. While the district courts have generally applied the 1986 amendments (including increased damages and penalties, lower burden of proof, etc.) retroactively, two courts of appeals have disagreed, and thus, the state of the law is unclear. The amendment is necessary to make clear Congress' intent so that additional resources are not consumed in litigating this issue. A number of large cases are still pending which include damages for conduct occurring pre-1986, and millions of dollars are at stake.

The bill also makes the statute of limitations amendment prospective only. Since the courts have held that amendments to limitations periods are procedural and may be immediately applied, as a matter of law this amendment can be made retroactive. Given the extreme practical difficulty in applying two different statutes of limitation to claims in the same case depending on whether they arise before or after the date of the amendments, the change to the limitations period should be made retroactive. The Substitute makes all of the amendments retroactive.

10. Reporting: The current bill imposes an even more onerous reporting requirement than the original S. 841. (Sec. 9). Many of

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the categories of data (e.g., nature and number of investigations and "related proceedings" (A), and results achieved, including "related recoveries" (F)) are so vague as to be impossible to satisfy, and would require us to disclose nonpublic information concerning existing investigations that would prejudice our ability to bring False Claims Act cases based on that information. We neither maintain nor do we have the mechanisms to collect much of the other data listed in this section. We have drafted a reporting provision which can be satisfied without unduly affecting our resources adversely (Substitute, Sec. 9).

We believe the ongoing discussions that we have had with members of the Senate Judiciary Committee have been most productive. We look forward to working with you further on this important bill.

Sincerely,

Sheila F. Anthony
Assistant Attorney General

Attachment

cc: Honorable Orrin Hatch
Ranking Minority Member

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
Administrative Practice

Honorable Charles Grassley
Ranking Minority Member

REVISED 6/1/94

A BILL

To amend chapter 37 of title 31, United States Code, relating to false claims actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "False Claims Amendments Act of 1993".

SECTION 2. TECHNICAL AMENDMENT TO SECTION 3730(b).

Section 3730(b) of title 31, United States Code, is amended by striking the number "60" whenever it appears and inserting "120".

SECTION 3. JURISDICTIONAL BAR FOR CERTAIN ACTIONS INCLUDING ACTIONS BASED ON INFORMATION OBTAINED IN THE COURSE AND SCOPE OF FEDERAL GOVERNMENT EMPLOYMENT.

Section 3730(e) of title 31, United States Code, is amended--

(1) by deleting subsection (e)(4) in its entirety, and by substituting the following:

"(4) The Court shall dismiss the person bringing the action on motion by the Government and such person shall not share in any recovery obtained under section 3730(d)(1) if:

(i) on the date of the filing (a) there exists a filed criminal indictment or information or an active investigation or audit by the Government into substantially the same matters as set out in the complaint, including an investigation or audit into matters disclosed and accepted into the Department of Defense's Voluntary Disclosure Program or any other voluntary disclosure program established by the head of an agency or department of the United States Government, and (b) any new information provided does not add substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation or audit and (c) the Government's indictment, information, investigation or audit was not initiated based on information provided by that person, voluntarily and prior to filing the action, to the Government, or to a news media or congressional source of the information to the Government, or

(ii) such person learned the basis for substantially all of the material allegations contained in the action from

(I) an active investigation or audit by the executive branch of Government, a filed criminal information or indictment, or a proceeding to which the Government is a party; or

(II) a news media report, congressional hearing or report, or congressional investigation, if within 60 days of issuance of such news media report or congressional hearing, or completion of such investigation, the executive branch of the Government commenced an active investigation or audit of the facts contained in such hearing, report or investigation.

(2) Subsection (e) is further amended by adding the following new subsections (e)(5) and (e)(6)--

"(5)(A) The court shall dismiss from the action the person bringing the action on motion by the Government where the action brought under subsection (b) is based, in whole or in part, upon information obtained in the course and scope of federal employment, unless all of the following has occurred:

"(1) Such person, before bringing an action--
"(i) where the employing agency has an Inspector General, such person disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed to such inspector general, and notified in writing such person's supervisor and the Attorney General of the disclosure under this subparagraph (a)(i); or

"(ii) where the employing agency does not have an Inspector General, such person disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed to the Attorney General, and notified in writing the person's supervisor of the disclosure under this subparagraph (a)(ii); and

"(2) Such person, before bringing the action, disclosed to the persons set forth in (A)(1)(i) or (ii) all material evidence and information which came to the person's attention after the initial disclosure and fully cooperated with the Attorney General and other officials in the Government's investigation of the alleged violation, and

"(3) Eighteen months (and any period of extension as provided for under subparagraph (B)) have elapsed since the disclosures of information and notification under either subparagraph (A)(1)(i) or (ii) were made and the Attorney General has not filed an action based on such information.

"(B) Prior to the expiration of the 18-month period described under subparagraph (A)(3) the Attorney General may provide written notice to the person who has disclosed information and provided notice under subparagraph (A)(1)(i) or (ii) that the Attorney General has elected to extend the 18-month period for an additional 6 months.

"(C) For purposes of subparagraph (A)(1), a person's supervisor is the officer or employee who--

"(i) has supervisory authority over such person; and
"(ii) such person believes is not culpable in connection with the violation upon which the action under this subsection is based, and
"(iii) is in a position of the next immediate non-culpable supervisor of such person.

"(D) A person who is dismissed from an action under subsection (e)(5) shall not share in any recovery under section 3730(d)(1).

"(E) No employee of any investigatory or audit agency of the United States Government, including, but not limited to, an Office of Inspector General, the Defense Contract Audit Agency, the General Accounting Office, the Department of Justice, nor persons whose responsibilities relate to contract award or performance, nor any individual acting as an attorney for the United States or any of its agencies shall be eligible for an award under subsection (d).

"(F) Nothing in this Act shall derogate from the obligation of a federal employee, imposed by law or otherwise, to disclose fraud to the appropriate authorities.

"(6) The Government may move to dismiss an action under subparagraph (e)(4)(i) prior to a date that is 60 days after the complaint is unsealed and served upon the defendant pursuant to subsection (b)(3), and later for good cause shown. The Government may move to dismiss an action under subparagraph (e)(4)(ii) prior to a date that is 120 days after the complaint is unsealed and served upon the defendant pursuant to subsection (b)(3), and later for good cause shown. Any person bringing a civil action under subsection (b) shall be provided an opportunity to contest a motion to dismiss under subsection (e).

Any motion to dismiss and supporting information shall be filed under seal and shall not be disclosed to the defendant. The court may, upon the Government's request, restrict the access of the person bringing the civil action tc evidentiary materials filed in support of a motion to dismiss as the interests of justice require. Where a motion to dismiss is based upon subsection (e)(5), it shall be the burden of the person bringing the civil action tc demonstrate that all of the conditions set forth in subparagraphs (e)(5)(A)(1) through (3) have occurred.

SECTION 4. PROVISIONS RELATING TO DISMISSAL, PRIVATE WAIVER OF RIGHT OF ACTION AND RELATOR'S SHARE.

Section 3730 of title 31, United States Code, is amended--

(1) in subsection (b)(1) by striking the last sentence and substituting the following: "An action brought under this section, including an action in which the United States has declined to intervene, may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."

(2) and by further amending subsection (b)(1) by adding the following at the end thereof: "A private person may waive or release a right of action under this subsection (b) only as part of a court approved settlement of a civil action brought under this section.";

(3) in subsection (d)(1)--

(A) in the first sentence--

(i) by striking out ",subject to the second sentence of this paragraph," and

(B) in the third sentence by striking out "or the second sentence"; and

(C) by striking out the second sentence and substituting therefore the following: "If the person bringing the action is not dismissed under subsection (e)(4)(i) because the person provided new information that adds substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation or audit, then such person shall be entitled to receive a share, pursuant to the first sentence of this paragraph, only of proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person."

SECTION 5. WHISTLEBLOWER PROTECTION.

Section 3730(h) of title 31, United States Code, is amended--

(1) by striking out "(h)" and inserting in lieu thereof "(h) Whistleblower Protection.--(1)"; and

(2) by adding at the end thereof the following new paragraphs:

"(2)(A) In any action brought by an employee under paragraph (1), the employee shall be entitled to relief if, based upon a preponderance of the evidence, the employee demonstrates that a lawful act described under paragraph (1) was a contributing factor in the action by the employer against the employee that is alleged in the complaint.

"(B) Notwithstanding subparagraph (A), an employee who brings an action under paragraph (1) shall not be entitled to relief if the employer demonstrates by clear and convincing evidence that the employer would have taken the same action against the employee in the absence of the lawful act that was a contributing factor described in subparagraph (A).".

"(3) For purposes of this subsection, the term "employer" includes any defendant in an action brought under section 3729, but does not include the United States Government."

SECTION 6. DEFINITION OF PERSON.

Section 3730 of title 31, United States Code, is further amended by inserting at the end thereof the following new subsection:

"(i) Definition.--For purposes of this section, the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State. The rights of any person under this section shall be the same as those of the natural person providing the information underlying the action.

SECTION 7. STATUTE OF LIMITATIONS.

Section 3731(b) of title 31, United States Code, is amended to read as follows:

"(b)(1) A civil action under section 3730 may not be brought more than 6 years after the date on which the violation of section 3729 is committed.

"(2) For the purpose of computing the period described under paragraph (1), there shall be excluded all periods during which facts material to the right of action are not known and reasonably could not be known by the official of the United States charged with the responsibility to act in the circumstances."

SECTION 8. AUTHORITY TO ISSUE INVESTIGATIVE DEMANDS.

Section 3733 of title 31, United States Code, is amended--

(1) in subsection (a)(1) in the matter following subparagraph (D), second sentence, by striking ", the Deputy Attorney General, or an Assistant Attorney General";

(2) in subsection (h)(6) by striking out ", the Deputy Attorney General, or an Assistant Attorney General";

(3) by inserting at the end thereof the following new subsection:

"(m) The authority of the Attorney General in this section 3733 may be exercised by the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General."

SECTION 9. ANNUAL REPORT.

Section 3730 of title 31, United States Code, is further amended by inserting at the end thereof the following new subsection:

"(j) ANNUAL REPORT.-- No later than 6 months after the date of the enactment of this Act, and at the end of each fiscal year thereafter, The Department of Justice shall report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives concerning --

(A) the number of qui tam actions brought for violations of section 3729;

(B) the number of qui tam actions brought for violations of section 3729 in which the Government has elected to proceed;

(C) the number of qui tam actions brought for violations of section 3729 in which the Government has elected not to proceed;

(D) the total amount of recoveries obtained for violations of section 3729 in qui tam actions;

(E) the amount of recoveries obtained for violations of section 3729 in qui tam actions in which the Government elected not to proceed;

(F) the amount awarded to persons pursuant to section 3730.

SECTION 10. APPLICABILITY AND EFFECTIVE DATE.

This Act shall apply to all cases pending on the date of enactment, and to all cases filed thereafter. All other amendments to the False Claims Act since 1986, to the extent they are not repealed by this Act, shall apply to all cases pending on the date of enactment of this Act, and to all cases filed thereafter, including the following: Pub. L. No. 99-562, §§ 1-6(a), Oct. 27, 1986, 100 Stat. 3153; Pub. L. No. 100-700, §9, Nov. 19, 1988, 102 Stat. 4638; Pub. L. No. 101-280, § 10(a), May 4, 1990, 104 Stat. 162.

DIANNE FEINSTEIN
CALIFORNIA

[redacted]

United States Senate

WASHINGTON, DC 20510-0504

February 2, 1994

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Office Building
Washington, DC 20510

Dear Mr. Chairman:

In response to several constituents with whom I met in California over the recess, I have written to Senator Grassley (letter attached) requesting that he and I work together, and with Sen. Heflin, to address possible further changes to S. 841, the False Claims Amendments Act of 1993.

It is my hope that the issues raised in my letter can be resolved prior to consideration of the bill by the full Judiciary Committee. In the event that is not possible, however, I wanted you to be aware that I may elect to circulate and offer amendments to the bill at the Executive Meeting at which it is ultimately considered.

Please feel free to call me directly regarding this legislation, or to put your staff in touch with Adam Elsgrau, my Committee counsel, at 224-3918.

Sincerely,

Dianne Feinstein
United States Senator

Attachment

United States Senate

WASHINGTON, DC 20510-0504

February 2, 1994

Honorable Charles E. Grassley
United States Senate
135 Hart Office Building
Washington, DC 20510

Dear Senator Grassley:

While in California over the winter recess, I had the opportunity to speak with a number of constituents involved in both the contracting and citrus communities regarding S. 841, your "False Claims Amendments Act of 1993." The legislation, I'm pleased to say, is generally highly regarded in those quarters. Both industries, however, asked that I carefully review it and work with you to address, if possible, a number of their remaining concerns.

First, as you know from your work in the Courts Subcommittee this fall, citrus growers believe it important to clarify that the False Claims Act was not and is not intended to encompass "reverse hypothetical claims" arising under agricultural marketing orders. They seek the same clarification in the Senate provided by the House in the 102d Congress.

I believe that the statute should be clarified in this regard and can be narrowly modified without undermining its philosophical integrity. Rather than offer an amendment to the bill in an Executive Meeting, however, I would prefer to work with you to develop mutually acceptable language in the near term.

Second, a number of major government-contractors believe that the False Claims Act needs to be strengthened in several respects not accomplished by S. 841, the substitute legislation crafted by the Courts Subcommittee. Specifically, their continued concerns relate to:

(1) the ability of government employees outside the Department of Justice and Inspector Generals' offices to file false claims actions;

(2) the degree to which courts may reduce the recovery of relators who participate in fraud; and

(3) suits brought by relators which raise the same issues as those presented by information already voluntarily disclosed to the government by defendants, or otherwise known.

Because I do not yet know enough about the intent and potential impact of the changes to your legislation proposed by the contractors' coalition, I take no position on the merits of their requests at this time. I am eager, however, to accept your invitation to talk together and look forward to our meeting. Adam Sieminski, my judiciary counsel, will continue to work with your staff to assure that I have all the material that I need to make that an informed discussion.

In the interim, thank you again for your courteous and generous offer to defer consideration of S. 841 until the next Judiciary Committee Executive Meeting after February 3rd.

Sincerely,

Dianne Feinstein
United States Senator

cc: Chairman Joseph R. Biden, Jr.
Committee on the Judiciary

Chairman Howell Heflin
Subcommittee on Courts &
Administrative Practice
Committee on the Judiciary

Chuck,
Let me know, at
your convenience, when
you wish to meet.
DF

United States Senate

WASHINGTON, DC 20510

1 February 1994

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We are writing to you regarding S. 841, a bill recently reported favorably by the Senate Subcommittee on Courts and Administrative Practice, which would make certain changes in the qui tam provisions of the Federal Civil False Claims Act. We are aware that this bill has been placed on the full Committee agenda for mark-up on Thursday.

As members of the Armed Services Committee, who represent many federal employees and government contractors, we are very interested in this topic. It has important implications for detecting and recovering damages resulting from fraud. We are aware of many concerns with the proposed reforms of the Committee substitute. It is in the best interests of all concerned to reach a workable compromise before the bill reaches the Senate floor. We would very much like the opportunity to explore some unresolved issues in greater detail and would respectfully ask that you hold off temporarily on any further action on the bill.

We understand that reform of the qui tam provisions are necessary and want to work with you and Senator Grassley on this issue to find a satisfactory compromise.

We appreciate your time and consideration in this matter.

Sincerely,

Charles S. Robb

Bob Graham

United States Senate

COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

February 1, 1994

The Honorable Senator Joseph Biden, Jr., Chairman
The Honorable Senator Orrin Hatch, Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Joe and Orrin:

We understand that in the near future the Judiciary Committee will consider S. 841, a bill to make certain changes in the qui tam provision of the federal Civil False Claims Act. Because this issue has an important impact on the federal acquisition process, we would like to share our views with you at this time.

As you know, the Administration has emphasized the importance of acquisition reform legislation as a key element of the "reinventing government" initiative. We have been urged by representatives of both the public and private sectors to include qui tam reform in the legislation. In view of the initiatives that have been undertaken by the Judiciary Committee, however, it would be our preference to work with you in developing appropriate changes to the legislation. Accordingly, we respectfully request that you consider the following recommendations. These recommendations are based upon our view as to how best to fulfill the purposes of the qui tam provisions in the context of comprehensive acquisition reform.

First, we are concerned about the relationship between qui tam and voluntary disclosure. Under the current law, even when companies make voluntary disclosures of possible wrongdoing under a formal government voluntary disclosure program, a qui tam suit may still be filed covering the same information as provided in a voluntary disclosure. In such circumstances, a qui tam relator could recover one quarter of the money due to the government. This means that funds due to the taxpayers would be diverted to a private individual even though the information was initially disclosed by a company, rather than the individual. The legislation should make it clear that such a recovery is not authorized.

Second, we are concerned about the fact that the current law has been interpreted to permit employees to file suits based on

information gained through their government employment. Public officials owe their loyalty to the government. There are significant opportunities for individuals to disclose information about fraud, waste, and abuse to the Inspector General, the General Accounting Office, and Congress. The very large financial rewards available in qui tam suits gives government employees a significant incentive to not report matters to appropriate government officials in order to pursue the matter for private gain. Permitting a government employee to receive a bounty as a qui tam relator is double payment for the same services, since the government employee has already received his government pay for properly acting on information as to possible fraud he may receive. We should put a complete end to qui tam suits by government employees when they gain the information for the suit from their government employment.

Third, we are concerned about the relationship between the False Claims Act and the Contract Disputes Act. Under the Contract Disputes Act, disputes between the Government and contractors are resolved in a specialized forum -- either the Court of Federal Claims or an agency board of contract appeals. When a False Claims Act case is filed, however, the matter, including any related contract dispute, goes solely to a Federal district court. We urge you to provide an appropriate means for removing contract dispute matters to the Court of Federal Claims or the agency boards of contract appeals.

Fourth, we are concerned that under present law, an active participant in a fraud scheme can receive a full qui tam reward. Federal courts should be given the discretion to reduce the reward earned by a qui tam relator when the relator participated in the fraud.

We urge you to take these concerns into account prior to reporting any legislation concerning the qui tam provisions of the False Claims Act. We appreciate your consideration of our views.

Sincerely,

Jeff Bingaman
Chairman
Subcommittee on Defense
Technology, Acquisition
and Industrial Base

Bob Smith
Ranking Member
Subcommittee on Defense
Technology, Acquisition
and Industrial Base

CHARLES S. ROBB
VIRGINIA

WASHINGTON OFFICE:
Russell Senate Office Building
First and Constitution Avenue, NE, Room 463
Washington, DC 20510
(202) 224-4024

United States Senate

WASHINGTON, DC 20510-4603

9 June 1994

ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
FOREIGN RELATIONS
Chairman, East Asian and Pacific Affairs Subcommittee
JOINT ECONOMIC COMMITTEE
Vice Chairman,
Democratic Policy Committee

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We are writing regarding S. 841, a bill under consideration by your Committee, which would make certain changes in the qui tam provisions of the Federal Civil False Claims Act (FCA). We would like to take this opportunity to bring a few of our concerns to your attention as the full Judiciary Committee considers FCA reform in the context of S. 841.

As you are aware, this matter was carefully considered in the report of the Section 800 Panel, a group of distinguished government procurement authorities that was statutorily created by PL 101-510, the FY93 Defense Authorization bill.

In addition to recommendations on acquisition reform, the Section 800 Panel made important suggestions regarding needed changes in FCA. It is our hope that we can come up with a compromise on FCA reform which incorporates some of the Panel's recommendations.

It is our understanding that the Department of Justice (DOJ) is now circulating its own draft of proposed changes to the qui tam provisions. While the DOJ draft recognizes some of the concerns of the Section 800 Panel, we believe that its recommendations can be improved. Major concerns with the DOJ's proposals remain:

- Any bar on qui tam suits following a voluntary disclosure should be jurisdictional, not based on a government motion alone; and such a bar should operate when the disclosure is made;

- The categories of government employees who cannot file suit is too narrow; it should include government employees involved in investigations, audit, or contractor oversight;

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Regional Offices:
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Norfolk, VA 23510
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8280 Greensboro Boulevard
Suite 918
Tysons Corner, VA 22182
(703) 356-2806

1 Court Square
Suite 340
Harrisonburg, VA 22801
(703) 434-0151

Dominion Bank Building
Main Street
Onancock, VA 23417
(804) 787-8196

Signet Bank Building
630 Main Street
Danville, VA 24541
(804) 793-0796

Center Bank Building
310 First Street SW, Suite 102
Roanoke, VA 24011
(703) 857-2672

- The proposed standard for lowering the reward for dilatory relaters should not be subjective, as the DOJ draft suggests. It basis its judgement on a relator's state of mind. An objective standard, such as "with the effect of increasing damage to the government," would be much easier for a court to apply;

- The DOJ draft does not grant discretion for courts to reduce remedies for relaters who participate in frauds; the conduct of such relaters should be subject to the same review as the DOJ would provide for dilatory realtors;

- The period of time for government reaction to a public disclosure of possible fraud (sixty days) is too short;

- The Section 800 Panel concerns related to potential disproportionate penalties under certain circumstances and the need to maintain integrity of the Contract Disputes are not addressed at all in the DOJ proposals.

We are interested in finding sound and equitable compromises on these issues and are prepared to work with your Committee to reconcile our concerns with the legislation. We would like to work with you to obtain the best possible legislation in this important area.

Sincerely,

Charles S. Robb

Bob Graham

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

July 15, 1994

VIA FACSIMILE
(202) 456-1647

Mr. Stephen Neuwirth
Associate Counsel to the President
Old Executive Office Building, Room 128
Washington, D.C. 20501

RE: False Claims Amendments - Letter to Senator Biden

Dear Stephen:

This letter will confirm the meeting for next week on Thursday, July 21, 1994, at 3:00 p.m. to discuss the Administration's policy concerning the pending Amendments to the False Claims Act. This meeting, of course, is subject to being rescheduled should conflicts arise for certain participants.

In reviewing the proposed letter to Senator Biden setting out the Administration's position, I realized that the statistics set out in the second paragraph of the second page were outdated. I have amended this paragraph to reflect the updated statistics. Otherwise this letter should be identical to the last draft. Attached is the updated draft.

Sincerely,

George J. Phillips
Counselor to the
Assistant Attorney General

Enclosure

cc: Jeremy Ben-Ami - VIA FACSIMILE (202) 456-7028
Ingrid Schroeder - VIA FACSIMILE (202) 395-3109
Stephen Preston - VIA FACSIMILE (703) 693-7278
Frank W. Hunger
Robert Brink
Amy Jeffress
Faith Burton

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

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Revised 7/15/94

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This provides the Department's views on S. 841, the False Claims Amendments Act of 1993, as reported by the Subcommittee on Courts and Administrative Practice. The Department supports the Act's goal of facilitating qui tam litigation to further augment the Government's war against fraud. We and the staff of the Subcommittee on Courts and Administrative Practice have been engaged in productive and worthwhile discussions aimed at reaching a consensus on this legislation. Our discussions have been productive, and we have candidly exchanged ideas to refine the areas of agreement and disagreement. We believe that those discussions have produced a markedly improved bill.

At the outset, let me reiterate this Administration's strong commitment to an effective and vigorous qui tam mechanism. In a clear break with the policies of previous Administrations, we have made a concerted effort to recognize the significant contribution of relators and whistleblowers to the Government's fight against fraud. We have encouraged the Department's litigators to make every effort to work cooperatively with relators to maximize the Government's recovery. We have scrutinized the legal arguments advanced to ensure that, in protecting the government's recoveries, we do not impair the incentives which are necessary to ensure that relators come forward, especially in light of the large personal hardships many must endure in bringing these suits. The Department and its client agencies have dedicated enormous resources to the investigation and prosecution of these cases.

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Our success in acquiring the evidence to support these cases and in litigating them has been noteworthy. Ultimately our aggressive involvement -- through investigation, litigation and negotiation -- is the most important incentive for relators, because when we succeed, they share in that success. As a result of the 1986 amendments to the False Claims Act, the most important factors in determining the outcome of these cases are the government's active involvement in the development of the investigation, its resolution of cases before a formal election is made, and its decisions to intervene in matters and prosecute cases on behalf of the government and the relator.

Of the approximately $697 million recovered in qui tam actions since the enactment of the amendments to the Act in 1986, about $688 million (almost 99% of the total) has been recovered in cases which the Department of Justice pursued, by negotiating a settlement prior to intervention or obtaining a settlement or judgment after it intervened and prosecuted the case. To date, in fiscal year 1994, the Department of Justice is on the verge of recovering a record breaking $1 billion in False Claims Act cases. So far in fiscal year 1994, $278 million of the recoveries have come from qui tam actions. This follows a record breaking year in 1993 when the Department recovered $372 million in settlements and judgments in civil fraud cases, of which $180 million was obtained in qui tam cases. These results reflect the resources which the government has devoted to these cases, including the 43,112 attorney hours which just the Civil Division of the Department of Justice devoted to qui tam suits in 1993. This allocation of attorney resources was augmented by the vast array of other government personnel involved in these cases, including prosecutors and civil attorneys in the Offices of the United States Attorneys, and investigative, audit, and program personnel throughout the government's agencies.

In addition to the Administration's demonstrated resolve to give these cases the highest priority, in our discussions on pending legislation we have made two significant changes in the policies of the last Administration. First, we have agreed that motions to dismiss relators based upon the source of relators' information should be made only by the government. This is a major gain for relators. Under the current law, motions to dismiss on this basis can be made by defendants. In fact, as the current case law reflects, almost all of the relators who have been dismissed on this basis have been dismissed on motions made by defendants, not by the government.

We believe that the decision whether a relator should be allowed to participate in a suit and share in the recovery is a matter that is of primary concern to the government, and that, accordingly, it is the government that should decide whether such a motion should be made, based upon the statutory criteria. Under current law, defendants have too often made these motions simply as

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a routine litigation tactic to increase the expense and time required for a relator to bring these suits. We have agreed that this weapon needs to be removed from the defendant's arsenal. In doing so, we will measurably increase the incentives for relators to bring qui tam actions.

Second, we have agreed for the first time that most government employees should be allowed to bring qui tam suits as long as they follow the reporting procedures provided and the government is given a reasonable amount of time to act on the fraud first. This is a major reversal of the previous Administration's opposition to government employees bringing suit under any circumstances.

We believe, however, that there are certain classes of government employees whose duties are so integral to the decision making process in a fraud investigation that it is important to ensure that their decisions are made solely on the basis of the public's interest and that there be no taint of personal financial motivations. This policy concern is acknowledged in the pending legislation which prohibits qui tam suits by government employees who work for the Department of Justice and the Inspector General's Offices of the various agencies. We believe that this bar needs to be expanded to other limited classes of government employees who play an equally integral role in these decisions.

We believe that the Department's willingness to reverse the positions of previous Administrations on the two major issues discussed above amply demonstrates our agreement with the sponsors of this legislation on the overall goal of strengthening the ability of the government and private citizens to fight fraud against the government. There are certain aspects of the pending legislation, however, which we believe should be modified to improve the statutory qui tam process.

The qui tam provisions create a mechanism by which private citizens may not only assert claims against those who defraud the government, but also effectively assert monetary claims against the United States Treasury. The Department must assess and occasionally challenge these claims. A major component of the statutory scheme of the False Claims Act is to provide private financial incentives to individuals to bring these actions. While the interests of the United States in these actions obviously are at odds with those of defendants, they are also sometimes unavoidably in conflict with the private financial interests of the relators as well. While we are committed to working with and minimizing conflict with qui tam relators, it must be remembered that in the end only Department of Justice attorneys are legally and ethically charged with protecting the interests of the United States. Some of the provisions included in the pending legislation should be amended to better ensure that the interests of the taxpayers of the United States are kept paramount.

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Pursuant to our discussions with the Subcommittee, we prepared a substitute bill that proffered certain changes to the Subcommittee's draft proposal. We attach that substitute ("Substitute") (Attachment A), for your consideration and urge its adoption in lieu of S. 841.

1. Government Right to Dismiss Certain Actions:

We are particularly concerned with the amendment to the public disclosure bar (Sec. 3). We completely agree with the primary legislative goals that: 1) only the government may move to dismiss relators who have brought parasitic suits; and 2) such motions should be filed early to conserve time and money by relators whose cases will be dismissed so that other relators will be encouraged to come forward. Other provisions of the bill will have the opposite effect, however, and will undermine these goals: they will simultaneously discourage relators from coming forward, and will unnecessarily deplete the Treasury by paying rewards to individuals when the government would have taken action without a qui tam suit.

Under the bill in its current form, a relator could file suit and recover even if the relator had contributed nothing to an ongoing and active government investigation or audit of the same matter. Dismissal of the relator would be allowed only if the relator "first learned" all or substantially all the information from a governmental investigation or from the news media. (Sec. 3, (e)(6)(A)(i)). This provision unnecessarily disadvantages the government, and thus the taxpayer, in the recovery process. The government may be put in the unfair position of having to split the recovery with a private relator who has not contributed anything to the case.[1] We urge the Committee to adopt language that would bar

[1] To illustrate, suppose that the government commences an investigation of a government contractor based on a tip, and that investigation proceeds as the government gathers evidence of fraud. The government prepares to indict and file suit against the company. However, before it is prepared to do so, either a news report is published discussing the government's allegations or the existence of the government's investigation otherwise becomes known (neither is an uncommon scenario where large contractors are under investigation). John Doe, who worked at the company and was aware of the wrongdoing when it occurred (but never reported it to the government) becomes aware of the investigation and realizes he can file a qui tam suit, charging the very same allegations as those already being investigated. He would not be dismissed under the bill because he did not "first learn" of the allegations from the investigation. Yet this opportunistic relator has in no manner contributed to the government's prosecution of the fraud.

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recovery in this situation, regardless of where the person derived the information, as suggested in the substitute bill.[2]

One specific example of such noncontributing suits is the qui tam action that virtually mirrors a company's voluntary disclosure to the government. Our proposed revision bars an action where substantially the same matters have been disclosed and accepted into an established voluntary disclosure program and are the subject of an active investigation or audit. These actions, which do nothing more than make the very allegations that a company has already disclosed and that the government is pursuing through an existing enforcement mechanism, add nothing to the government's anti-fraud effort.

We also suggest additional language at Sec. 3 (e)(4)(i) to protect relators who bring valuable new information to the government's active investigation or audit, which significantly increases the government's recovery. Such a relator should be authorized to recover where the new information provides substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation or audit. (Substitute, Sec. 3, (e)(4)(i)) The Substitute limits the relator's recovery to the "proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person." (Substitute, Sec. 4, (3)(C)) These safeguards would also apply to qui tam actions which go beyond the matters revealed in a company's voluntary disclosure. Thus, where the qui tam action alleges that the voluntary disclosure itself is false or fraudulent or the action provides additional facts that are not substantially the same as those disclosed, such a case would not be subject to dismissal under this section.

Additionally, we are concerned that the bill does not protect the person who reports fraud to the government before filing a qui tam suit, while permitting suits by other relators who file suit first but add nothing to the government's knowledge. We would correct this oversight with language to permit the relator who alerted the government to file suit, even if the government, as a result of the publicity of the fraud from the Congress or the news media, opens an investigation first. (Substitute, Sec. 3, (e)(4)(i))

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[2] In our view, mere information in the government's possession should not bar a qui tam suit. If the government was not utilizing that information in an active investigation or audit or had closed its consideration of a matter, a qui tam suit should be permitted. Ultimately, it would be up to the court to decide if the government's investigation was sufficiently active to bar the relator's suit.

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Thus, the Department proposes language to better accomplish several goals underlying this legislation. First, this language would reward those who are sources of information in the first place and voluntarily provide it to the Department or to a media or congressional source before they file a case. Second, our language would encourage those with information about fraud to report it to the government promptly, thus advancing the taxpayers' interests and maximizing our ability to develop and prosecute these cases. Without this encouragement, we are concerned that individuals would wait to file their own lawsuits instead of coming forward, relying on the argument that they did not "first learn of" the allegations as a result of the investigation but on their own. Third, it has been our experience that many relators and counsel find it in their interest to report their information to the government before they file to facilitate a working relationship and to validate the information. We think that the bill in its present form will discourage this process entirely, because it would allow witnesses who learn of the investigation to recover and displace the original source from recovery if they beat the original source to the courthouse door in filing these suits.

2. Other Aspects of Dismissal Provision:

a. Court's Dismissal: We believe that as currently drafted, the bill would improperly allow the court to exercise discretion in deciding whether or not to dismiss actions under (e)(6)(A) (where the relator obtained substantially all of the allegations from a government investigation or the news media or Congress). The bill should explicitly state that the court "shall dismiss" the actions under these circumstances.

b. Period to Move to Dismiss the Relator: We have agreed to limit the ability to file motions to dismiss the relator to the government, eliminating the possibility of defendants moving to dismiss. However, the 90 day period within which the government could file such a motion is insufficient. We understand that it is preferable for the motions to be filed early in the lawsuit rather than later, after the relator has participated in the suit. However, we urge the Committee to adopt a more workable limitation, as set forth in the Substitute, so that the government will have an opportunity to acquire essential evidence regarding the relator's status, e.g., whether the relator learned of the information from an active investigation, and, if not, whether he otherwise can proceed as a relator. Either investigation or discovery, or both, will be necessary. Such a procedure causes no prejudice because, during the early stage after filing a qui tam case, the relator typically does not invest significant resources in the litigation.

Moreover, the Department's time and limited resources following the filing of the complaint should be used to investigate whether the defendant has committed a fraud and whether the

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government should intervene. Once those decisions are made, the government then can turn its attention to determining whether a motion to dismiss the relator is appropriate.

c. Basis for Dismissal: The current language of the bill would bar only relators who learned substantially all of the facts underlying the material allegations from active investigations or the news media. We suggest additional language to extend the bar to those who learned the "basis" for those allegations from the public sources listed. This is meant to clarify that relators' attorneys who simply fashion their claims in legal language that differs from that used by perhaps non-lawyer government investigators (or made public by non-lawyer reporters) cannot avoid the bar if the basis for those claims was learned from those sources. (Substitute, Sec. 3(4)(ii)) We urge you to include this language.

d. "Fraud" Investigation: In its present form, the bill would bar suits only where the relator learned of the facts from an active and ongoing "fraud" investigation, which is an unduly narrow provision. Investigations cannot be easily labeled "fraud" investigations at the early stages -- we investigate allegations that could give rise to a finding of fraud, depending upon the evidence developed. The touchstone should be whether a government inquiry into the matters alleged in the qui tam suit is pending, whether or not that inquiry is termed a "fraud" investigation.

Similarly, although the current language does not include "audit", the government's inquiry into allegations of fraud typically begin with a government audit. Whether a particular government action is called an "audit" or an "investigation" is often just a matter of nomenclature. Audit action without any separate inquiry termed an "investigation" often constitutes the entire basis for a False Claims Act case. Thus, an active audit is government action on the matter just as an investigation is government action (and, under the Substitute as well as the Senate bill, if the government does not take action and the audit is closed, a qui tam suit can be filed). We urge the Committee to add "audit" to the existing language in section (6)(A)(i)(I), as does the Substitute.

e. Proceedings to which the government is a party: Section 3 of the bill does not bar the relator who derives his information from a filed criminal indictment or information or other proceedings to which the United States is a party. This bar is necessary because there may be no formal investigations pending once criminal charges have been filed, even though the Government intends to proceed civilly once the criminal action is concluded. Moreover, a relator who derives his information from the government's proceeding but adds nothing to the government's case, has no legitimate basis for recovery. We suggest language to

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address this oversight. (Substitute, Sec. 3, (e)(4)(i)(a) and (e)(4)(ii)(I)).

f. Government Employees:

1. Exclusions of certain employees. As mentioned above, under the bill, only DOJ employees and employees of the Offices of Inspectors General are barred from becoming relators. (Sec. 3, (e)(6)(C)). This exclusion category should also cover federal employees whose responsibilities include the detection and investigation of fraud (investigators, auditors, agency contracting personnel and attorneys), as set forth in the Substitute at Sec. 2(5)(E). These employees are not confined to the Offices of Inspectors General but include auditors who are charged by law with the responsibility of auditing for potential fraud and abuse. For instance, the Defense Contract Audit Agency audits both DOD procurements and selected agencies' contracts, has subpoena authority as well as document inspection authority pursuant to contract, and conducts audits of government contracts, contract proposals, and other contract actions. DCAA, furthermore, is charged with the responsibility to report suspected fraud to the Office of Inspector General. Similarly, the General Accounting Office is charged broadly by statute to investigate "all matters relating to the receipt, disbursement, and use of public money" and assist the Congress in obtaining information about federal expenditures. 31 U.S.C. § 712.

The Substitute would also exclude agency contracting personnel from those eligible to file qui tam suits. Contracting personnel are the employees who are the most familiar with the award and administration of a contract, and thus often the government employees most familiar with a contractor's practices, including its negotiations, charging of costs, and production or delivery of the procured items or services. Thus, they are among those most likely to uncover procurement fraud and be responsible for deciding to initiate fraud investigations. Likewise, attorneys employed by government agencies also are charged with the responsibility to pursue, and to refer to the Department of Justice, allegations of fraud in connection with government contracts and programs. Attorneys, of course, are also under an ethical obligation not to profit personally based on information belonging to their clients.

Without the expanded exclusion, the same government employees who are given the responsibility to decide whether the government should open an investigation and pursue fraud claims could profit personally if they decide not to do so. This would create disincentives for the government to investigate fraud and obvious conflicts of interest. We also are concerned that criminal cases could be jeopardized because government employee witnesses would be subject to impeachment based on their financial interests in the outcome of the fraud investigation.

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2. Suits based on information learned in the course and scope of government employment: The bill's current language does not correct a potential problem of the laundering of governmental employees' information to others outside the government. We urge the Committee to correct this significant loophole by barring suits based "in whole or in part, upon information obtained in the course and scope of federal employment." (Substitute, Sec. 3, (e)(5)(A))

3. Continuing obligation to disclose: The bill requires full cooperation but does not provide for the continuing obligation of the government employee to disclose information obtained after reporting the fraud. (Sec. 3, (e)(6)(A)(ii)(II)). This provision, as set forth in the Substitute, is necessary to ensure that the employee does not withhold relevant information in order to pursue a personal claim. (Substitute, Sec. 3(5)(A)(2))

4. Extension of 12 month period: The bill does not allow for any extension of the 12-month period in which the government may file suit after disclosure by the government employee. The Substitute reduces the extension period to 12 months upon notice to the relator. (Substitute, Sec. 3, (e)(5)(A)(B)) This extension period is necessary because it is very difficult to predict the complexity and duration of an investigation. A total period not to exceed 24 months is wholly reasonable.

5. Obligation of government employees to report fraud: We have added language to the Substitute to make clear that notwithstanding the ability of a government employee to file suit under section 3730 where that employee has satisfied the requirements of the statute and is not otherwise excluded, that nothing in the statute is intended to eliminate or lessen the employee's independent and existing obligations to report fraud. (Substitute, Sec. 3, (e)(5)(F)) For example, Executive Order 12674 (April 12, 1989) and federal regulations (5 C.F.R. § 2635.101) require that every government employee must disclose "waste, fraud, abuse and corruption to appropriate authorities." We would expect that the legislative history should clarify this point further.

g. Protection of Information in Support of Motions to Dismiss: The bill does not afford the government clear protection for its investigative information supporting its motions to dismiss a relator. Hence, our entire investigative file can be disclosed to a defendant, endangering a subsequent False Claims Act case. We suggest a revision to protect against such a disclosure by keeping the motion to dismiss and supporting information under seal. The motion itself may be disclosed to the relator, although the court, in its discretion and where the interests of justice require (for instance, where disclosure of investigative information would

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compromise an active investigation or would reveal classified information), may limit disclosure of the supporting evidence. (Substitute, Sec. 3, (e)(6))

3. Extension of the Investigative Period to 120 Days: Although we appreciate the bill's extension of the investigative period from 60 to 90 days, we would urge an increase to 120 days. (Substitute, Sec. 2) In our experience, the 60 days is simply insufficient to conduct the investigation required in these typically complex, fact-intensive cases. For example, agency Inspectors General often issue Inspector General subpoenas for documents, or we issue Civil Investigative Demands. Depending upon the company's compliance, the process of obtaining and reviewing the documents can consume months. Witness interviews or testimony pursuant to CIDs are generally also necessary, which consume additional time. Significantly, many cases are delayed because of the pendency of a parallel criminal investigation and premature decisions on intervention caused by qui tam deadlines can seriously disrupt the criminal proceeding. While 90 days is an improvement over the current 60 day period, 120 days is not unreasonable and is a more realistic measure of the minimal time required to investigate a fraud case.

4. Provisions Relating to Actions Barred and Qui Tam Awards: The bill amends § 3730(d) to allow 15-25% of "all of the proceeds of the action or settlement", dropping "of the claim". (Sec. 4) Arguably, this would allow relators to obtain shares of non-fraud recoveries (where the government elects not to pursue the fraud claims, but resolves them as a matter of contract).

The qui tam statute and the diversion of federal funds to the private citizen have historically been justified by the compelling need for information about fraud against the government. There is no similar justification to allow the private plaintiff a share of taxpayer dollars for providing information about a contract dispute, where the government is entitled only to compensatory damages (as opposed to False Claims Act multiples and penalties) and will not be made whole if up to 30% of that must be diverted to a relator.

5. Waiver of Private Right of Action: Given the definition of "person" in section 5 of the bill, we do not think it is enough to rely on the legislative history to clarify that the waiver section deals only with private parties and is not intended to affect the rights of the Government. We propose a change in the language. (Substitute, Sec.4, (2))

6. "Person" Definition: Based upon discussions with subcommittee staff, we had understood that the relator's status should be defined by that of the person who provided the information. However, the bill does not amend the language accordingly. The Substitute would preclude a third party, for

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example, recovery where the individual providing the underlying information is otherwise barred, as would be the case if that latter person were criminally convicted for the underlying fraud. 31 U.S.C. § 3730(d)(3). (Substitute, Sec. 6) We believe that this should be clarified in the bill.

7. Statute of Limitations: We support the equitable tolling of the six-year statute of limitations contained in the bill; this provision is consistent with the law providing for equitable tolling of fraud and other tort actions during the period when discovery of the fraud or tort has not occurred and is also consistent with the six-year equitable tolling of the general contract statute of limitations in Title 28 of the U.S. Code. The DOJ had obtained favorable case law under the pre-1986 6 year statute of limitations to the effect that the government had 6 years from its discovery of the fraud to file suit. The 1986 Amendments essentially cut this back to allow only a 3 year tolling period. The amendment will certainly improve the DOJ's ability to assert the government's claims and recover our losses. We do not object to the addition of the ten year statute of repose.

8. CID Authority: While we support the concept of amending the CID statute to extend the Attorney General's authority to other officials within the Department, we believe that the statute should provide that the Attorney General's authority may be exercised not only by an Assistant Attorney General, but officials above the Assistant Attorney General, that is, the Associate and Deputy Attorneys General. The Substitute accomplishes this result.

9. Retroactivity: We regret that the bill does not expressly make the 1986 and 1988 amendments retroactive. While the district courts have generally applied the 1986 amendments (including increased damages and penalties, lower burden of proof, etc.) retroactively, two courts of appeals have disagreed, and thus, the state of the law is unclear. The amendment is necessary to make clear Congress' intent so that additional resources are not consumed in litigating this issue. A number of large cases are still pending which include damages for conduct occurring pre-1986, and millions of dollars are at stake.

The bill also makes the statute of limitations amendment prospective only. Since the courts have held that amendments to limitations periods are procedural and may be immediately applied, as a matter of law this amendment can be made retroactive. Given the extreme practical difficulty in applying two different statutes of limitation to claims in the same case depending on whether they arise before or after the date of the amendments, the change to the limitations period should be made retroactive. The Substitute makes all of the amendments retroactive.

10. Reporting: The current bill imposes an even more onerous reporting requirement than the original S. 841. (Sec. 9). Many of

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the categories of data (e.g., nature and number of investigations and "related proceedings" (A), and results achieved, including "related recoveries" (F)) are so vague as to be impossible to satisfy, and would require us to disclose nonpublic information concerning existing investigations that would prejudice our ability to bring False Claims Act cases based on that information. We neither maintain nor do we have the mechanisms to collect much of the other data listed in this section. We have drafted a reporting provision which can be satisfied without unduly affecting our resources adversely (Substitute, Sec. 9).

We believe the ongoing discussions that we have had with members of the Senate Judiciary Committee have been most productive. We look forward to working with you further on this important bill.

Sincerely,

Sheila F. Anthony
Assistant Attorney General

Attachment

cc: Honorable Orrin Hatch
Ranking Minority Member

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
Administrative Practice

Honorable Charles Grassley
Ranking Minority Member

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

27-Jun-1994 06:40pm

TO: Stephen C. Warnath

FROM: Bruce N. Reed
Domestic Policy Council

SUBJECT: false claims act

Are you handling this issue now that Donsia is gone? DOJ called me to push us on it. Do you know the scoop?

Call Steve Neuwirth

Next Week:
call July 5 A.m.

BANS – Grassley
DOJ; IG; Atty's; DCAA

Berman – make hoops; hurdles more difficult – don't ban any group ↔

DOD – Contractor personnel

Investigatory Period – DOD 18mos – 42mos

Tilman Hasche

she had undergone a circumcision and, if she returned to Nigeria, whether the procedure would be forced on her daughters: argument that could have some resonance," he notes. "And it did."

—Dimitra Kessenides

Winning A Record Award For A Whistle-Blower

Would-be whistle-blower Douglas Keeth, vice-president of finance at Hartford's United Technologies Corporation (UTC), had a problem. He wanted to file a suit against the defense contractor because of improper practices he had uncovered as head of UTC's internal team investigating billing procedures, but he feared that such allegations would be challenged by the company as a violation of his fiduciary responsibilities, and viewed suspiciously by the government as being motivated by monetary reward.

But Keeth and his lawyer, David Golub, overcame these obstacles and, five years after filing the suit, on March 30, Keeth walked away with $22.5 million of a $150 million settlement—the largest award ever to a whistle-blower. Under the so-called whistle-blower law, an employee alleging corporate wrongdoing sues the company, and the government may join as co-plaintiff. Golub, 45, a high-profile litigator and founding partner of the ten-lawyer Stamford, Connecticut, firm of Silver Golub & Teitell, said initially the government was reluctant even to communicate with Keeth—fearing its own investigation would be tainted by such a far-from-disinterested witness—let alone to join him as co-plaintiff.

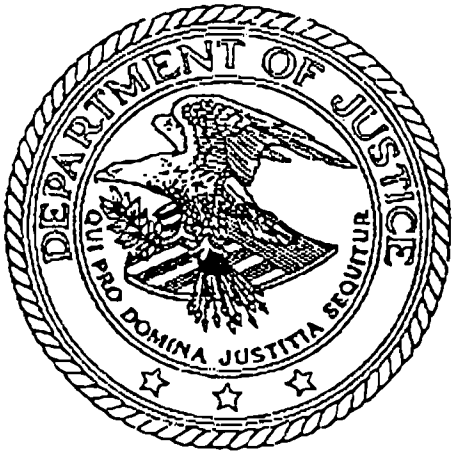
Furthermore, Golub, who earned roughly $7.5 million in fees (shared with a Boston firm that helped in the initial filing) on the case, had to convince the government that UTC was subject to a false claims suit in the first place. UTC claimed immunity from suits under a voluntary disclosure program it signed on to in 1988, in which the company's Sikorsky Aircraft division admitted to billing the Department of Defense in advance of work done—in effect, collecting interest-free loans. UTC returned the principal and promised to report back on remaining interest owed. But Keeth found that the problem went much deeper, and alleged that management tried to cover up his team's findings.

Golub successfully argued that UTC's sanitized disclosure and subsequent failure to remedy the problem invalidated its immunity. To get immunity, "they have to tell the truth," says Golub. "UTC didn't tell the truth."

—Julie Triedman

GALE ZUCKER

David Golub



GEORGE J. PHILLIPS
COUNSELOR TO THE
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
(202) 514-5713 (OFFICE)
(202) 514-8071 (FAX)

DATE: 6-20-94

TO: Donsia Strong

FAX #: 456-7028 PHONE #: _____

OF PAGES: 4

COMMENTS: _____

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 20, 1994

VIA FACSIMILE
(202) 456-7028

Ms. Donsia Strong
White House Domestic Policy Council
Old Executive Office Building
Washington, D.C. 20501

RE: False Claims Amendments - Letter to Senator Biden From Senators Robb and Graham

Dear Donsia:

I obtained the enclosed letter from Senators Robb and Graham to Senator Biden stating their concerns over the Department of Justice's "proposed changes to the qui tam provisions." I wanted to make sure you were aware of these Senators' interest in this.

Sincerely,

George J. Phillips
Counselor to the
Assistant Attorney General

Enclosure

cc: Stephen Neuwirth - VIA FACSIMILE (202) 456-1647
Michael Waldman - VIA FACSIMILE (202) 456-6485
Ingrid Schroeder - VIA FACSIMILE (202) 395-3109
Stephen Preston - VIA FACSIMILE (703) 693-7278
Frank W. Hunger
Robert Brink
Amy Jeffress
Faith Burton

CHARLES S. ROBB
VIRGINIA

WASHINGTON OFFICE:
Russell Senate Office Building
First and Constitution Avenue, NE, Room 493
Washington, DC 20510
(202) 224-4024

United States Senate

WASHINGTON, DC 20510-4603

9 June 1994

COMMITTEES:
ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
FOREIGN RELATIONS
Chairman, East Asian and Pacific Affairs Subcommittee
JOINT ECONOMIC COMMITTEE
Vice Chairman,
Democratic Policy Committee

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We are writing regarding S. 841, a bill under consideration by your Committee, which would make certain changes in the qui tam provisions of the Federal Civil False Claims Act (FCA). We would like to take this opportunity to bring a few of our concerns to your attention as the full Judiciary Committee considers FCA reform in the context of S. 841.

As you are aware, this matter was carefully considered in the report of the Section 800 Panel, a group of distinguished government procurement authorities that was statutorily created by PL 101-510, the FY93 Defense Authorization bill.

In addition to recommendations on acquisition reform, the Section 800 Panel made important suggestions regarding needed changes in FCA. It is our hope that we can come up with a compromise on FCA reform which incorporates some of the Panel's recommendations.

It is our understanding that the Department of Justice (DOJ) is now circulating its own draft of proposed changes to the qui tam provisions. While the DOJ draft recognizes some of the concerns of the Section 800 Panel, we believe that its recommendations can be improved. Major concerns with the DOJ's proposals remain:

- Any bar on qui tam suits following a voluntary disclosure should be jurisdictional, not based on a government motion alone; and such a bar should operate when the disclosure is made;

- The categories of government employees who cannot file suit is too narrow; it should include government employees involved in investigations, audit, or contractor oversight;

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(804) 791-0330

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310 First Street SW, Suite 102
Roanoke, VA 24011
(703) 983-0193

- The proposed standard for lowering the reward for dilatory relaters should not be subjective, as the DOJ draft suggests. It basis its judgement on a relator's state of mind. An objective standard, such as "with the effect of increasing damage to the government," would be much easier for a court to apply;

- The DOJ draft does not grant discretion for courts to reduce remedies for relaters who participate in frauds; the conduct of such relaters should be subject to the same review as the DOJ would provide for dilatory realtors;

- The period of time for government reaction to a public disclosure of possible fraud (sixty days) is too short;

- The Section 800 Panel concerns related to potential disproportionate penalties under certain circumstances and the need to maintain integrity of the Contract Disputes are not addressed at all in the DOJ proposals.

We are interested in finding sound and equitable compromises on these issues and are prepared to work with your Committee to reconcile our concerns with the legislation. We would like to work with you to obtain the best possible legislation in this important area.

Sincerely,

Charles S. Robb

Bob Graham