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FOLDER TITLE:

Legal Issues: False Claims Act [2]

2013-0854-S

ms676

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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Mark



U.S. Department of Justice
Civil Division

Washington, D.C. 20530

Revised 6/1/94

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

2013-0854-S

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: MA DATE: 8/16/13

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 \$610 million that the government has recovered in qui tam actions since the enactment of the Act in 1986, about \$600 million (almost 99% of the total) has been recovered in cases which the Department of Justice has pursued by negotiating a settlement prior to intervention or obtaining a settlement after it has intervened and prosecuted the case. Last year the Department of Justice recovered a record total of \$372 million, of which \$180 million came from qui tam actions. We have directed significant resources to this area: last year the Civil Division of the Department alone devoted 44,010 attorney hours to qui tam suits. 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. This year, the Civil Division expects to devote even more attorney hours to these suits, and we expect that recoveries for the taxpayer and the government will once again set new records.

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 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

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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.

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

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("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))

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

to dismiss the relator

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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.~~

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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 officers 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 officers from those eligible to file qui tam suits. Contracting officers 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. *What about very good?*

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).

I continue to strongly disagree
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.~~

where?
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.~~

as well.

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,

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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

House

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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.

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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 to 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 to 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.

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26TH DISTRICT, CALIFORNIA

COMMITTEES:

FOREIGN AFFAIRS

CHAIRMAN, SUBCOMMITTEE ON
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March 23, 1993

Hon. Janet Reno
 Attorney General of the United States
 U.S. Department of Justice
 Constitution and 10th Street N.W.
 Washington, D.C. 20530

Dear Madam Attorney General:

As one of the principal authors of the False Claims Act Amendments of 1986, Pub. L. No. 99-562, I respectfully request your prompt attention to defending the qui tam provisions of the False Claims Act and to ensuring their proper implementation.

In particular, I request that the Department under your leadership become active in defending the constitutionality of the qui tam provisions. Three cases are scheduled for oral argument on April 7, 1993, before the U.S. Court of Appeals for the Ninth Circuit. In addition, in the interest of proper implementation of the False Claims Act, I urge you to preserve the qui tam provisions against recent restrictive interpretations.

It was against a backdrop of evidence of overwhelming defense procurement fraud being perpetrated against the U.S. that Congress acted in 1986 to revitalize the False Claims Act as a means of ferreting out fraud, augmenting traditional enforcement efforts by enlisting the support of the private bar and encouraging whistleblowers by setting guaranteed minimum shares for qui tam plaintiffs in proceeds recovered to the U.S. Treasury as a result of citizen suits.

We sought to reinvigorate citizen action on behalf of the U.S. as a matter of policy, in order to achieve greater recoveries and to improve deterrence against fraudulent conduct undermining the Government. The Department was not uncovering what was becoming pervasive fraud. Encouraging whistleblowers to come forward was, thus, an essential purpose of the 1986 amendments. Further, whether on account of a lack of resources or of resolve, False Claims Act cases were not being brought and vigorously pursued. It is for these reasons that we strengthened the qui tam provisions.

The False Claims Act should be a cornerstone of our assault on fraud, waste and abuse. It can be a source of significant deterrence as those who contemplate trying to cheat the Government through overcharges or underpayments recognize the substantially increased likelihood that they will be called to account for treble damages. Violators can no longer rely on a conspiracy of silence when the False Claims Act's incentives for suing on the Government's behalf outweigh both the benefits of going along with a false statement and the burden of coming forward.

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Qui tam cases are now resulting in greater individual and aggregate recoveries to the Treasury than cases generated within the Department. In the last seven months alone almost \$250 million has been recovered through qui tam actions. False Claims Act recoveries to the Treasury can go a long way toward reducing the deficit, funding health care reform and minimizing the additional tax burdens Americans are being called upon to shoulder. Witness the \$100 million recovery in the recently settled National Health Laboratories case.

On April 7, 1993, the Ninth Circuit has scheduled oral argument in three cases in which the constitutionality of certain qui tam provisions of the False Claims Act has been challenged by False Claims Act defendants. United States ex rel. Kelly v. The Boeing Company, Docket No. 92-36660; United States ex rel. Rohan v. Litton Systems, Inc., et al., Docket No. 92-55546; United States ex rel. Madden v. General Dynamics Corp., Docket No. 92-56042. I urge you to join Congress in defending the False Claims Act against attack. I understand that to date the Department has not taken an official position on the constitutional challenge and that its only participation in these three cases is as an amicus curiae in the Litton Systems case on an issue of equitable estoppel.

Unfortunately, False Claims Act defendants are utilizing remarks of your predecessor, William Barr, and Departmental memoranda to argue against the constitutionality of the False Claims Act. It is important that the Attorney General disassociate the position of the Department from the views espoused by Mr. Barr.

While head of the Department's Office of Legal Counsel in 1989, Mr. Barr authored a memorandum to the Attorney General arguing against the constitutionality of the qui tam provisions. In October 1992, while Attorney General, Mr. Barr remarked before the American Corporate Counsel Association that he had "profound concerns" about the constitutionality of the False Claims Act. More recently on the day before Mr. Barr resigned, his 1989 memorandum was leaked from the Department. That 1989 memorandum is being included in the Opinions of the Office of Legal Counsel being released for publication. It has been submitted to the Ninth Circuit in advance of the upcoming oral argument and is being relied upon by False Claims Act defendants. In this setting, it is important that you not remain silent. I ask that the Department join the legal battle in defense of the constitutionality of the False Claims Act.

In addition I urge your attention to the threats to the False Claims Act posed by Departmental holdovers intent on undermining the qui tam provisions. Their antagonism to the qui tam provisions was expressly noted by Judge Rubin recently in United States v. General Electric, --F. Supp.--(S.D. Ohio Dec. 4, 1992), a case that resulted in the U.S. recovering in excess of \$70 million as the direct result of the actions of the qui tam plaintiff:

It is instead the very concept of "whistleblowers" that appears to be in issue. The pattern of behavior in these cases by the Department of Justice has always been a mystery. The use of a qui tam plaintiff is nothing new. The Internal Revenue Service has for decades offered a monetary reward to anyone who provides information regarding tax evasion. It is a standard practice of law enforcement agencies to pay confidential informants. . . . No one likes "snitches", but they can be valuable. In view of their widespread use, it is worthy of note

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that the Department of Justice has considered such individuals as adversaries rather than allies. This is not the first case where the Court has noted the antagonism of the Justice Department to a whistleblower. The reasons continue to be unknown, but the attitude is clear. Footnote omitted.)

Such should not be the attitude or approach of our leading law enforcement officials. I look to you to uphold and utilize the False Claims Act and end the historic antipathy to the qui tam provisions shown at the Department. It is high time that the Department of Justice accept the qui tam provisions as a weapon in our arsenal against fraud. I am concerned that the Department not continue down a path seeking to have the qui tam provisions interpreted in ways that discourage future qui tam actions.

The disdain with which the Department has viewed this law is subverting its current use and future promise. Instead of encouraging qui tam plaintiffs, working with them and rewarding them, the Department has treated them as adversaries and employed oppressive litigation tactics to reduce their awards below statutorily prescribed shares.

Delaying the awarding of statutorily mandated shares of recoveries to qui tam plaintiffs in order to leverage them into accepting settlements below the statutory amount should not be an objective of a Justice Department that is properly enforcing the False Claims Act.

It was Congress' judgment that by guaranteeing a range of percentage shares in proceeds, a financial incentive is provided to encourage people to initiate and vigorously pursue qui tam cases. Ironically, it is in the more significant cases where the recoveries have been the largest to the Treasury that the Department has seen fit to mount the most vicious attacks against successful qui tam plaintiffs. The Department's reluctance to share recoveries as congressionally prescribed is a short-sighted attempt to retain a few extra dollars for the Treasury, but will cost the Government much more in the longer term as potential plaintiffs shy away, fraud goes unreported and deterrence is undercut.

The Department should keep faith with qui tam plaintiffs as allies and not turn on them by forcing them to run a second gauntlet once defendants have been subdued. The Government should not be devoting resources to resisting qui tam shares in awards but rather to developing additional cases and investigations.

Rather than an even-handed and straightforward reading of the statute, the Department has been seeking to expand the narrow jurisdictional bars included therein and has supplemented the efforts of defendants seeking to undercut qui tam actions by expanding the narrow "public disclosure" restrictions on qui tam actions. 31 U.S.C. §3730(e)(4) (1988).

When Congress amended the False Claims Act in 1986, we did so in order to expand and encourage use of qui tam actions. Over the four preceding decades the False Claims Act had fallen into disuse. This was due in part to the provision of the law that allowed actions to be resisted and qui tam plaintiffs dismissed if their claims included evidence or information known to the Government when the action was commenced. Qui tam plaintiffs were not being encouraged to come forward by this "information known to the Government"

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barrier. Congress was dissatisfied with enforcement of the False Claims Act and we acted in 1986 to make it easier and more inviting for persons to initiate and pursue qui tam actions.

We eliminated the "known to the Government" barrier and included a narrowed standard that was objectively verifiable to determine the limited circumstances in which a qui tam action should be dismissed as "based on public disclosure." The jurisdictional bar of section 3730(e)(4) was intended to prevent qui tam suits derived from Government investigations unless the qui tam plaintiff had been an original source of information to the Government in its investigation. A principal reason "public" disclosure was a prerequisite was to get away from the previous standard for disqualifying qui tam actions so as to provide an objective, verifiable check on the origin of the claim.

If the qui tam plaintiff contributed nothing to the uncovering of a false claim but simply copied from a Government indictment, public hearing or investigative news report, such action could be dismissed and we would rely exclusively on the Department to pursue the matter. This narrow limitation barring qui tam cases "based on public disclosure" has been misinterpreted and misapplied to the point where it now threatens to enervate the 1986 amendments. Indeed the results of some recent cases are more restrictive than the pre-1986 standard that we amended. For example, courts are barring qui tam actions for fraud against the United States because they were based on evidence obtained from civil discovery in private litigation.

In United States ex. rel. Stinson, Lyons, Gerlin & Bustamente v. Prudential Insurance Co., 944 F.2d 1149 (3d Cir. 1991), the Third Circuit misapprehended the congressional purpose of the 1986 amendments. We were not limiting qui tam status to whistleblowing insiders. Third parties who uncover such wrongdoing through investigative effort are likewise encouraged to sue on behalf of the United States. The Third Circuit's rationale "assumed" that civil discovery in a private lawsuit over insurance claims procedures was "potentially accessible" to the public. That is not "public disclosure" and should not bar a qui tam action. The Third Circuit was persuaded by the defendant insurance company charged with defrauding Medicare that the case had to be dismissed because information about the insurance company's claims processing procedure was "equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." That theoretical possibility is both irrelevant and impractical. The fact was that the qui tam plaintiff uncovered the claim and pursued it, which is what the 1986 amendments were designed to encourage.

More recently, in United States ex. rel. Kreindler & Kreindler v. United Technologies Corp., --F.2d-- (2d Cir. Jan. 22, 1993), the Second Circuit held that a qui tam case should be barred because certain documents on which it was based, while subject to a protective order, were contained in unsealed pleadings and available to "anyone who wished to consult the court file." While the Government participated as amicus curiae in these proceedings, it limited its comments to a statute of limitations issue and did not comment on this misapprehension of the jurisdictional bar to qui tam actions or the constitutionality of the qui tam provisions. Such acquiescence is destructive of the statutory scheme in the law that the Department should be seeking to uphold.

Distorting the statute further, courts have at the behest of defendants and the

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Department read out of the factors circumscribing the narrow jurisdictional bar provided by section 3730(e)(4) the requirement that in order for a qui tam action to be subject to dismissal, the action be "based on" the public disclosure. We did not intend to disqualify qui tam plaintiffs whose actions did not derive from detailed published reports but arose through their own investigative efforts or knowledge.

Nonetheless, the Second Circuit has at the urging of the Department read the "based upon" limitation out of the statute. United States ex. rel. John Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992). Indeed, in this case the court held that Government investigation of a fraud was itself to be construed as "public disclosure". In order to bar another qui tam action the Tenth Circuit went further in holding that a qui tam action in which even part of the allegations or transactions was publicly disclosed should be barred. United States ex. rel. Precision Co. v. Koch Industries, 971 F.2d 578 (10th Cir. 1992).

These cases improperly undercut and limit the False Claims Act. My point is not that any of these matters would necessarily have succeeded on the merits; my point is that these qui tam actions should not be jurisdictionally barred but allowed to be determined on the merits. At present these decisions aggregate to transform what was designed by Congress to be a narrow exception to qui tam actions for truly parasitic litigation in which the plaintiff brought nothing to the table into a steep barrier that can be raised improperly against the vast majority of qui tam cases.

Surely some portion of virtually every transaction that could be infected by a false claim will be non-secret, but that is not the standard for dismissal. If any Government agency has paid a transaction any mind, defendants are now likely to argue that it is beyond the reach of a qui tam action. This is not what I authored, not what Congress intended, not what the law should be interpreted to bar and not the interpretation of the law that the Department should be accepting.

Accordingly, I would be interested in your view of the following hypotheticals:

- An Inspector General conducts an investigation and issues a report critical of testing practices of a company in connection with its manufacture of products sold to the United States, but concludes that they are not illegal. A person discovers that the company has been falsifying results of tests required as part of the contract and brings a False Claim Act qui tam action.
- A foreign government is conducting an investigation of illegal bribery. Mention of the foreign government's investigation appears in the press without identifying any specific incident or company. An employee of a company presents the United States Department of Justice with evidence that his employer is fraudulently diverting United States funds in the foreign country and then brings a qui tam action.
- The Government successfully prosecutes a case based on

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fraudulently inflated labor estimates against the subsidiary of a corporation. Upon reading newspaper accounts of the case, an employee in another subsidiary of the same corporation realizes that she has witnessed similar conduct at her company and that it is unlawful. She files a qui tam action against her employer for the specific activity she witnessed.

- An investigator with no personal knowledge of the fraud uncovers evidence of a false claim by examining Government records obtained through a series of Freedom of Information Act requests in light of his knowledge of industry practices. There is no Government investigation or case pending. The investigator commences a qui tam action.

None of the qui tam actions described by these hypotheticals should be barred by section 3730(e)(4) as "based on public disclosure." That provision was aimed at a stranger to the fraud who files a qui tam action after seeing detailed accounts in the press of a criminal indictment or investigation of false claims against the United States.

I look forward to discussing these matters with you and to working with you to ensure that the promise of the False Claims Amendments Act of 1986 is fulfilled.

Sincerely,



HOWARD L. BERMAN
Member of Congress

HLB/bs

D
J

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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

Dear Mr. Chairman:

This is to provide the Department's views on S. 841, the False Claims Amendments Act of 1993, as recently reported by the Subcommittee on Courts and Administrative Practice. We and the staff of the Subcommittee on Courts and Administrative Practice have been seeking a compromise on this legislation. Our discussions have been productive, and we have candidly exchanged ideas to refine the areas of agreement and disagreement. We appreciated the opportunity to work with the subcommittee staff and are pleased that our cooperative efforts produced a markedly improved bill.

Nonetheless, we continue to have significant concerns about the bill in its current form. We believe additional revisions would further strengthen the ability of the government and citizens to fight fraud against the government and maximize the government's recovery in these cases, a goal shared by the Subcommittee and the Department.

In 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 the Committee to adopt it 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 have agreed to the primary legislative goal 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. However, other provisions of the bill will have the opposite effect 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 takes money from the taxpayers' pocket. The government would have otherwise recovered the same money, except now it must 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 recovery in this situation, regardless of where the person derived the information, as suggested in the substitute bill.²

One specific example of such opportunistic suits is the qui tam action that virtually mirrors a company's voluntary disclosure to the government. Our proposed revision bars an

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.

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 could be filed. Ultimately, it would be up to the court to decide if the government's investigation was sufficiently active to bar relator's suit.

There should be objective some level of activity -

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 allege the very allegations that a company has already disclosed and 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))

Thus, we suggest language to better accomplish several goals underlying this legislation. First, we would reward those who are sources of our information in the first place and voluntarily provide it to us or to our 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 (which advances the taxpayers' interests and maximizes our ability to prosecute). 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 that it is 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 allows

why?

What is the benefit to the relator in doing this?

witnesses who learn of the investigation to recover as long as they file before the original source.

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.

No

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.

how long?

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.

What if
the relator
had a suspicion
but can't prove
up with more
info

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.

There needs to be some limit -

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.

but an ordinary routine audit should not bar - especially when an audit has previously taken place

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

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f. Government Employees:

1. Exclusions of certain employees. 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, persons whose responsibilities relate to contract award or performance 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 persons 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 as well as 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 persons whose responsibilities relate to contract award or performance from those eligible to file *qui tam* suits. Such employees are the most familiar with the award and administration of a contract, and thus often the 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 are critical to initiating 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.

Much to
broad

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, (a)(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 only allows for a 12-month period in which the government may file suit after disclosure by the government employee. The Substitute increases this period to 18 months with a possibility of an additional six-month extension upon notice to the relator. (Substitute, Sec. 3, (e)(5)(A)(B)). This longer period is necessary because it is very difficult to predict the complexity and duration of an investigation. The longer period of time is also required because not only must the government complete the investigation, it must also file suit within this time frame.

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: We support the amendment to the CID statute.

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 issue of the effective date of statutes absent a clear statement of congressional intent is currently before the Supreme Court.) 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 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 adversely our resources adversely (Substitute, Sec. 9).

We look forward to working with you further on this important bill.

Sincerely,

Sheila P. 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

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

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(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

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"(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 to 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 to demonstrate that all of the conditions set forth in subparagraphs (A)(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:

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"(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)

(A) in the matter preceding subparagraph (A) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears; and

(B) in the matter following subparagraph (D)--

(i) in the first sentence by inserting "or an Assistant Attorney General" after "Attorney General"; and

(ii) in the second sentence by striking out "the Deputy Attorney General,";

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- (2) in subsection (a)(2)--
 - (A) in subparagraph (F) by striking out "designated by the Attorney General"; and
 - (B) in subparagraph (G) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears;
- (3) in subsection (h)(6) by striking out ", the Deputy Attorney General,";
- (4) in subsection (i) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears; and
- (5) in subsection (l)(6) by inserting "or an Assistant Attorney General" after "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

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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. 101-200, § 10(a), May 4, 1990, 104 Stat. 162.

STATEMENT OF SEN. CHUCK GRASSLEY
FRAUD IN PUBLIC CONTRACTING
February 25, 1994

TODAY I WOULD LIKE TO SPEAK FOR A FEW MINUTES ON THE TOPIC OF PUBLIC CONTRACT FRAUD.

THE TAXPAYERS GOT GOOD NEWS TUESDAY WHEN THE SUPREME COURT LET STAND THE COURT OF APPEALS' RULING IN U.S. EX REL. KELLY V. BOEING THAT THE WHISTLEBLOWER PROVISIONS OF THE FALSE CLAIMS ACT ARE CONSTITUTIONAL. THAT SHOULD SETTLE THE ISSUE ONCE AND FOR ALL. CONGRATULATIONS TO SENATE LEGAL COUNSEL MICHAEL DAVIDSON AND ASSISTANT SENATE LEGAL COUNSEL CLAIRE SYLVIA FOR THEIR OUTSTANDING ADVOCACY ON THE SIDE OF CONGRESS AND THE TAXPAYERS. I HAD HOPED THE NEW JUSTICE DEPARTMENT WOULD STEP IN AND ADVOCATE THE CONSTITUTIONALITY OF WHISTLEBLOWER LAWSUITS, BUT I AM STILL WAITING FOR ATTORNEY GENERAL RENO AND HER ASSISTANTS TO FOLLOW UP ON THEIR CONFIRMATION HEARING PROMISES TO CONSIDER REVERSING THE HOSTILE NEUTRALITY OF THE PREVIOUS ADMINISTRATION.

THIS AND OTHER MATTERS HAVE CAUSED ME CONCERN THAT THE NEW ADMINISTRATION IS NO MORE COMMITTED TO AN AGGRESSIVE STANCE ON PUBLIC CONTRACT FRAUD THAN THE PREVIOUS TWO ADMINISTRATIONS WERE. THAT CONCERN WAS COMPOUNDED ON WEDNESDAY, WHEN ATTORNEY GENERAL RENO AND PRESIDENT CLINTON NOMINATED DEFENSE DEPARTMENT GENERAL COUNSEL JAMIE GORELICK TO BE SECOND-IN-COMMAND OF THE JUSTICE DEPARTMENT. I AM CONCERNED THAT THIS NOMINATION SIGNALS AN ADMINISTRATION WILLINGNESS TO LET THE FOX GUARD THE CHICKEN COOP WHEN IT COMES TO FRAUD ON THE TAXPAYERS.

MS. GORELICK HAS A FINE REPUTATION AS AN EFFECTIVE LAWYER AND BAR ACTIVIST. WHAT CONCERNS ME IS HOW SHE EARNED THAT REPUTATION -- BY SPECIALIZING IN GETTING DEFENSE CONTRACTORS OFF THE HOOK FOR FRAUD AGAINST THE UNITED STATES. MS. GORELICK SPENT THE LAST TWELVE YEARS WORKING AS OUTSIDE COUNSEL FOR COMPANIES LIKE GENERAL ELECTRIC, TELEDYNE, AND UNITED TECHNOLOGIES. I HAVE ALWAYS BEEN UNCOMFORTABLE WITH THE REVOLVING DOOR BETWEEN THE JUSTICE DEPARTMENT AND THE PUBLIC CONTRACT DEFENSE BAR. IN THIS INSTANCE, I AM CONCERNED THAT MS. GORELICK HAS CAMPAIGNED SO HARD AND SO LONG FOR THE CONTRACTORS' SIDE OF FRAUD ISSUES THAT SHE WILL FIND IT DIFFICULT TO TURN AROUND AND ZEALOUSLY PROTECT THE INTERESTS OF TAXPAYERS. I AM ANXIOUS TO HEAR THE EXTENT TO WHICH SHE WILL RECUSE HERSELF FROM ISSUES THAT AFFECT THE HER FORMER CLIENTS IN THE DEFENSE INDUSTRY, OR HER FORMER COLLEAGUES IN THE PUBLIC CONTRACT BAR.

MY CONCERN ABOUT HOW MS. GORELICK WILL HANDLE FRAUD MATTERS AS DEPUTY ATTORNEY GENERAL IS HEIGHTENED BY THE FACT THAT HER CURRENT OFFICE -- PENTAGON GENERAL COUNSEL -- IS CURRENTLY ADVOCATING POSITIONS ON A MAJOR FRAUD STATUTE WHICH FAVOR THE DEFENSE INDUSTRY OVER THE TAXPAYERS. I LOOK FORWARD TO HER CONFIRMATION HEARING IN ORDER TO DISCUSS THESE ISSUES IN DETAIL.

THE JUDICIARY COMMITTEE IS PRESENTLY CONSIDERING

HOUSEKEEPING AMENDMENTS TO THE WHISTLEBLOWER PROVISIONS OF THE FALSE CLAIMS ACT. UNDER THE ACT, BETTER KNOWN AS THE "LINCOLN LAW" (AFTER ITS ENACTMENT IN 1863 TO DEAL WITH FRAUD BY CIVIL WAR ARMS MANUFACTURERS), PRIVATE CITIZENS WITH KNOWLEDGE OF FRAUD CAN SUE THE CULPRIT ON BEHALF OF THE UNITED STATES, AND SHARE IN THE GOVERNMENT'S RECOVERY. SINCE REPRESENTATIVE HOWARD BERMAN AND I GOT AMENDMENTS ENACTED IN 1986 WHICH REVIVED THE ACT, THE LINCOLN LAW HAS BROUGHT \$588 MILLION BACK INTO THE TREASURY. THE GOVERNMENT NOW RECOVERS MORE MONEY THROUGH THESE WHISTLEBLOWER LAWSUITS THAN THROUGH SUITS INITIATED BY THE JUSTICE DEPARTMENT.

NOT SURPRISINGLY, DEFENSE CONTRACTORS HATE THE WHISTLEBLOWER LAW. THEY HATE IT BECAUSE IT IS VERY EFFECTIVE AT EXPOSING THEIR FRAUD. THE LAW ALLOWS HONEST EMPLOYEES WHO DON'T WANT TO BE PARTY TO THEIR EMPLOYER'S FRAUD, AND WHO FIND THE FEDERAL BUREAUCRACY LACKADAISICAL IN ITS REPRESENTATION OF THE TAXPAYERS, TO ACT AS CITIZEN ATTORNEYS GENERAL AND MAKE THEIR EMPLOYERS ACCOUNTABLE FOR THE FRAUD.

WHEN WE ENACTED THE AMENDMENTS TO THE LINCOLN LAW IN 1986, I KNEW WE WOULD BE HEARING FROM THE DEFENSE CONTRACTORS DOWN THE ROAD. IT HAS FINALLY HAPPENED. THE CONTRACTORS AND THEIR SLICK LOBBYISTS HAVE DESCENDED ON CAPITOL HILL. THEY ARE BREAKING OUT THE CRYING TOWELS, COMPLAINING ABOUT HOW HARD IT IS TO COPE WITH WHISTLEBLOWER LAWSUITS. A COALITION OF MAJOR DEFENSE CONTRACTORS IS PUSHING FOR A SERIES OF AMENDMENTS WHICH WOULD EMASCULATE THE LINCOLN LAW. THEY ARE ALSO PUSHING A BILL TO "STREAMLINE" PROCUREMENT LAW -- WHICH IS ANOTHER WAY OF SAYING THEY WANT TO GUT MUCH OF THE PROCUREMENT REFORM LEGISLATION OF THE 1980S.

THESE SAME COMPANIES HAVE PAID OUT MORE THAN A HALF-BILLION DOLLARS IN PENALTIES AND SETTLEMENTS FOR FRAUD IN JUST THE PAST THREE FISCAL YEARS -- A QUARTER OF WHICH COMES FROM WHISTLEBLOWER LAWSUITS ALONE. MY MESSAGE TO THE CONTRACTORS IS: STOP THE FRAUD, INSTEAD OF BLOWING MONEY ON BILLABLE HOURS IN FUTILE EFFORTS TO GUT THE GOVERNMENT'S ANTI-FRAUD TOOLS.

WHILE I EXPECT COMPANIES WHO FEED AT THE PUBLIC TROUGH TO LOBBY TO WEAKEN FRAUD STATUTES, I AM ALWAYS SURPRISED AT THE EXTENT TO WHICH THE ADMINISTRATION, BE IT REPUBLICAN OR DEMOCRAT, SEEMS MORE INTERESTED IN PROTECTING CONTRACTORS THAN PROTECTING TAXPAYERS. BUT MY EXPERIENCES WITH THE REAGAN ADMINISTRATION, THE BUSH ADMINISTRATION, AND NOW THE CLINTON ADMINISTRATION HAVE ALL SHOWN ME THAT'S THE CASE. THE DEFENSE DEPARTMENT IS OUT TO PROTECT ITS CONTRACTORS, AND THE JUSTICE DEPARTMENT IS OUT TO PROTECT THE DEFENSE DEPARTMENT. WHICH BRINGS ME BACK TO MS. GORELICK.

THE DEFENSE DEPARTMENT HAS BEEN PRESSING WITHIN THE GOVERNMENT FOR AMENDMENTS WHICH WOULD SIGNIFICANTLY WEAKEN THE LINCOLN LAW -- AMENDMENTS NEARLY IDENTICAL TO THOSE PROMOTED BY THE DEFENSE INDUSTRY. I WANT TO KNOW FROM MS. GORELICK WHY LAWYERS IN HER OFFICE HAVE BEEN ADVOCATING AMENDMENTS WHICH WOULD GUT THE WHISTLEBLOWER LAW. I WANT TO KNOW WHETHER SHE HAS

DIRECTED THESE EFFORTS, WHETHER SHE AGREES WITH THE POSITIONS ADVOCATED BY HER OFFICE, AND WHETHER SHE WILL PRESS THE SAME ANTI-WHISTLEBLOWER AGENDA WHEN SHE GETS TO DOJ.

THIS IS ESPECIALLY IMPORTANT GIVEN THE CURRENT LACK OF LEADERSHIP ON THESE ISSUES AT DOJ. WHILE THE ATTORNEY GENERAL AND HER CHIEF DEPUTIES ALL PLEDGED TO REVERSE THE PREVIOUS ADMINISTRATION'S HOSTILITY TO WHISTLEBLOWERS, THEIR ACTIONS SPEAK LOUDER THAN THEIR WORDS. SO FAR, THE DEPARTMENT HAS SHOWN ITSELF TO BE MORE RESPONSIVE TO THE ANTI-WHISTLEBLOWER SENTIMENTS OF CAREER LAWYERS BURROWED INTO THE BOWELS OF THE CIVIL DIVISION, AND TO THE DEFENSE INDUSTRY'S PROTECTORS AT THE PENTAGON.

I WANT THE CHANGE IN LEADERSHIP AT THE JUSTICE DEPARTMENT TO ACCOMPLISH A CHANGE IN POLICY ON FRAUD AND WHISTLEBLOWERS, NOT A STEP BACK IN THE OTHER DIRECTION.



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 7, 1994

VIA FACSIMILE
(703) 693-7278

Ms. Amy Jeffress
Department of Defense
Office of the General Counsel
The Pentagon
Washington, D.C. 20301-1600

Re: "False Claims Amendments Act"

Dear Amy:

Last Thursday I attended a meeting with Chris Brown and Melissa Patack of Senator Grassley's office, Winston Lett with Senator Heflin, Shawn Moylan with Senator Biden and Bari Schwartz with Congressman Berman.

Senator Grassley still believes that the redlined version that was circulated, especially the section addressing the "opportunistic" relator, goes too far. His staff is still pushing the alternative of giving the Judge the discretion of reducing the share of an opportunistic relator to zero (a copy of this proposal is attached as the "discretionary" option). Chris Brown and Bari Schwartz agreed that the section of the redlined version dealing with the dilatory relator was completely unacceptable.

Congressman Berman, on the other hand, wants to "stiffen" the language defining an opportunistic relator (Bari Schwartz objected to the term "opportunistic" relator because she said all relators were opportunistic, instead it was determined that "noncontributing" relator was better). Bari said that the relators thought it was very important to have the decision of whether the relator was going to share in the recovery decided early in the litigation. She said that the Judge could only make the decision to reduce the share at the end of the litigation and that they would rather have the decision concerning the relator's participation made early on even if it had to be made on an "in or out" basis (a copy of this proposal is attached as the "in or out" option).

The "in or out" proposal basically limits the ability to bar noncontributing relators to the situation in which the government's investigation has advanced to the point of being a

DOJ false claims investigation. The rest of the language in this proposal is so restrictive that the initial reaction of our litigators is that the government under this proposal in the real world could never successfully exclude the noncontributing relator.

Ms. Schwartz also said that the House Judiciary Subcommittee had already extensively debated and passed last Congress the provisions allowing government employees to bring qui tam actions. She said that there was a consensus among the House members that the hoops and hurdles that government employees have to go through should be as strong as necessary, but that they would oppose barring particular classes of government employees. She did indicate that they might consider allowing the DOJ bar. Chris said Senator Grassley would oppose the additional hurdle that was set out in the redlined draft requiring that government employees take "additional affirmative steps" to call attention to the fraud within the government. He said that they could possibly extend the groups excluded to include DCAA employees.

Bari also presented a separate section to deal with voluntary disclosure (a copy is attached). I argued that the general language proposed in the redlined draft was better because it encouraged quick turnover of all the relevant documents by only protecting contractors participating in a voluntary disclosure program to the extent that they had turned over all the information to the government before a relator brings a qui tam action. I told them that I thought it was inappropriate to dictate the specifics of how a voluntary disclosure program should work in this bill and that the goal of ensuring that everything was turned over was accomplished in the redlined draft. There seemed to be some agreement that the simpler language in the redlined version accomplished the same goals as Bari's draft and was preferable. I explained that we would need more time to adequately review Bari's proposal.

I mainly listened to the debate between Chris and Bari as to which of their approaches was better. I suggested that they get together and decide which direction they wanted to go on the noncontributing relator and the government employee section and let us know. I reiterated that there was no administration position and that the redlined draft that had been circulated may have already gone beyond what the administration could support. I said that we would just have to look at what they came up with but it would be helpful to know that whatever we were looking at represented their consensus position. It was my understanding that they were going to get back in touch with us with their consensus position if it could be worked out.

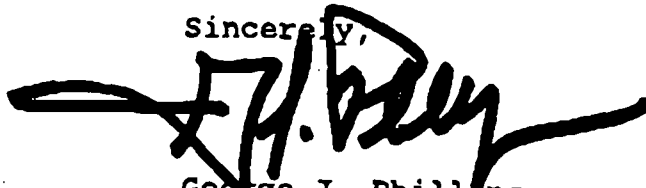
While their debate is ongoing, I still strongly believe that it would be extremely helpful to have our comments to the currently pending bill approved so that it can be circulated on the Hill. We may have to come back and offer different comments

should the currently pending bill be amended further, but we can cross that bridge when we come to it. We need a clear statement setting out the administration's position on the currently pending bill. Since the bill has been pending since last November, we may be subject to criticism for not having reached closure by now.

The letter to Senator Biden as amended to accommodate the points raised by the DOD needs to be approved. I understand that the only remaining holdup is that DOD still objects to anything less than a complete ban on government employees bringing qui tam actions. I do not believe this politically realistic in that I have not found one Senator on the Judiciary Committee who supports a complete ban. Currently, the law is unclear and we have a very mixed litigating record on excluding government employees. It would be better for us and the government employee to have the ground rules clearly in place dictating the circumstances in which an government employee can bring suit than the current situation which leaves the door wide open for any government employee in any circumstances to bring such an action.

As soon as I receive any further proposals from the Hill, I will forward them to you. In the meantime, I would appreciate your Department's consideration of approving the letter to Senator Biden as currently drafted setting out the Administration's position on the currently pending Amendments to the False Claims Act.

Sincerely,



George J. Phillips
Counselor to the
Assistant Attorney General

Enclosures

cc: Donsia Strong - VIA FACSIMILE (202) 456-7028
Ingrid Schroeder - VIA FACSIMILE (202) 395-3109
Frank W. Hunger
Robert Brink
Faith Burton

GRASSLEY'S PROPOSAL - DISCRETIONARY OPTION**1/28/94 DRAFT****FOR DISCUSSION PURPOSES ONLY**

"The court may, to the extent it considers appropriate, reduce the share of the proceeds the person would otherwise receive under this paragraph, if no later than 90 days after the date of service of the initial complaint under subsection (b)(2) the Government demonstrates by clear and convincing evidence that --

(A) all of the facts and allegations disclosed in the complaint and written disclosure were already known by the Department of Justice and were the subject of an active and advanced false claims investigation by the Department of Justice at the time the person filed the complaint and written disclosure, and

(B) the person was not a source of any of the facts or allegations under investigation.

To apply for such reduction, the Government must set forth all facts and allegations known to the Government before the filing of the civil action and when and from what source such facts and allegations were obtained. The person bringing the action shall be provided an opportunity to contest any such application for reduction. The court may restrict access to the evidentiary materials filed in support of such application for good cause shown.

DRAFT



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 10, 1994

VIA FACSIMILE

Ms. Ingrid Schroeder
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20501

Re: "False Claims Amendments Act"

Dear Ingrid:

Enclosed are the letter and substitute bill. The letter has been amended from the one handed out in the meeting earlier today to make it conform to the change requested by DOD that "persons whose responsibilities include contract award and performance" be substituted for "contracting officers."

Sincerely,

George J. Phillips
Counselor to the
Assistant Attorney General

Enclosures

cc: Donsia Strong - VIA FACSIMILE (202) 456-7028
Stephen Neuwirth - VIA FACSIMILE (202) 456-1647
Robert Brink

3/4/94

BERMAN'S VOLUNTARY DISCLOSURE PROPOSAL

Voluntary disclosure

No later than 120 days after being served pursuant to paragraph (2), the Government may move to dismiss the action on the grounds that (i) prior to the filing of the qui tam complaint, the defendant has already disclosed to the Department of Defense or to any other voluntary disclosure program established by the head of an agency all of the information, facts and evidence material to the false claims allegations set forth in the qui tam complaint and provided in the written disclosure made by the relator pursuant to paragraph (2) of this subsection; and (ii) the Department of Justice is actively investigating the disclosed allegations. Provided however, where the defendant has made a preliminary disclosure prior to the filing of the qui tam suit, and within 120 days after the preliminary disclosure completes the disclosure, all facts, evidence and information filed within the 120 days will be considered as if disclosed before the qui tam filing for purposes of this paragraph.

The motion to dismiss shall set forth the allegations, evidence and information provided in the voluntary disclosure that are material to the qui tam complaint and the timing thereof.

Persons bringing civil actions pursuant to paragraph 1 shall be provided an opportunity to contest such a motion to dismiss, but the court may restrict access to the evidentiary material filed in support of the motion to dismiss as the interests of justice require. These motions to dismiss and papers filed in support and in opposition thereto shall not be made public without the prior written consent of the relator and shall not be subject to discovery by the defendant.

Qui Tam: An imperfect Too

YALAN YUSPEH

A recent *Legal Times* article on the congressional debate over proposed amendments to the False Claims Act—"Whistleblower Law Under Attack," by Sheila Kaplan (Feb. 14, 1994, Page 5)—was breezy and, in my view, inaccurate, misleading, and incomplete the article (which quoted failing to convey any of the richness of the ongoing policy debate, a dispassionate review of what it is really all about is needed.

First, the article's description of industry participation in this debate failed to note the comprehensive

In Rebuttal

analysis underlying the industry's position and the broad range of support for

position. A detailed position paper developed by 22 major defense contractors, explaining concerns with the current law recommendations for changing its provisions, was shared by these contractors with members of the Senate Judiciary Committee, their staffs, and others on the Hill. Meetings with those individuals usually included in-house lawyers, virtually all of whom have had firsthand experience with *qui tam* suits.

This hardly constituted "bombarding" of Congress by defense-contractor lobbyists. In addition, Kaplan failed to mention the active involvement of lawyers who represent *qui tam* relators; these lawyers have a personal financial stake in the statute operates.

few amendments advocated by the defense industry to S. 841—the bill sponsored by Sen. Charles Grassley (R-Iowa)—that has become the vehicle for reform efforts—would in no way "reduce the False Claims Act to a pile of rubble," as stated in the *Legal Times* article. In fact, the proposed amendments would not in any way impair the vitality of that law or its *qui tam* practice. Rather, the changes would promote a fairer system, protect recoveries that should go to the American taxpayer, and avoid unduly rewarding relators whose own conduct is inappropriate.

Reasonable Reforms

The primary amendments now being advocated by the defense industry would bar *qui tam* suits after voluntary disclosures by contractors in formal government disclosure programs; provide courts with discretion to reduce rewards for relators who participated in fraud or unreasonably delayed disclosure of fraud; provide with discretion to reduce penalties for claim under the act (in addition to or treble damages) if the accumulation of counts yielded a penalty disproportionate to the harm to the government; and the exclusive jurisdictions of the U.S. Court of Federal Claims and agency of contract appeals to resolve government contract disputes.

positions are not positions of the defense industry alone. In 1991, Congress required the Department of Defense to appoint a panel to consider streamlining and codifying acquisition laws. The Acquisition Law Advisory Panel—commonly referred to as the Section 800 Panel—consisted of recognized experts in procurement law and policy from government, industry, private legal practice, legal education. The panel reviewed all procurement-related statutes affecting

the Defense Department and, among other things, reported its own proposed amendments to the False Claims Act. These are substantially the same as the defense-industry amendments—a key fact that the *Legal Times* article omitted.

In addition, the views expressed by the defense industry are very similar to those of groups who testified at a Senate subcommittee hearing on S. 841, including the Public Contract Law Section of the American Bar Association and the Procurement Council of the U.S. Chamber of Commerce.

Sen. Grassley is quoted in the *Legal Times* article as saying that the defense industry is "trying to use my bill to destroy *qui tam*." If the quote is accurate, I would respectfully suggest that the senator's comment reflects his fundamental misunderstanding of the defense industry's agenda and its impact. It is difficult to understand how rewarding culpable relators somewhat less generously and en-

suring that expert tribunals resolve technical contract issues reserved to them under existing statutes do violence to his bill or to the underlying law. And if the government already has information from someone who admits acts that may constitute a false claim, the government doesn't need the *qui tam* relator. There is no purpose, therefore, in permitting the relator to siphon off 25 percent of the recovery due the taxpayers.

Threatening Major Change

While Sen. Grassley has referred to S. 841 as a "housecleaning" measure, the bill as introduced would have made substantive legal changes. It would have eliminated the existing statute of repose, and thus have permitted suits relating to events occurring at any time in the past. This provision was modified during subcommittee consideration of the bill in November, and the current 10-year statute

of repose has been maintained. This certainly makes sense, since statutes of limitation are intended to ensure that matters are not litigated when the facts are so stale that fair litigation is unlikely.

In addition, S. 841 as introduced sought to apply certain statutes retroactively, including the False Claims Act Amendments of 1986, which made major changes in the law. This retroactivity was also removed during subcommittee consideration, which seems appropriate since retroactive application of substantive legal provisions is strongly disfavored.

One of the most important changes in S. 841 as introduced is a limitation on the right of government employees (rather than private-sector workers, as Kaplan implied) to be *qui tam* relators based on information learned on the job. The Grassley bill would prohibit suits by government employees unless they notified certain government officials and then waited a year. This restriction is justified because of the obvious conflicts of interest and double payment for government services that such *qui tam* suits entail. An even better approach would be to bar completely suits by employees of government investigatory or audit agencies and by government attorneys.

S. 841 also makes major changes in the provisions relating to suits based on public information. The 1986 amendments prohibited relators from initiating a *qui tam* action based upon material that had already been publicly disclosed, unless the person bringing the suit was the original source of the information. The Justice Department and U.S. attorneys are presumably capable of evaluating information in the public domain and determining if formal investigation is necessary. But S. 841 would permit suits based on public information. It is unclear what public policy objective is served by allowing someone who reads about a situation in the newspaper to file a fraud suit on behalf of the United States and reap 25 percent of the recovery.

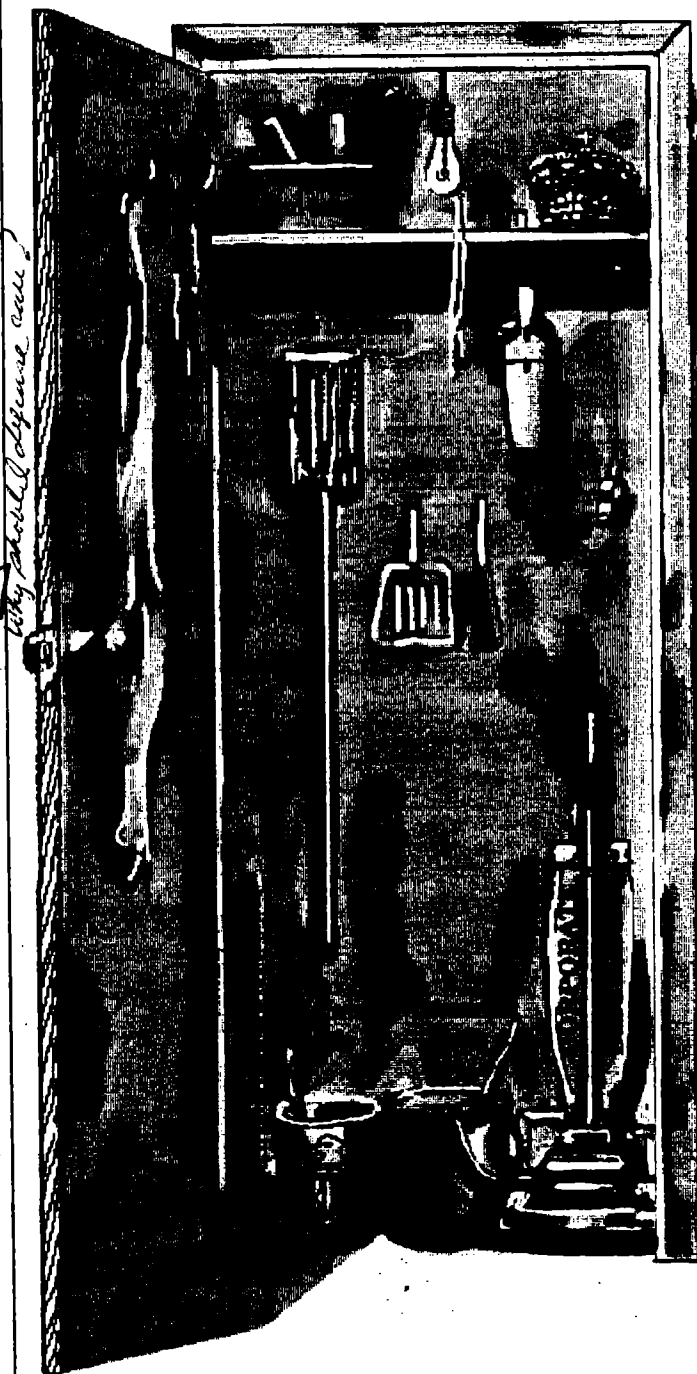
Qui Tam Flaws

As for the value of *qui tam* suits generally, there are several ways that fraud can be discovered and remedied. Companies may discover the fraud themselves and disclose it through a voluntary disclosure program. Governmental authorities through normal audits and investigations may discover fraud and prosecute it. *Qui tam* suits are yet another tool for disclosing and remedying fraud. But it is important to recognize that *qui tam* is not the only tool, not a perfect tool, and, in many ways, not the most desirable tool.

It is correct that several hundred million dollars in recoveries have come from *qui tam* suits since 1986, though the government joined in almost all these cases, and it is difficult to know how much the government would have recovered without any *qui tam* assistance.

The issue really seems to be how to ensure that use of *qui tam* suits is balanced with other means of fighting fraud. *Qui tam* isn't the ultimate panacea for several reasons.

First, the law confers on private citizens one of the most sensitive responsibilities of government: the prosecution of wrongs in the courts. The idea that any person may haul someone else into U.S. District Court and charge him with fraud in the name of the United States is not very comforting. Interestingly, Congress tried to exempt itself, at least partially, from these suits—a curious action if Congress be serious about promoting honesty in government.



Alan R. Yuspeh is a partner in D.C.'s & Simon, where he practices government law, predominantly representing large defense contractors.

Seeking a Sensible 'Balance' In Debate Over False Claims Act

IN REBUTTAL FROM PAGE 27

Second, private citizens (and their lawyers) who bring these suits are not acting only for the public good, but stand to make huge amounts of money—a factor that potentially distorts fairness in the litigation. Moreover, the process leaves the U.S. treasury with only 75 percent of the recovery.

Third, because successful suits can be enormously remunerative for relators' counsel, the existence of *qui tam* only fuels the litigation explosion that Americans are so concerned about. *Qui tam* counsel fees earned over the last several years could have created hundreds of full-time positions in the Justice Department devoted to bringing these suits.

Fourth, the great majority of these cases result in little or no recovery for the government, but place an enormous burden on government contractors to defend the actions. The approximately 350 suits filed since the 1986 amendments that the government has not joined have yielded only \$8 million in recovery thus far.

Fifth, a *qui tam* bar that aggressively encourages employees—who have an obligation to their employers to report misconduct internally—to try instead to make themselves and their lawyers rich by

bringing *qui tam* suits undermines companies' efforts to be responsible. Today, there is growing evidence that large businesses see the value in voluntary compliance programs, particularly since the advent of the implicit exhortation in the federal sentencing guidelines that companies make voluntary disclosures of criminal conduct.

What the defense industry is trying to do in the current debate over proposed amendments to the *qui tam* provisions of the False Claims Act is to achieve some balance in the law by addressing a limited number of issues that will not impair the ability of relators to bring suits.

Senior Reporter Sheila Kaplan replies:

Alan Yuspeh writes that I implied that the Grassley bill would limit the right of all employees—rather than just government employees—to be *qui tam* relators unless they notified government officials within a certain period of time. But my article didn't state that the measure covering all employees was in the Grassley bill. I described it as a provision being pushed by several defense companies, which is indeed true.

And yes, Sen. Grassley is quoted accurately from a statement provided by his office.

A NEW WAY TO SOUND OFF

If you want to weigh in about something you've read in *Legal Times* or about anything else you deem of interest to the legal community, Washington, D.C., Counsel Connect is available as a sounding board. Counsel Connect members may post their comments online in "The Washington Beat" or send letters to the editor via electronic mail to Eric Effron. If you're not a member of Counsel Connect (IDs are free to *Legal Times* subscribers), we can post comments online for you if you send them to Jonathan Groner.

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Qui Jan

The New York Times

DATE: 4-1-94

PAGE: D-1

A Whistle-Blower Is Awarded \$22.5 Million

By JOHN HOLUSHA

In the latest sign yet that the Federal whistle-blowing law is climbing higher up the corporate ladder, a former chief financial officer of the United Technologies Corporation, has been awarded \$22.5 million for exposing fraudulent billing practices for helicopters bought by the Defense Department in the 1980's.

Douglas D. Keeth, a former corporate vice president for finance at United Technologies, which is based in Hartford, had participated in an internal investigation of the wrongdoing when the company first learned that its Sikorsky Aircraft division was billing the Pentagon for work it had not yet performed.

However, in a complaint he filed in Federal court, Mr. Keeth charged that United Technologies officials, whom he did not name, attempted to cover up the extent of unjustified billings by its Sikorsky subsidiary and allowed them to continue.

United Technologies denied any cover-up but it agreed Wednesday to pay the Government \$150 million for accounting irregularities, of which Mr. Keeth will get 15 percent. Robert F. Daniell, who has been chief executive of the company since 1986, had previously served as president of the

Sikorsky Aircraft operation during part of the time that the irregularities were said to have taken place.

Mr. Keeth, 46, is the highest-ranking corporate official to disclose wrongdoing to the Government, according to John Phillips, a lawyer in Washington, D.C., who specializes in whistle-blower cases. According to Mr. Phillips, United Technologies settlement brings to \$738 million the amount Government has recovered under the program since the legislation was updated in 1986.

"The numbers are going up," he said, as cases arising from the military buildup of the 1980's reach settlement. "The recoveries this year will probably be near \$500 million."

Mr. Keeth could not be reached yesterday.

United Technologies issued a statement saying that it had voluntarily disclosed the initial problems at Sikorsky, which mainly involved billing the Government for work that it had not yet done. It noted that the company never received more money for the helicopters than the agreed-upon price.

But a statement issued by the Justice Department said that "the inflated progress payments constituted in-

terest-free loans from the Government and resulted in additional debt service costs to the Government."

According to both the Government and the company, Mr. Keeth was a member of a team sent to investigate billing practices at Sikorsky, after the division admitted problems and refunded \$75 million to the Government in April 1988. Mr. Keeth said in a complaint filed in court that the group uncovered "other methods fraudulently inflating progress billings, going back at least as far as 1982."

But when he reported these findings to corporate headquarters in March 1989, Mr. Keeth said in the complaint, the unnamed managers first ordered that all copies of the report be destroyed. Evidently that did not happen, because, Mr. Keeth said, on April 10, 1989, all copies were ordered to be turned over to the company's lawyers.

It was shortly afterward, in May, that he filed the whistle-blower suit in Federal court in Bridgeport, Conn.

Martin Moore, a United Technologies spokesman, said the alleged March order to destroy the reports was not true. The order to turn them over to the lawyers a few weeks later was true, he said, adding that "they turned them over to the Government."

'Accounting Issues'

Mr. Moore said the company did not concede the cover-up charges in its settlement with the Government. "We settled on accounting issues," he said.

Nevertheless, the Justice Department announcement of the settlement prominently referred to Mr. Keeth's allegations of information suppression.

The \$150 million settlement apparently represents a compromise between the Justice Department and the company. In its 1992 annual re-

Army Investigators

In its statement Wednesday, the company said Federal officials had decided not to level any criminal charges in connection with the over-billing. It also said that investigators from the Army had participated in the case and decided not to bar the company from future contracts or impose any other penalty.

Mr. Moore said Mr. Keeth had been kept on the company's payroll until the announcement of the settlement, but company officials said he had no meaningful responsibilities or duties once it leaked out he had filed the suit.

Mr. Moore attempted to diminish Mr. Keeth's standing in the company. He said Mr. Keeth was vice president of finance for the Essex Group, a subsidiary that was sold during the 1980's. "When he came back here, they just never changed the title," he said.

Settling cases arising from the military buildup of the 1980's.

port, United Technologies said the Justice Department was holding out for \$370 million. It also noted that employees of the company had been subpoenaed to appear before a Federal grand jury.

Justice Ginsburg Goes 25 for 25 on Voting With Court Majority

By Joan Biskupic
Washington Post Staff Writer

The Supreme Court has handed down 25 opinions this term and only one justice has been in the majority every time: Ruth Bader Ginsburg.

From her first day on the bench last October, the court's newest justice showed she was a force to contend with during oral arguments. She peppered lawyers with questions and often interrupted her colleagues.

Now, it appears that Ginsburg may be just as determined behind the closed door of the justices' conference room.

"Wow," said Eleni Constantine, of the National Association of Attorneys General, when she heard Ginsburg was 25 for 25. "You could hypothesize that she is, in fact, building coalitions or you could hypothesize that she doesn't want to make waves," said Constantine, a lawyer who monitors the court for the association.



Justice Ruth Bader Ginsburg, forceful in oral argument, may be just as determined in conference.

Constantine's view is that Ginsburg, who spent 13 years on the sharply divided D.C. Circuit Court of Appeals, may become a consensus builder.

Ginsburg's record on this term's early cases—which typically are the less controversial, easily decided ones—also shows her aligning more with the conservative justices than with the liberals.

But the term is young.

It is impossible at this point to draw conclusions on Ginsburg's judicial philosophy or where the first Democratic appointee in 26 years will rank among her colleagues. About 60 more rulings will be handed down before late June when the court recesses.

As an appeals judge, Ginsburg was known for a moderate judicial approach and for her view that judges generally follow, rather than lead, changes taking place in society.

Appellate lawyer Richard K. Willard said Ginsburg's new record reflects a pragmatic, results-oriented approach she took on the appeals court: "She wants to be in the majority."

Ginsburg may well have been the decisive fifth vote in an unusual justice lineup last month on a case testing when a potentially biased judge should withdraw from a case. She joined Justice Antonin Scalia's opinion that said judges generally cannot be disqualified for bias because of anything they have said or done on the bench. "Judicial remarks . . . that are critical or disapproving of, or even hostile . . . ordinarily do not support a bias or partiality challenge," Scalia wrote, unless they reveal "a high degree of favoritism or antagonism as to make fair judgment impossible."

Also in the majority in *Litky v. United States* were Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Clarence Thomas.

Ginsburg's experience on the

D.C. Circuit has also made her one of the most prolific freshman justices in recent years. She and O'Connor

nor have written the most majority opinions so far this term: six each. Rehnquist has written four. All the other justices have authored one or two. The most senior justice on the winning side of a case assigns the majority opinion, so Ginsburg's record here likely reflects her speed in writing opinions.

In fact, virtually all of Ginsburg's opinions have been in dry, little-noticed cases. One exception was her opinion for a five-justice majority in *Ratzlaf v. United States*. Rejecting the Justice Department's arguments, the court leniently interpreted an anti-money-laundering regulation. The ruling makes it more difficult for prosecutors to prove that people who break up their cash transactions to avoid reporting a single deal of more than \$10,000 are engaged in money laundering. Ginsburg was joined by Scalia and Justices John Paul Stevens, Anthony M. Kennedy and David H. Souter.

More than half of the court's rulings so far this term have been unanimous, and only three cases were decided on 5 to 4 splits. So most of the justices have gotten their way most of the time.

But only Ginsburg prevailed in every case. Following is how the others fared: Scalia was in the majority 24 of 25 times (he and Ginsburg, former colleagues on the D.C. Circuit, voted together 95 percent of the time); O'Connor, Kennedy and Souter were in the majority in 22 of the 25 cases; Rehnquist, 21 cases; Stevens, 20 cases; and Harry A. Blackmun and Thomas, 18 cases.

Blackmun, the liberal pole of the court, and Thomas, a firm conservative, were not joining forces. When one dissented, the other usually was in the majority. So far, they have voted together 55 percent of the time.

William Casey, director of computer-assisted reporting, contributed to this report.

- ① government employees could become relators if
- ② they inform the Agency IG or DOJ
 - ③ rules out people who are atty's

every gov employee has a regulatory & C/L duty to disclose - atty's have an ethical obligation to

Dod's previous position was an absolute bar.

Protect the integrity & utility of the voluntary disclosure programs —
nonopportunistic relator —

Berman — make a decision early on to dismiss relator ~~one~~

Grassely — give judge the discretion to bring.

Also at what point

Did DOJ depend constitutionality
of qui tam?

D
J

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

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

Dear Mr. Chairman:

This is to provide the Department's views on S. 841, the False Claims Amendments Act of 1993, as recently reported by the Subcommittee on Courts and Administrative Practice. We and the staff of the Subcommittee on Courts and Administrative Practice have been seeking a compromise on this legislation. Our discussions have been productive, and we have candidly exchanged ideas to refine the areas of agreement and disagreement. We appreciated the opportunity to work with the subcommittee staff and are pleased that our cooperative efforts produced a markedly improved bill.

Nonetheless, we continue to have significant concerns about the bill in its current form. We believe additional revisions would further strengthen the ability of the government and citizens to fight fraud against the government and maximize the government's recovery in these cases, a goal shared by the Subcommittee and the Department.

In 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 the Committee to adopt it 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 have agreed to the primary legislative goal 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. However, other provisions of the bill will have the opposite effect 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 takes money from the taxpayers' pocket. The government would have otherwise recovered the same money, except now it must 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 recovery in this situation, regardless of where the person derived the information, as suggested in the substitute bill.²

One specific example of such opportunistic suits is the qui tam action that virtually mirrors a company's voluntary disclosure to the government. Our proposed revision bars an

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.

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 could be filed. Ultimately, it would be up to the court to decide if the government's investigation was sufficiently active to bar relator's suit.

DRAFT

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 allege the very allegations that a company has already disclosed and 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))

Thus, we suggest language to better accomplish several goals underlying this legislation. First, we would reward those who are sources of our information in the first place and voluntarily provide it to us or to our 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 (which advances the taxpayers' interests and maximizes our ability to prosecute). 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 that it is 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 allows

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witnesses who learn of the investigation to recover as long as they file before the original source.

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

f. Government Employees:

1. Exclusions of certain employees. 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 officers 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 as well as selected agencies' contracts, has subpoena authority as well as document inspection authority pursuant to contract, and conducts audits of government

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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 officers from those eligible to file qui tam suits. Contracting officers 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 only allows for a 12-month period in which the government may file suit after disclosure by the government employee. The Substitute increases this period to 18-months with a possibility of an additional six-month extension upon notice to the relator. (Substitute, Sec. 3, (e)(5)(A)(B)) This longer period is necessary because it is very difficult to predict the complexity and duration of an investigation. The longer period of time is also required because not only must the government complete the investigation, it must also file suit within this time frame.

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: We support the amendment to the CID statute.

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 issue of the effective date of statutes absent a clear statement of congressional intent is currently before the Supreme Court.) The amendment is necessary to make clear Congress' intent so that

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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 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 adversely our resources adversely (Substitute, Sec. 9).

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

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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 any agency official whose responsibilities relate to contract award or oversight, 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).

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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 to 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 to 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)--

(A) in the matter preceding subparagraph (A) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears; and

(B) in the matter following subparagraph (D)--

(i) in the first sentence by inserting "or an Assistant Attorney General" after "Attorney General"; and

(ii) in the second sentence by striking out "the Deputy Attorney General,";

- (2) in subsection (a)(2)--
 - (A) in subparagraph (F) by striking out "designated by the Attorney General"; and
 - (B) in subparagraph (G) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears;
- (3) in subsection (h)(6) by striking out ", the Deputy Attorney General,";
- (4) in subsection (i) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears; and
- (5) in subsection (l)(6) by inserting "or an Assistant Attorney General" after "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

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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.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	DOBs (Partial) (1 page)	03/09/1994	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Kathryn Way
OA/Box Number: 7356

FOLDER TITLE:

Legal Issues: False Claims Act [2]

2013-0854-S

ms676

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



U.S. Department of Justice

Civil Division

[001]

Office of the Assistant Attorney General

Washington, D.C. 20530

March 9, 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 - March 10, 1994, Meeting

Dear Donsia:

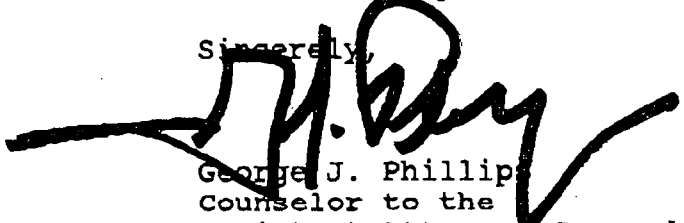
This will confirm the meeting tomorrow at the Old Executive Office Building, Room 224, at 1:00 p.m. to discuss the pending Amendments to the False Claims Act.

The following people need to be given clearance into the OEOB for this meeting:

1. George J. Phillips - (b)(6)
Counselor to the Assistant Attorney General
Department of Justice - Civil Division
2. Robert H. Brink - (b)(6)
Deputy Assistant Attorney General
Department of Justice - Office of Legislative Affairs
3. Stephen Preston - (b)(6)
Principal Deputy General Counsel
Department of Defense
4. Amy Jeffress - (b)(6)
Special Counsel to the General Counsel
Department of Defense

Please call me at 514-5713 if there is any problem.

Sincerely,



George J. Phillip
Counselor to the
Assistant Attorney General

"CORRECTION"*** Additional Information -****EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503**

January 31, 1994

LEGISLATIVE REFERRAL MEMORANDUM*Please see
attached draft
bill referred to
in Justice's
proposed
report.***TO: Legislative Liaison Officer -**

AGRICULTURE - Marvin Shapiro - (202) 720-1516 - 312
 COMMERCE - Michael A. Levitt - (202) 482-3086 - 324
 HHS - Frances White - (202) 690-7750 - 328
 HUD - Edward J. Murphy, Jr. - (202) 708-1793 - 215
 INTERIOR - Danny Conenstein - (202) 208-6706 - 329
 DEFENSE - Samuel T. Brick, Jr. - (703) 697-1305 - 325
 LABOR - Robert A. Shapiro - (202) 219-8201 - 330
 STATE - Julia C. Norton - (202) 647-4463 - 225
 TRANSPORTATION - Tom Herlihy - (202) 366-4687 - 226
 TREASURY - Richard S. Carro - (202) 622-1146 - 228
 VA - Robert Coy - (202) 535-8113 - 229
 ENERGY - Bob Rabben - (202) 585-6718 - 209
 NASA - Jeff Lawrence - (202) 358-1948 - 219
 NEC - Sonyia Matthews - (202) 456-6722 - 429
 OPM - James N. Woodruff - (202) 606-1424 - 331
 SBA - Christine Swedin - (202) 205-6702 - 315

FROM:

JAMES J. JUKES (for) *jj*
 Assistant Director for Legislative Reference

OMB CONTACT:

Ingrid SCHROEDER (305-3453)
 Secretary's line (for simple responses): 305-3454

SUBJECT:

JUSTICE Proposed Report RE: S 841, False
 Claims Amendments Act of 1993

DEADLINE:

OOS January 31, 1994

COMMENTS: The Senate Judiciary Committee is marking up S. 841 on Feb. 3, 1994. If we do not receive your comments by the above deadline we will assume that you have no objection to the report.

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:

Sue Murrin
 Adrien Silas
 Clarissa Cerda
 Steve Aitken
 Donpia Strong

Peggy Young
 Cyndi Vallina
 John McClelland

_____ Concur

_____ No objection

_____ No comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this
_____ response sheet

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 only upon 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 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

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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 only upon 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) (i) (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) Twelve months (and any period of extension as provided for under subparagraph (B)) have elapsed since the disclosures of information and notification under either

- 3 -

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 12-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 12-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 any individual acting as an attorney for the United States or any of its agencies shall be eligible for an award under subsection (d).

"(6) The Government may move to dismiss an action under subparagraph (e) (1) (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) (1) (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 to 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

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the civil action to demonstrate that all of the conditions set forth in subparagraphs (c) (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

- 5 -

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:

"(1) 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)--

(A) in the matter preceding subparagraph (A) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears; and

(B) in the matter following subparagraph (D)--

(i) in the first sentence by inserting "or an Assistant Attorney General" after "Attorney General"; and

(ii) in the second sentence by striking out ", the Deputy Attorney General,";

(2) in subsection (a) (2)--

(A) in subparagraph (F) by striking out "designated by the Attorney General"; and

(B) in subparagraph (G) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears;

(3) in subsection (h) (6) by striking out ", the Deputy Attorney General,";

- 6 -

- (4) in subsection (i) by inserting "or an Assistant Attorney General" after "Attorney General" each place it appears; and
- (5) in subsection (1)(6) by inserting "or an Assistant Attorney General" after "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.

MEMORANDUM
OF CALL

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TO:

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OF (Organization)

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☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

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Rm 135, Hart Senate
off Bldg

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DATE

TIME

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01-Mar-1994 09:55am

Ingrid -
395-3109

TO: James J. Jukes
TO: Donsia Strong
FROM: Ingrid M. Schroeder
Office of Mgmt and Budget, LRD
SUBJECT: S. 841 - False Claims update

Talked with Justice today. They had a meeting with Berman, Grassley, and Heflin planned for Monday and Heflin could not make it. Grassley's office is rescheduling.

Well let you know when I hear more.

The Unresolved Issues include:

1. DOD - Does not want any GOVERNMENT relator to benefit from any awards (qui tam or contract dispute).
2. Donsia/DPC - Supports the bill language and wants all relators to be able to benefit from contract dispute awards and qui tam awards.

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.

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

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; "Whistleblower 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).

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.

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).

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