Testimony of

Pamela H. Bucy

February 27, 2008

February 27, 2008
Written Statement
Submitted by Pamela H. Bucy
Bainbridge Professor of Law University of Alabama School of Law

S.2041, "The False Claims Act Correction Act of 2007," is likely to encourage more whistleblowers to bring actions under The False Claim Act (FCA).2 In addition, because S.2041 also gives the United States Department of Justice (DOJ) greater authority to monitor frivolous qui tam actions, S. 2041 has the potential to enhance the quality of relators' actions and thereby protect defendants from inappropriate qui tam action. There are, however, some respects in which S. 2041 could be improved upon. This Statement addresses those.

I. OVERVIEW OF THE CIVIL FALSE CLAIMS ACT, 31 U.S.C. §3729 et seq.

The civil False Claims Act (FCA) creates a cause of action on the part of "any person" who believes that another person or entity has submitted false claims to the federal government. The FCA has been heralded as one of the most effective crime-fighting tools ever devised, and cursed as irresponsible and disruptive to a healthy economy.
Under the FCA, a person who believes that he has information and evidence that someone else (individual or company) has filed false claims against the federal government may file a lawsuit making such allegations. This plaintiff (termed a "qui tam relator") is required to file his lawsuit under seal (not even serving it on the defendant). The relator is also required to give a copy of the lawsuit to the United States Department of Justice (DOJ), along with a written report of "all material evidence and information" the relator possesses.3

The lawsuit stays under seal, often for two years or more, to allow DOJ to fully investigate the charges made by the relator. The secrecy provided by sealing the complaint not only protects a defendant's reputation if the relator's information amounts to nothing, but also facilitates DOJ's further investigation of the relator's information.

At the conclusion of its investigation, DOJ decides whether it will intervene in the lawsuit as an additional plaintiff. If it does, DOJ assumes "primary responsibility" for the case, although the relator remains as a plaintiff and is guaranteed a participatory role.4

In some cases, DOJ handles the entire case after intervening; in others, relators work hand-in-hand with government prosecutors. In some cases, relators and their attorneys assume the bulk of the investigative and litigative duties.

If DOJ does not join the lawsuit, the relator may continue pursuing the case, litigating it alone. Even if DOJ does not join a relator's case, it retains authority over the relator's lawsuit in several

ways: DOJ monitors the case and may join it at any time, even for limited purposes, such as appeal; DOJ may settle or dismiss a relator's suit over the relator's objections as long as the relator has been given an opportunity in court to be heard; DOJ may seek limitations on the relator's involvement in the case, or seek alternative remedies (such as administrative sanctions) in lieu of the relator's lawsuit.

If the government joins the relator's case, the relator is guaranteed at least 15 percent of any judgment or settlement and the court can award more -- up to 25 percent. If the government does not join the lawsuit, the relator is guaranteed 25 percent and could receive up to 30 percent of the judgment. The amount within the statutory award depends upon the relator's helpfulness to the government. Because the FCA's damages and penalty provisions tend to generate exceptionally large judgments, relators' percentages involve substantial sums.

II. THE FCA'S PRIVATE-PUBLIC PARTNERSHIP MAKES THE FCA AN EFFECTIVE TOOL AGAINST FRAUD

There are three primary reasons the FCA is so effective. First, it recognizes the value of "inside information of fraud and encourages those who have such information to come forward with it. Second, it effectively recruits legal talent who can supplement strapped prosecutive resources of DOJ. Third, it provides a mechanism for private citizens to report information to, and work with, law enforcement. This dialog has the potential, not yet fully realized, for controlling frivolous qui tam actions.

A. The Importance of Whistleblowers In Detecting, Deterring and Combating Fraud

Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring. They will not find out about such fraud until it is too late, if at all. When law enforcement does find out about such fraud, it is very labor intensive to investigate.

Fraud is usually buried in mountains of paper or digital documents. It is hidden within an organization. Many different people within an organization, in multiple offices, divisions, and corporate capacities, may have participated in the illegality. Because of the complex nature of economic crime and the diffuse nature of business environments, it may not be apparent, perhaps for years, that malfeasance is afoot. By then, victims will have been hurt, records and witnesses will have disappeared, and memories will have faded.

Given these facts, insiders who are willing to blow the whistle are the only effective way to learn that wrongdoing has occurred. Information from insiders is the only way to effectively and efficiently piece together what happened and who is responsible. Insiders can provide invaluable assistance during an investigation by identifying key records and witnesses, interpreting technical or industry information, providing expertise, and explaining the customs and habits of the business or industry. Help from an insider can save time and expense for both law enforcement and putative defendants by focusing the investigation on relevant areas.

Because of the valuable information brought by insiders, it is no surprise that government officials state: "Whistleblowers are essential to our operation. Without them, we wouldn't have cases."5

It can be a difficult decision to become a whistleblower because "[w]hat happens to whistleblowers shouldn't happen to a dog."6 Personally and professionally, it can be a devastating experience to become a whistleblower. And, unlike the typical cooperating individual whose looming criminal liability is the impetus to cooperate with law enforcement, most whistleblowers have a choice. They have not participated in illegality and thus need not cooperate to obtain a "better bargain" for their own problems.

The FCA recognizes the difficulty of coming forward as a whistleblower, and in three ways encourages insiders to become whistleblowers. First, it awards whistleblowers who become relators in successful cases. This is simple market economics. Not only does the FCA guarantee such relators a share of judgements obtained and recovery of attorneys fees and litigation expenses, but it communicates, in this way, that whistleblowing is valuable. For whistleblowing to be seen as socially acceptable, rather than disloyal snitching or "tattling," it must be viewed with approval.7 It is a human tendency to measure worth by material rewards.8 Large financial awards to those who provide helpful inside information not only increase the attention whistleblowing gets and helps overcome the hardships it brings, they also affirm whistleblowing as a worthy endeavor.

B. The Resource of Legal Talent

In qui tam practice under the FCA, insiders potentially bring another resource to law enforcement: legal talent with skill and resources that can supplement DOJ resources. The large potential recoveries and statutory award of attorneys' fees under the FCA are incentive for top legal to represent relators. The structure of the FCA also has the potential to discourage inexperienced or unskilled relators' counsel. Every relator's goal is to convince DOJ to intervene as co-plaintiff in the case. To do so, relators' attorneys need to present to DOJ, prior to filing their complaint, a thorough, well thought out, carefully researched case describing exactly how the false claims were generated and how the fraud can be proven.

C. Mechanism for Cooperation

The FCA provides a protocol for whistleblowers to report their information and for law enforcement to evaluate their information. DOJ has a structured system in place for obtaining information from whistleblowers about potential fraud upon the government, for investigating this information, and for working with whistleblowers who become qui tam relators. The FCA allocate duties to both DOJ and relators. While the adequacy of DOJ resources to fully participate in this protocol is an open question, the point is a structured system exists for whistleblowers and law enforcement to work together to pursue potential fraud.

III. THE COSTS OF THE FCA'S PRIVATE-PUBLIC PARTNERSHIP

An honest appraisal of the FCA recognizes that for all of its benefits, the FCA's unusual partnering of private and public plaintiffs presents potential problems for businesses, regulatory authorities, and the judicial system.

The FCA presents problems for businesses. It is expensive for a company to respond to a allegations of fraud. Company employees are distracted from their normal duties when they have

to gather subpoenaed records, respond to inquiries of investigators, or testify at hearings or depositions. When a fraud investigation becomes public, business expansions, corporate borrowing, and mergers may be put on hold, or lost as opportunities. Stock prices may fall and lay-offs may result, clients may leave, company stars may jump ship, company moral may plummet.

The FCA present problems for DOJ. It absorbs resources of DOJ and the agencies that investigate relators' allegations. Relators can end up driving some of DOJ's investigative agenda by filing cases. Relators may generate harmful precedent that binds DOJ and prevents DOJ from shaping the law. Whereas DOJ can choose which cases to pursue so as to present favorable legal theories and facts on appeal in efforts to develop helpful precedent and further the FCA, relators rarely will have this institutional interest in case law development.

Lastly, the FCA poses complications for the judicial system. Relators' actions often require the courts to referee disputes between relators and DOJ. To resolve these conflicts, courts find themselves delving into issues of prosecutive discretion and executive branch policy, issues that present separation of powers tensions.

IV. WAYS IN WHICH THE FCA CURRENTLY ADDRESSES THE COSTS OF THE FCA'S PRIVATE-PUBLIC PROSECUTOR PARTNERSHIP

The FCA currently includes four features which help address the tensions created by the FCA's unique private-public prosecutor partnership: (1) required dialog between relators and DOJ,

(2) seal requirement, (3) DOJ's statutory authority to monitor and limit relators' involvement, (4) DOJ's authority to move for dismissal of frivolous actions. These features can neutralize the difficulties created for businesses, regulators, and the courts by this tension.

A. Required Dialog

The FCA requires that relators present their information of potential fraud to the DOJ prior to filing their complaint and also provide DOJ with a copy of their complaint and all relevant information and evidence they have after filing the complaint.9 This required communication provides DOJ with the opportunity to corral frivolous relators' actions.

B. Seal Period

When relators file their lawsuits they are required to do so under seal, not even serving the defendants.10 While the matter remains under seal, DOJ has the opportunity to investigate the allegations to determine if it will intervene as plaintiff, seek dismissal of the case, or seek some restrictions on the relator's involvement in the case. The initial secrecy surrounding qui tam complaints and the confidentiality of the reports relators file with DOJ help to protect defendants from reputational damage and the costs incurred in responding to a frivolous private action. DOJ can weed out frivolous allegations and refine credible allegations further protects defendants from reputational and financial damage that could result from unfounded or poorly pled private lawsuits.

C. DOJ Authority To Monitor Relators

The FCA gives DOJ considerable authority to monitor and control relators' conduct in FCA actions, whether or not DOJ intervenes. DOJ may move for extensions of the seal period to allow full investigation of relators' complaints and evidence,11 seek restrictions on a relator's involvement in a case,12 monitor lawsuits in which DOJ does not intervene by receiving copies of all pleadings filed, and depositions taken,13 intervene at any time during a case "upon a showing of good cause,"14 seek stays (in camera if necessary) in the relators' action if it interferes with Government investigations of related civil or criminal matters,15 pursue the matter through any alternate remedy including administrative proceedings.16

D. DOJ Authority To Move for Dismissal

Of all of DOJ's supervisory powers over relators, the most important in protecting against frivolous qui tam actions is its authority to move for dismissal of a relator's lawsuit.17 DOJ has utilized its authority to seek dismissal of qui tam actions sparingly. There is some logic to this approach: there is always a chance, however small, that the relator will prevail and collect a judgment, of which at least seventy percent will go to the government. Thus, economically it is advantageous for the government to remain a passive observer in the FCA actions it does not join.

E. Resources

It takes considerable DOJ resources to exercise its authority over relators' actions. If the FCA is to remain a powerful tool against fraud, such resources need to be allocated. Only by effective and thorough monitoring, can we have some assurance that the FCA's unique private-public partnership will further the public interest, protect defendants from frivolous actions, and preserve the long-term viability of the FCA.

V. HOW S.2041 ENHANCES THE FCA'S EFFECTIVENESS AND HOW REVISIONS IN S. 2041 WOULD FURTHER ENHANCE THE FCA'S EFFECTIVENESS

A. The "Presentment" Clause
S. 2041, Section 2
S. 2041, Section 2 addresses the "presentment" issue raised in United States ex rel. Totten v. Bombardier Corp.,18 and United States DRC v. Custer Battles.19 In these decisions, courts held that liability under the FCA attaches only if the claim is "presented to an officer or employee of the United States Government." In both cases, the courts held that this meant the FCA did not apply to false claims submitted. In Totten,, the claims had been submitted to a "grantee" of federal funds; in Custer Battles, the claims were submitted to the Coalition Provisional Authority (CPA) established to rebuild and administer Iraq after Saddam Hussein's capture.20

Edward L. Totten brought a qui tam action alleging that defendants, Bombardier Corporation, and Envirovac, Inc., delivered defective rail cars to the National Railroad Passenger Corporation (Amtrak) and further, that they submitted false claims for payment of the rail cars by certifying that the cars met contractual specifications when they did not. Amtrack is not a federal governmental agency but a private entity which receives federal funds as a "grantee." As a grantee, Amtrak paid defendants with federal funds.21

While recognizing that the FCA's definition of "claim" specifically includes "claims presented to grantees,"22 the DC Court of Appeals noted that the FCA, in § 3729(a)(1) also requires presentment of the claims "to an officer or employee of the United States Government."23 Finding the language in § 37299(a)(1) controlling, the court held that presentment to a federal grantee did not fall within the FCA. The DC Circuit noted that the inconsistency in the FCA provisions was likely a "drafting error"24 but held that Congress, not the courts, was the body to correct the error.25

In Custer Battles, the District Court for the Eastern District of Virginia examined three types of funds that financed the Coalition Provisional Authority (CPA) established to rebuild Iraq. The court found that Iraqi funds confiscated by the United States "vested" title in the United States and thus claims for "vested" funds were within the FCA.26 The court further found that claims submitted for "seized" funds (Iraqi state assets, mostly currency and negotiable instruments, "seized" by Coalition Forces were within the FCA because even though the United States did not hold title to such funds, it had "dominion and control" over such funds,27 and had the "discretion to direct [that their] expenditure [be] in the best interest of the United States."28 Lastly, the court held that claims submitted for funds from the "Development Fund for Iraq" (DFI), funded from multiple sources including the United Nations and international donations, were not within the FCA because these were funds given to and belonging to the Iraqi people.29 Clarifying the definition of 'Government money or property" will help resolve questions of blended funds.

Lastly, the Sixth Circuit has weighed in, holding in United States ex rel. Sanders v. Allison Engine Company, Inc. that the FCA, at least in §§ 3729(a)(2) and (a) (3), do not require presentment to an "officer or employee of the Government."30 The Supreme Court has granted certiorari in this case.

By defining "Government money or property" as "money or property the United States Government provides, has provided, or will reimburse to a contractor, grantee, agent or other recipient to be spent or used on the Government's behalf or to advance Government programs,"31
S. 2041 makes clear that the FCA covers federal funds, whether disbursed by a grantee or directly by the federal government, and whether held by the federal government as a beneficiary for others.

S. 2041 does not, however, correct the "drafting error" identified by the D.C. Court of Appeals whereby one provision of the FCA (§ 3729(a)(1)) requires presentment of the claim to "an officer or employee of the United States Government," while another provision (§ 3739(c)) includes claims submitted to "grantees," who likely are not "officers or employees of the United States Government."

This anomaly should be corrected. Thus, I would recommend that § 3729(a)(1) be amended by substituting "knowingly makes, uses or causes to be made or used" for the language "knowingly presents, or causes to be presented."
B. Government Employees as Relators
S. 2041, Section 3

Section 3 of S. 2041 addresses a problem that has bedeviled courts for decades, i.e., whether government employees qualify to be relators. Utilizing different rationales, almost all courts have held that government employees whose duties include uncovering fraud, do not qualify as relators.32

S. 2041 permits a government employee to qualify as a relator when the government employee reports the fraud utilizing the designated protocol and no one does anything. 33 In this circumstance and after waiting at least 12 months, the employee may file an FCA action. There are several noteworthy points about S. 2041, Section 3:

(1) The employees to whom this protocol applies are those who "learned of the information that underlies the alleged violation of § 3729 that is the basis of the action in the course of the person's employment by the United States." Thus, government employees who happen to learn of fraud independently of their government employment still qualify as relators. For obvious policy reasons (bringing forth important information of fraud) and to maintain equality with other potential relators, this limitation is appropriate. This is also the approach taken, appropriately so, by the courts that have considered this scenario.34

(2) The employee must present "all necessary and specific material allegations" through the proscribed reporting chain. This requirement of specificity should prevent government employees from "gaming" the reporting protocol by reporting generalities, or holding back information, in hopes of filing their own FCA actions.

(3) The reporting mechanism set forth (to the agency inspector general, employee's supervisor and Attorney General) is multi-sourced and thus, the information is less likely to get overlooked.

(4) The proviso that the government employee may file an FCA action after 12 months from the time he reports the information as required if the Attorney General has not filed an FCA action is consistent with the FCA's terms and philosophy that qui tam actions should be able to proceed even if DOJ does not intervene.

Despite these positive aspects of this amendment, it should not be passed. There are significant policy problems in allowing government employees to file FCA actions when the information they use is information they obtain while serving as a government employee. The reporting protocols in S. 2041, which by the way should be required for government employees regardless of FCA issues, cannot overcome these problems.

(1) Access to confidential information. By virtue of their official position, government employees whose duty is to investigate fraud by government contractors, obtain access to confidential, proprietary, and privileged information of companies that serve as government contractors. These governmental officials also have access to internal governmental information including confidential and non-public records and experts. Access to all of this information is granted only because of the employee's governmental position. It is wrong for a government employee to use this access for his personal benefit.

(2) Damaged Credibility. Often the government auditor or agent who investigated fraud by a contractor is a key witness at any civil or criminal trial or administrative hearing. These

individuals often testify as summary expert witnesses, explaining billing requirements and tracing how the defendant's conduct violated these requirements. When this individual has filed a lawsuit under the FCA in his own name and stands to profit personally from it, his credibility as a witness is ruined. This unfairly cripples any government case.

(3) Conflict of Interest. There are specific prohibitions against federal employees using "nonpublic government information...to further any private interest,"35 participating in a government matter in which the employee has a financial interest,36 using public office for private gain,37 using government property or time for personal purposes,38 and holding a financial interest that may conflict with the impartial performance of government duties39. There are also criminal penalties for federal government employees who participate in matters in which they have a financial interest.40

When a government employee who obtains information of fraud by a government contractor in the course of the employee's duties, files an FCA action in his own name, all of the above regulations and statutes are violated. They are violated when the employee reviews documents, interviews witnesses, and discusses strategy and investigative direction with other government employees with expertise in such matters. Access to such information and expertise would not be available to the employee if he were a private citizen; he should not reap special benefit from the unique access he obtains by virtue of his employment.
(4) Erosion of Public Confidence. When potential defendants or witnesses know that a government employee who is investigating fraud may be working for himself and his own profit, they are less likely to come forward or voluntarily cooperate, or be fully forthcoming.
Also, the general public cannot help but look with scorn on a governmental system that allows its employees to personally profit from doing his job.
Summary: Section 3 of S. 2041 should not be passed, nor under any circumstance should government employees who obtain information about fraud in the course of their governmental duties be allowed to file qui tam actions.

C. Barred Actions

S. 2041, Section 4
S. 2041, Section 4, amends what is known as the FCA's "jurisdictional bar" provision. This provision, which seeks to ensure that relators' information in fact assists the government, is key to the FCA's goal of encouraging knowledgeable whistleblowers to bring forth helpful information about fraud upon the government. Since the 1986 amendments, this provision has generated the greatest amount of litigation of any FCA issue. While S. 2041 remedies inequities that have arisen given court decisions, principally Rockwell International Corporation v.United States ex rel. Stone,41 it is not yet an optimal revision of the "jurisdictional bar" provision.

S. 2041 makes three major changes to current "jurisdictional bar" provision: (1) it gives the Attorney General sole authority to raise the issue whether relators' information is based upon what is publicly known, (2) it cures the problem created by Rockwell, and (3) it redefines the definition of "public information."
(1) Authority to Challenge Relator's Eligibility as Plaintiff. S. 2041 assigns to the Attorney General sole authority to seek dismissal of a relator on the ground that the relator provides nothing new to the case.42 Currently, this provision is "jurisdictional," which empowers any

party, including defendants, to seek dismissal of a relator on this ground. For two reasons, this part of S. 2041, Section 3, makes sense. First, DOJ should assume a greater role in policing frivolous qui tam actions. This amendment consolidates and helps direct this duty to DOJ. Second, DOJ is uniquely situated to determine whether the allegations made by a relator are in fact based upon public information since assessing this often requires analysis of data available primarily to DOJ.
(2) The Rockwell Decision. In Rockwell, the Supreme Court in held that James Stone, the relator who brought a qui tam action against Rockwell International Corporation, was precluded from recovering any portion of the almost $5 million judgment awarded because the information Stone presented to DOJ when he initiated the case were not the ultimate facts upon which Rockwell was convicted.43 By adding a wild card (the claims upon which the verdict will rest) to the existing unpredictability of litigation, this interpretation of the FCA will discourage knowledgeable individuals from becoming relators.

S. 2041 cures this problem by making clear that a relator is entitled to a portion of any recovery if the relator's information contributed to the "essential elements of liability."

Although S. 2041 cures the problem presented by Rockwell, it does so in a confusing way that will lead to significant practical problems. By focusing on "essential elements of liability" ie, what ultimately is proven in a case, S. 2041 adds to tensions between relators and DOJ. Linking relators' recoveries to the claims stay in the case all the way to judgment may well cause DOJ and relators to battle over what claims stay in a case or are heavily litigated during a trial. DOJ may be tempted to leverage the decision about claims into a decision about what percentage of the recovery relators will get. These disagreements will require more refereeing by the courts. This, in turn, will add to the separation of powers tensions already existing in FCA cases.

If S. 2041focused instead on the information the relator brings to DOJ initially rather than on the ultimate outcome of the case, the FCA will continue to encourage relators to come forward while also avoiding the inequity of Rockwell and the practical problems created by the current amendment. Instead of the suggestion in S. 2041, Section 3, 31 U.S.C. § 3730(e)(4)(A) should be amended as follows:

(4)(A) Upon timely motion of the Attorney General, a court shall dismiss an action or claim brought under section 3730(b) if the information supplied to the Attorney General by the relator is based exclusively on the public disclosure of allegations or transactions in ...."
(2) Changes to sources of "disqualifying public information" S. 2041 changes the definition of "public disclosure" in four ways. These changes impact relators' ability to bring FCA actions. The first change to the definition of "public disclosure" in S. 2041 (at (4)(B)) is limiting public disclosures to "disclosures made on the public record or that have otherwise been disseminated broadly to the general public." There are three problems with this proposal. First, it is vague. "Public record" and "disseminated broadly to the general public" are unclear terms. No one: not relators, defense counsel, DOJ, or the courts, will have a clear sense of what these terms mean. The second reason this provision should not be enacted is that it is confusing when read with (4)(A), which sets forth a list of sources of public disclosure. Interpretative questions abound: Does 4(B) overrule 4(A), or supplement it? If there are conflicts in 4(A) and 4(B), which controls? For example, what if a "hearing" referred to in 4(A) is not on the "public record? " The third problem

with this provision is that it is unnecessary. Section 4(A) lists the sources of public disclosure. There is no need to describe them again, this time generically, in 4(B).
The second change S. 2041 makes to the definition of public disclosure also limits the definition.

Specifically, 4(A) of S. 2041 provides that relators are disqualified if their information is based upon a "Federal criminal, civil, or administrative hearing" or a Federal administrative or General Accounting Office report, hearing, audit or investigation. Currently, the FCA is not limited to Federal matters. Thus with S. 2041, relators whose information is based upon state or possibly international criminal, civil or administrative matters would qualify as relators as long as the relator's information is not otherwise barred (because it had been disclosed, for example, in the news media).

This is an appropriate proposal. The point of the FCA is to encourage individuals who have knowledge of fraud upon the federal government to come forward with their information. Trolling through the overwhelming amount of information publicly available to find instances, even large instances, of fraud upon the federal government, is not a job that federal law enforcement officials can do alone. There is too much information and not enough investigative resources. To encourage knowledgeable individuals (ie, "professional relators" who specialize in such data gathering endeavors) to seek out information about fraud upon the federal government about which federal law enforcement officials are not aware, is good policy.

Notably, there are two significant restrictions on this "trolling-through-state-proceedings" opportunity that will limit possible abuse. The first restriction is the requirement that the information brought by a relator has not been disclosed in the news media. If the facts from the state proceeding have appeared in the news media, the information is public and the relator is disqualified. Second, a number of state agencies, Medicaid for example, are statutorily and contractually obligated to report instances of fraud involving federal funds to the federal government. When these state agencies fulfill their federal obligation to report such fraud, they will do so in a "federal administrative report" which the current amendment similarly includes as public information. Once such a report is made to federal authorities by a state office, the relator is disqualified.

The third change S. 2041 makes in the definition of "public disclosure" is excluding information obtained from "a Freedom of Information Act [FOIA] request."44 Like the limitation of public disclosure to "Federal" sources of information," this proposal will expand relators' ability to bring actions. It will encourage "professional relators" to seek and research FOIA data sources, thereby supplementing law enforcement's investigative resources. Because any such FOIA search efforts are still subject to existing limitations on what is public disclosure, namely, information in the news media or disclosed in various hearings, reports or audits, this FOIA "carve-out," should result in helpful but not duplicative assistance from relators.

The fourth change S. 2041 makes to the definition of "public disclosure" is excluding information obtained from "exchanges with law enforcement and other Government employees."45 Like the other limitations to the definition of public disclosure proposed by S. 2041, this information is still subject to the caveat that it is nevertheless public information if this information is reported in media or in hearings, audits or reports.

This change in the definition of "public disclosure" should not be made. It will be helpful only in a few instances (when all government employees at issue are ignoring their duties) and could generate considerable mischief (encouraging would-be relators to pester government employees for information). For these two reasons it should not be included.

Lastly, S. 2041 does not make a change to the "jurisdictional bar" provision that should be made. Neither current § 3730(e)(4)(A) nor S.2041, 4(A), includes "investigation" in the list of sources that constitute public disclosure. Both refer to "public disclosure...in a criminal, civil or administrative hearing" and later to a "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation...." The term "investigation should be added in both places for the obvious reason that sometimes investigations will become public. Allowing relators to file suit based upon a publicly disclosed investigation would be parasitic to the government's existing effort.
In summary, therefore, S. 2041, Section 4 at 4(A) and (B) should state:46

(4)(A) Upon timely motion of the Attorney General, a court shall dismiss an action or claim brought under section 3730(b) if the allegations relating to all essential elements of liability of the action or claim are information supplied by the relator is based exclusively on the public disclosure of allegations or transactions in a Federal criminal, civil or administrative hearing or investigation, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit or investigation or from the news media.

(B) In this paragraph:

(i) The term 'public disclosure' includes only disclosures made on the public record or that have otherwise been disseminated broadly to the general public.

(ii) The person bringing the action does not create a public disclosure

by obtaining information from a Freedom of Information Act request or from information exchanges with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed.

(iii) An action or claim is based on public disclosure only if the person bringing the action derived his knowledge of all essential elements of liability of the action or claim alleged in his complaint from the public disclosure.

D. Relief From Retaliatory Actions

S. 2041, Section 5
Section 5 makes two major changes in the protection against retaliatory actions. First, section 5 expands the coverage of individuals who are entitled to seek relief from an "employee" to "employee, government contractor or agent." This is an appropriate expansion of the FCA. It reflects the reality of who is, can be, and should be, relators under the FCA.

The second major change made by section 5 concerns the description of conduct which activates the protection of the FCA. The current FCA provides protection for "lawful acts ...in furtherance

of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section." S. 2041 replaces this language with the following: "lawful acts...in furtherance of other efforts to stop 1 or more violations of this chapter."
S. 2041's proposed change in the conduct protected is problematic. The amendment is confusing and raises multiple interpretative difficulties. What exactly is an "effort" to "stop" a "violation"? Is reporting the problem internally sufficient "effort"? Or is reporting to law enforcement agencies necessary to qualify for protection? Must a person report to the correct agency or just make a reasonable attempt to report to the appropriate agency? How much information must be reported to constitute an "effort"? Is "effort" satisfied only by filing an FCA action? Does "violation" mean the defendant must be found liable before the protection is activated? Depending on the interpretation of these terms, S. 2041 could be too narrow (providing protection only the filing of FCA actions and only when defendants are actually found liable) or too broad (reporting vague suspicions internally).

It seems more prudent to retain the current language with minor amendments to it to clarify issues over which courts have struggled. For example, while most courts hold that it is not necessary to actually file an FCA action to obtain protection under the FCA,47 the matter is not completely settled. The applicable statute of limitations for retaliatory claims was resolved by the Supreme Court but only by applying a default rule of statutory construction. The Court held that the statute
of limitations for a 3730(h) action runs from the date of retaliation rather than from the date of the FCA violation.48 Because the facts concerning the violation of the FCA will enter into the issues of retaliation, the activating event for statute of limitation purposes should be the FCA violation. In addition, a 10-year statute of limitations is consistent with S. 2041, Section 6.
In summary, S. 2041, Section 5 should amend 31 U.S.C. § 3730(h) as follows:49

(1) IN GENERAL - Any employee, government contractor, or agent shall be entitled to all relief necessary to make that employee, government contractor whole, if that employee, government contractor or Agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, government contractor, or agent in furtherance of other efforts to stop 1 or more violations of this subchapter in furtherance of an action under this section, not necessarily including filing an action under this Section but including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section.

(2) RELIEF - Relief under (1) shall include reinstatement with the same seniority status that employee, government contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

E. Statute of Limitations

S. 2041, Section 6
This amendment replaces the dual 3 and 10 year provision to a simplified 10 year standard for all

cases. It also provides that when the government intervenes in a case brought by a relator, pleadings relate back and do not change the original filing date as long as "the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint...." This amendment is appropriate and should be enacted. Doing so will clarify what have been an unnecessarily confusing aspects of FCA practice.

F. Civil Investigative Demands

S. 2041, Section 7
Civil Investigative Demands (CIDs) permit DOJ to obtain, prior to filing suit, "any documentary material or information relevant to a false claims law investigation." CIDs have great potential, allowing DOJ to fully investigate a matter before deciding whether to intervene. Full use of CIDs help DOJ weed out frivolous qui tam actions.

As currently drafted, the FCA has been interpreted by DOJ to perrmit only the Attorney General, Deputy Attorney General, or Assistant Attorney General to authorize CIDs. This is unworkable. S. 2041 provides that the Attorney General "or his designee" may authorize CIDs. This is an appropriate amendment for it recognizes the practicalities of DOJ delegation of duties.

DOJ has also interpreted the FCA as prohibiting sharing with relators information obtained by virtue of CIDs. S. 2041 addresses this issue and allows such sharing of information "if the Attorney General, or his designee, "determine it to be necessary as part of any false claims act investigation. This amendment should be adopted for it recognizes the investigative needs and potential of the private-public partnership created by the FCA.

1 Portions of this written statement are excerpted from Pamela H. Bucy, Games and Stories: Game Theory and the Civil False Claims Act, 31 FLA. ST. U. L. REV. 603 (2004); Pamela H. Bucy, Private Justice, 76 S. CAL. L. REV. 1 (2002); Pamela H. Bucy, Information as a Commodity in the Regulatory World, 39 HOUS. L. REV. 905 (2002).

2 31 U.S.C. § 3729 et seq.

3 31 U.S.C. § 3730(b)(2) (2002).

4 Id. at § 3730(b)(4)(B).

5 Justin Gillis, Whistleblowing: What Price Among Scientists? WASH. POST, Dec. 28, 1995, at A21 (quoting Lawrence J. Rhoades, a division direction at the U.S. Department of Health and Human Services, which polices federal health research for scientific misconduct).

6 Jane Bryan Quinn, When Whistleblowing Backfires, WA. POST, May 24, 1998, at H2.

7 As Professors Robert Frank and Philip Cook note, "the recognition and approval of others is a profound source of human recognition." ROBERT H. FRANK & PHILIP J. COOK, THE WINNER TAKE-ALL SOCIETY 113 (1995).
8 FRANK & COOK at 113.

9 31 U.S.C. § 3730(b)(2).

10 31 U.S.C. § 3730(b)(2).

11 31 U.S.C. § 3730(b)(3).

12 Id. at § 3730(c)(2)(C),(D).

13 Id. at § 3730(3).

14 Id.

15 Id. at § 3730(4).

16 Id.

17 31 U.S.C. § 3730(c)(2)(A).

18 380 F.3d. 488 (D.C. 2004)

19 376 F. Supp. 2d 628 (E.D. Va. 2006) (appeal filed, No. 07-1220, 4th Cir.)

20 Id. at 618.

21 380 F. 3d. at 490-91.

22 Id. at 492; See 31 U.S.C. § 3729 (c): "CLAIM DEFINED - For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." (emphasis added)

23 380 F.3d at 492; See 31 U.S.C. § 3729 (a)(1): Any person who...knowingly presents, or causes to be presented, to an officer or employee of the United States Government...a false or fraudulent claims for payment or approval." (emphasis added)
24 Id. at 496.

25 "[O]ur job is reading statutes as written, not rewriting them "in an effort to achieve that which congress is perceived to have failed to do." Id. at 497
26 Id. at 641.

27 Id. at 644.

28 Id. at 645.

29 Id. at 646-647.

30 471 F.3d 610 (6th Cir. 2006).

31 S. 2041, Section 2.

32 See, e.g., LeBlanc, 913 F2d 17 (1st Cir.)(on the ground that such a relator does not qualify as an original source as required in the FCA if the information in the complaint is known to the government); Fine, 72 F.3d 740 (9th Cir.)(on the ground that the relator did not "voluntarily" provide the information in his complaint to the government as required in the FCA).

33 S. 2041 specifies that the employee must report "all ...necessary and specific material allegations" to relevant inspector general, the employee's supervisor and the Attorney General" or to the employee's supervisor and the Attorney General if the employee's agency does not have an inspector general.

34 United States ex rel. Givler v. Smith, 760 F. Supp 72 (E.D. PA 1991); United States ex rel McDowell v. McDonnell Douglas, 755 F. Supp 1038, 1040 (M.D. Ga. 1991)

35 5 C.F.R. §§ 2635.101(b)(3), 2635.7039(a).

36 5 C.F.R. §§ 2635.402, 2635.501, 2635.502.

37 5 C.F.R.§§ 2635.101(b)(7), 2635.702.

38 5 C.F.R. §§ 2635.704, 2635.705.

39 5 C.F.R. §§ 2635.403.

40 18 U.S.C. § 201.

41 549 U.S. ____, 127 S. Ct. 1397 (2007).

42 S. 2041(4)(A).

43 127 S. Ct. at 1397.

44 S. 2041(4)(B).

45 S. 2041

46 The underlined portion is the additional language I propose to S. 2041, Section 4, at 4(A) and (B).

47 United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 235 (1st Cir. 2004); Dookeran
v. Mercy Hospital, 281 F.3d 105, 108 (3d Cir. 2002).

48 United States ex rel. Wilson. Graham County Soil & Water Conserv., 545 U.S. 409 (2005).

49 Underlined portion is additional to S. 2041 and also is identical to existing § 3730(h) except for the italicized portion which is new to both.