Preventing Government Overpayments to *Qui Tam* Plaintiffs

PROPOSED AMENDMENTS TO THE **FALSE CLAIMS ACT**

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By Peter B. Hutt II and Anna R. Dolinsky[*]

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[*] Authored on behalf of the U.S. Chamber Institute for Legal Reform. Mr. Hutt is a partner in the Washington, D.C. office of Akin Gump Strauss Hauer & Feld LLP. Ms. Dolinsky is an associate in the firm's Washington, D.C. office.

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EXECUTIVE SUMMARY

In 2010, a former pharmaceutical company employee received a $96 million bounty from the government under the civil False Claims Act ("FCA") for filing a lawsuit alleging that her employer had committed fraud against the government. Like other whistleblowers, she suggested that she did not do it for the money, but rather blew the whistle on fraud out of concern for patient safety.[1]

If we take this individual at her word, obvious questions arise: why should the government pay this individual $96 million when she was evidently not motivated by money? Is the government routinely overpaying whistleblowers (known as "Relators") who file suit under the FCA? How much taxpayer money is the government wasting by overpaying Relators and their counsel? This paper examines the structure of the FCA's whistleblower provisions and available information on whistleblower motivation and concludes that the statute's existing structure systematically overpays Relators and their counsel. This paper identifies several simple legislative amendments that would address these systematic flaws and ensure that the government is getting its money's worth when it pays Relators under the FCA.

Introduction

In 1986, Congress decided to update the FCA, then a dusty law in the statute books, to address a vexing, recurring problem: fraud in defense contracting. Since then, the FCA has imposed liability on persons who knowingly submit false claims seeking government funds, or who knowingly seek to avoid paying amounts owed to the government. A violator is liable for treble the government's damages, plus statutory penalties.

The most innovative feature of the 1986 amendments to the FCA was the complete rewrite of the whistleblower, or "*qui tam*," provisions of the statute that aimed to provide an incentive for individuals with knowledge of fraud to come forward and "lift the conspiracy of silence." The 1986 amendments' proponents hypothesized that, without concrete monetary incentives, individuals would not undertake the effort of coming forward and filing suit. Thus, Congress provided a concrete monetary incentive by setting the Relator's award as a straight percentage of the government's recovery, usually between fifteen percent and thirty percent, no matter how high the recovery turned out to be.

The incentive that the amended *qui tam* provisions provide proved effective beyond Congress's expectations in inducing whistleblowers to come forward. Over the ensuing decades, more than 7,000 *qui tam* lawsuits have been filed, alleging that defendants were committing frauds against the government. While most of these lawsuits lead to zero recovery, a handful have proven so successful that Relators have been paid astonishing amounts, in some cases exceeding $100 million. Equally significant, Relators' counsel have been paid millions of dollars, providing a strong incentive for lawyers to identify would-be whistleblowers and file suits on their behalf.

Proposed Amendments

Notwithstanding the apparent success of the law in returning funds to the U.S. Treasury, there are serious questions about whether the FCA's *qui tam* provisions, and the purely percentage-based bounty structure, are well designed. This paper will briefly examine several of these questions and propose modest amendments to the statute.

- ***First***, an examination of Relators' motivations and financial concerns suggests that a maximum award of $15 million would provide a sufficient incentive for would-be whistleblowers to file suit. This sum, in conjunction with the attorneys' fees that defendants must pay in successful *qui tam* cases, would also provide an adequate incentive for lawyers to represent Relators and continue to bring *qui tam* lawsuits. We propose that the FCA be amended to impose a $15 million cap on *qui tam* awards. If this cap had been in place over the past twenty-five years, the government would have saved at least $674 million in the ten largest cases alone.

1 *See* Lisa Flam, *Ex-Worker Wins $96M for Blowing Whistle on Drug Giant,* AOLNews (Oct. 27, 2010), http://www.aolnews.com/2010/10/27/ex-worker-wins-96m-for-blowing-whistle-on-drug-giant/.

Current law permits Relators to go forward with *qui tam* suits even if the defendants have already made a disclosure to the U.S. government about the facts underlying the allegations of fraud, which clearly overvalues the worth of the Relators' information and directly undercuts corporate incentives to make disclosures to the government.

- ***Second***, the FCA's *qui tam* provisions, which permit employees to disregard their employer's internal reporting requirements and instead file *qui tam* suits, work at cross-purposes with the principles underlying corporate compliance programs. We propose a simple amendment to the law that would cap Relators' potential awards at ten percent if they file suit without first utilizing internal reporting systems.
- ***Third***, current law permits Relators to go forward with *qui tam* suits even if the defendants have already made a disclosure to the U.S. government about the facts underlying the allegations of fraud, which clearly overvalues the worth of the Relators' information and directly undercuts corporate incentives to make disclosures to the government. We propose that *qui tam* suits be banned after the defendant has already made a disclosure or, at least, that the Relator's recovery be capped at ten percent in such cases.
- ***Fourth***, some have called for legislation overturning a recent Supreme Court decision that bars *qui tam* suits based on Freedom of Information Act ("FOIA") requests – that is, suits in which the Relator derived some of his or her information from the United States itself through the FOIA statute. Here, it is evident that the FCA is appropriately structured to avoid paying Relators for information that is already in the government's possession and no amendment is needed.

The FCA amendments proposed in this paper address two basic questions: whether Congress has properly valued the worth of Relators' information, and whether the FCA incorporates a payment structure that is designed to incentivize desirable whistleblowing without overpaying for duplicative information and assistance.

OVERVIEW OF THE FALSE CLAIMS ACT

Liability Under the FCA

The FCA imposes liability on any person who knowingly submits a false claim seeking government funds. A company is liable under the FCA when it "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[2] The most important elements of liability are summarized below.

- ***Claim.*** The FCA applies to all "claims" for payment, defined to mean any request for money or property that is directly presented to the government, or that is made indirectly to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government's behalf or to advance a government program or interest, and if the government provides or will provide any portion of the money or property requested.[3] The effect of this definition of "claim" is that *any* person receiving funds traceable to the federal government is potentially subject to liability under the Act.
- ***False or Fraudulent.*** The FCA imposes liability only when a claim is "false or fraudulent." A claim may be "false" on its face – for example, if it seeks payment for more money than due – or it may be "false" if the claimant has failed to comply with mandatory contract or grant requirements, regulations, statutes, or other requirements on which payment is conditioned.
- ***Knowing Conduct.*** The FCA imposes liability when a claimant has "knowingly" submitted a false claim. The term "knowingly" is defined to include not only actual knowledge of falsity, but also "reckless disregard" as to whether a claim is true or false and "deliberate ignorance" as to whether a claim is true or false.[4] While the FCA does not impose liability for negligence or mistakes, a company cannot evade liability by contending that it did not intend to commit fraud or submit false claims; the law states that liability can be imposed even when there is no intent to defraud the government.

2 31 U.S.C. §§ 3729(a)(1)(A)-(B).
3 31 U.S.C. § 3729(b)(2).
4 31 U.S.C. § 3729(b)(1).

Though initially the majority of FCA cases resulted from government-initiated investigations, the last two decades have seen roughly three times as many *qui tam* cases as non-*qui tam* cases each year.

The "reverse false claim" provision of the FCA imposes liability for the "reverse" of the typical situation: when a company "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[5] This type of liability can be imposed when a company improperly retains a government overpayment or otherwise seeks to evade other kinds of established duties that arise from contracts, grants, licenses, fee-based relationships, statutes, or regulations. However, liability is not imposed when a company seeks to avoid paying a "contingent" future obligation, such as the potential imposition of a fine.

Violations of the FCA can have substantial monetary consequences. A company that has violated the FCA is liable for treble the United States' damages. In addition, the company must pay civil penalties of between $5,500 and $11,000 per false claim.[6]

Enforcement of FCA by *Qui Tam* Plaintiffs

Both the U.S. Department of Justice ("DOJ") and private citizens are authorized to bring actions asserting violations of the FCA. When an individual files a *qui tam* complaint, the DOJ investigates the allegations and decides whether to intervene. If the DOJ intervenes in the *qui tam* action, it has the primary responsibility for prosecuting the action, although the Relator remains a party and can assist in the litigation. If the DOJ declines to intervene in the action, the Relator has the right to conduct the case on his or her own.[7]

The FCA provides financial incentives for current and former employees, and others, to file *qui tam* lawsuits. If the government intervenes, the Relator is eligible for an award of between fifteen percent and twenty-five percent of the government recovery, whether the action is resolved by settlement, on summary judgment, or at trial.[8] If the DOJ declines to intervene, the Relator is eligible for an award of between twenty-five percent and thirty percent.[9] The statute also provides that a Relator in a successful action shall be awarded reasonable attorneys' fees and costs, to be paid by the defendant.[10]

In addition, *qui tam* plaintiffs often bring additional personal "retaliation" claims alleging that their employers have engaged in retaliatory actions. The FCA provides that employees, contractors, and other agents can sue if the company has retaliated against them for actions to stop an ongoing FCA violation, and can be awarded back-pay and other damages, attorneys' fees, and reinstatement in their former position.[11] Relators are entitled to retain all of the damages they recover from defendants as a result of their retaliation claims, whether or not the government intervenes in the *qui tam* action.

Snapshot of FCA Enforcement History

Litigation under the FCA has steadily increased in the quarter century since the 1986 amendments, and the structure of the law has been highly successful in providing incentives for Relators to file suit. Though initially the majority of FCA cases resulted from government-initiated investigations, the last two decades have seen roughly three times as many *qui tam* cases as non-*qui tam* cases each year.

5 31 U.S.C. § 3729(a)(1)(G).

6 31 U.S.C. § 3729(a)(1). The statute provides for a reduction in the amount of the damages (to double damages) if the defendant made a disclosure to the government within thirty days of discovering the violation and cooperated with the government in any ensuing investigation. 31 U.S.C. § 3729(a)(2).

7 31 U.S.C. §§ 3730(b)-(c).

8 31 U.S.C. § 3730(d)(1).

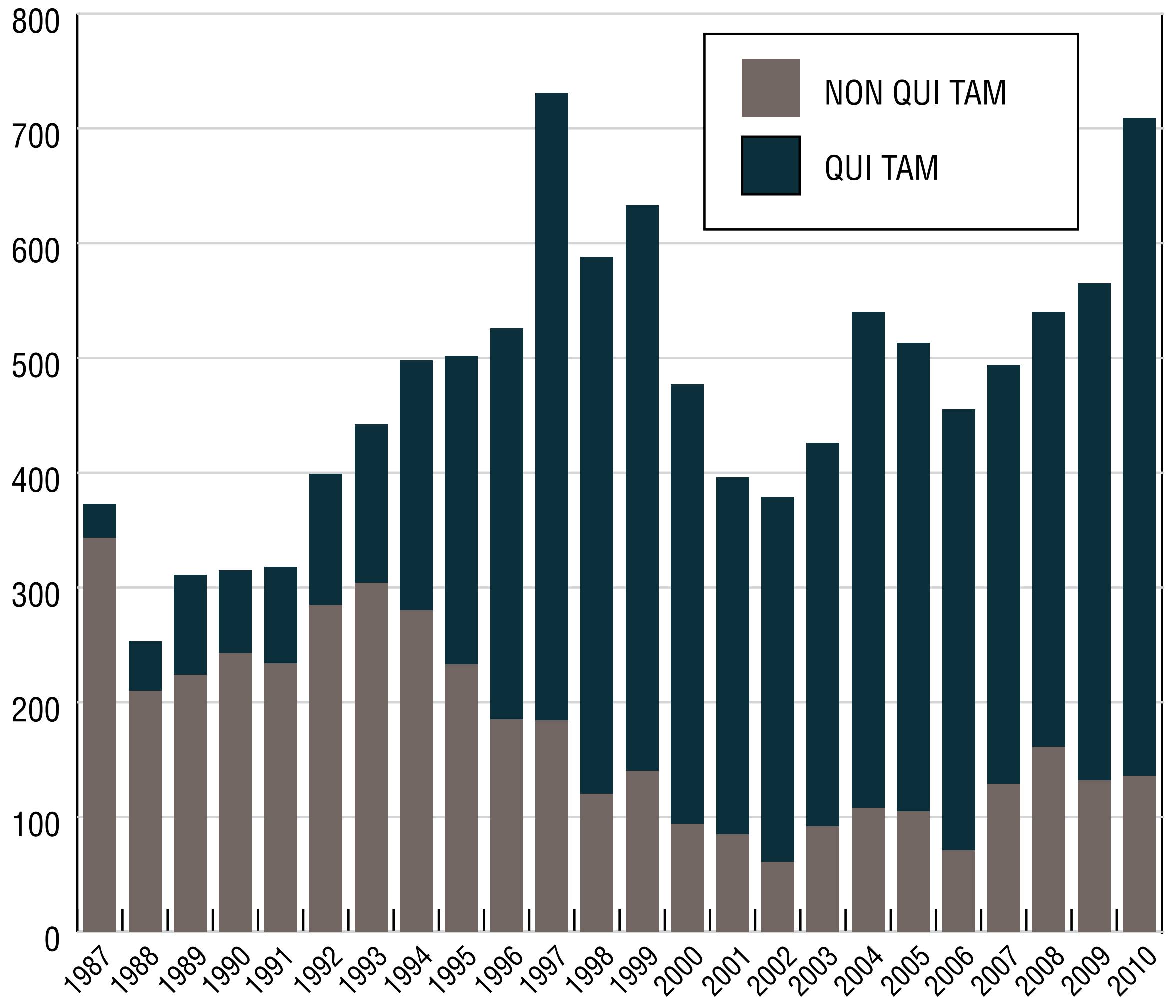
9 31 U.S.C. § 3730(d)(2). The award percentage can be reduced if the Relator "planned and initiated" the misconduct. 31 U.S.C. § 3730(d)(3). No recovery is permitted if the Relator is convicted of criminal conduct in connection with the alleged fraud. *Id.*

10 31 U.S.C. §§ 3730(d)(1)-(2).

11 31 U.S.C. § 3730(h).

Table 1: Growth of FCA Filings[12]

Even more striking than the increase in FCA litigation is the growth of settlement and award amounts. The amount of total government recoveries under the statute has significantly increased over the past quarter century, and the majority of the government's recoveries now are attributable to *qui tam* cases. Since 2000, the government has typically recovered more than $1.2 billion each year.



12 U.S. Department of Justice, Civil Division, *Fraud Statistics – Overview* (Jan 10, 2011), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (hereinafter "DOJ Fraud Statistics").

Table 2: Growth in FCA Settlements and Judgments[13]

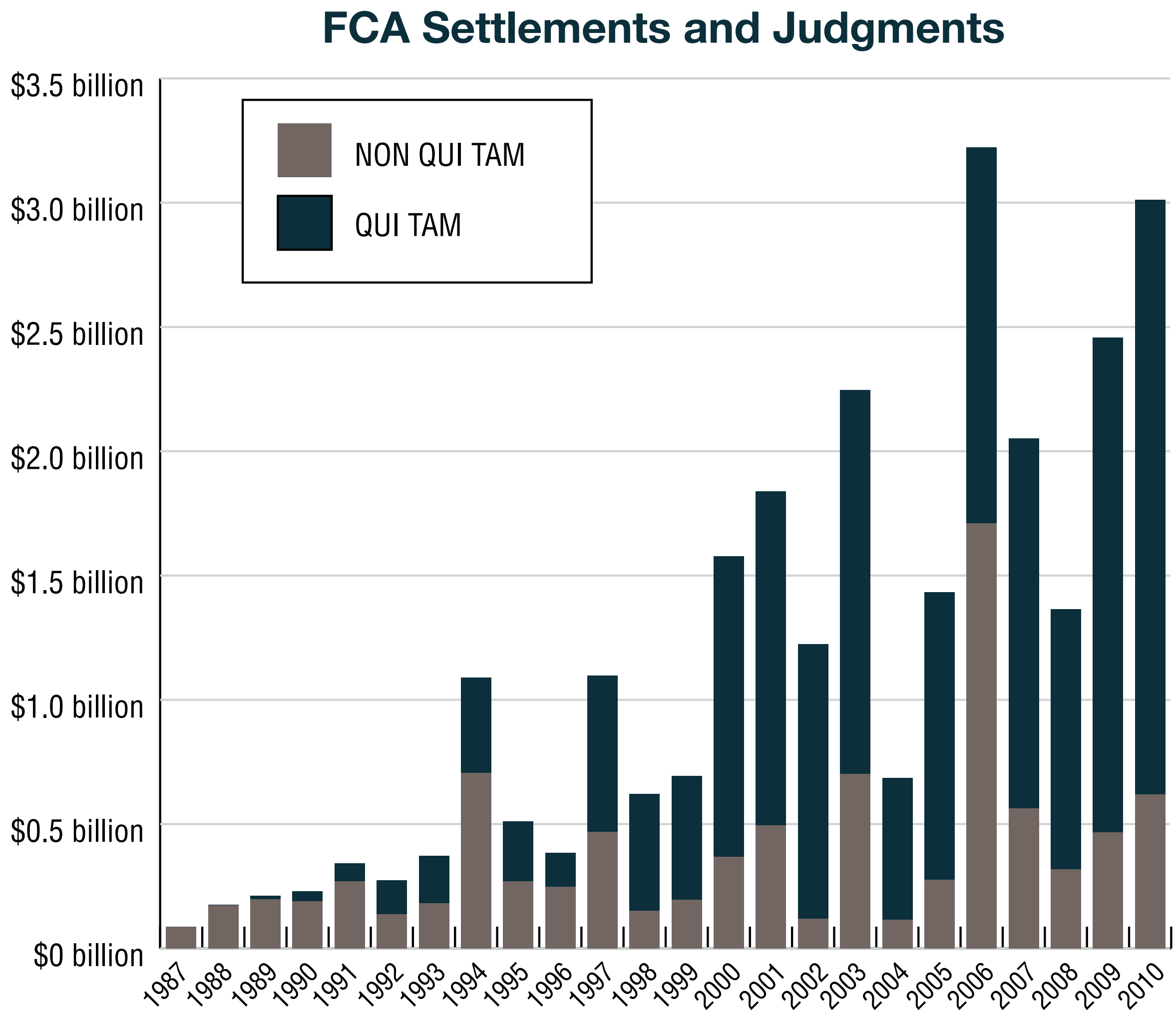
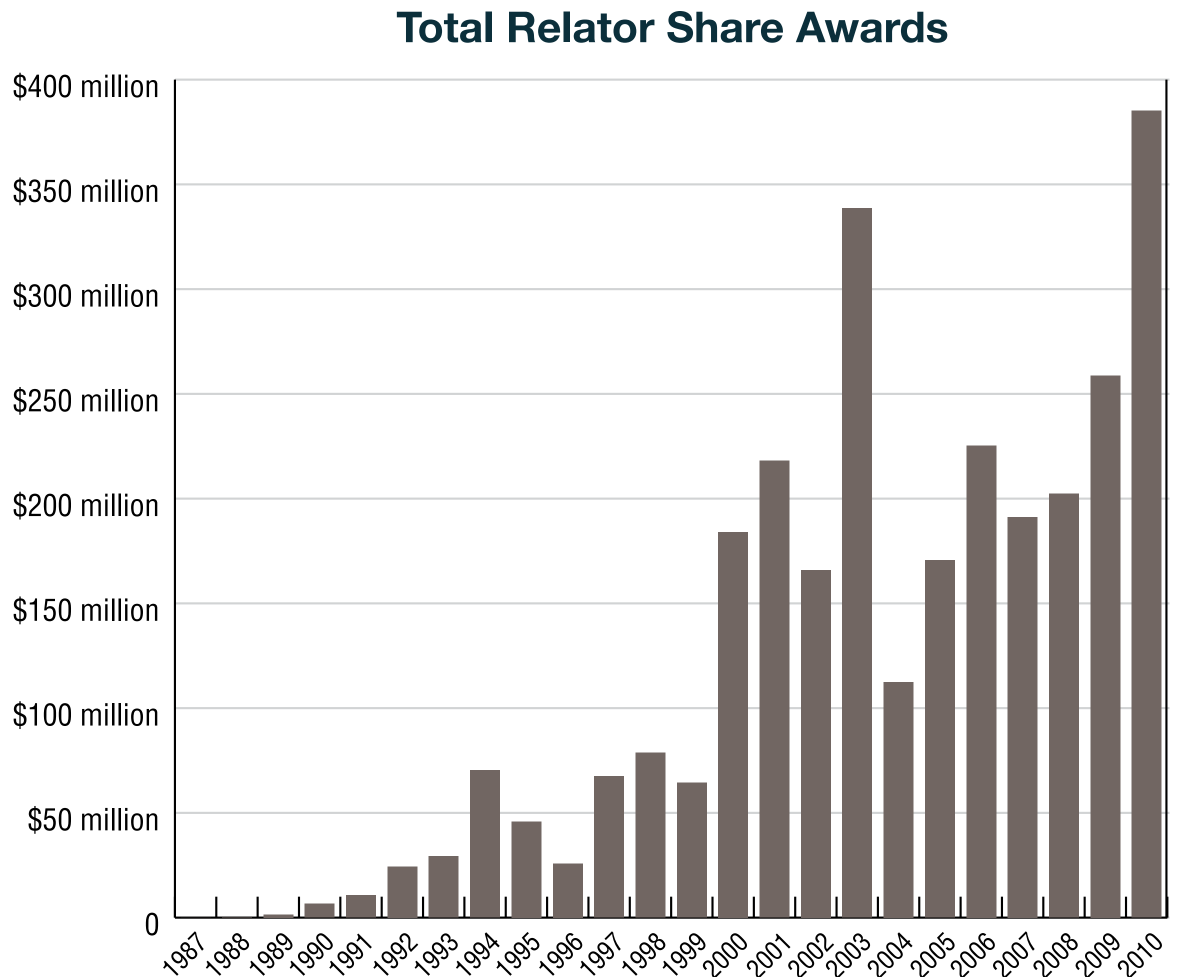


Table 3 indicates the amounts that the government has given Relators as their share of the overall proceeds from FCA settlements and judgments. The table shows that the government has paid more than $2.8 billion to Relators since 1986. As discussed below, the government appears to have overpaid Relators by at least $674 million in these cases.

13 *Id.*

Table 3: Growth in *Qui Tam* Awards[14]



The DOJ intervenes in approximately twenty-three percent of all *qui tam* cases filed.[15] DOJ intervention is almost always an accurate predictor of the ultimate success of the case – ninety-five percent of intervened cases result in a settlement or judgment for the government, while only six percent of non-intervened cases result in a settlement or judgment.[16]

14 *Id.*

15 Gov't Accountability Office, *Information on False Claims Act Litigation, Briefing for Congressional Requestors,* at 30 (Dec 15, 2005), *available at* http://www.gao.gov/new.items/d06320r.pdf (hereinafter "GAO FCA Presentation"). Information in these the slides was drawn from DOJ statistics from 1986-2005.

16 *Id.*

There is good reason to believe that many Relators are strongly motivated to provide information about alleged fraud to the government absent the prospect of any substantial monetary reward.

PROPOSAL ONE: MONETARY CAP ON *QUI TAM* AWARDS

This paper proposes a monetary cap on Relator awards based on a simple premise: the government is paying more than is necessary to incentivize whistleblowers and their counsel to uncover and assist in the prosecution of fraud. As described below, the government in the last twenty-five years has overpaid at least $674 million for the information and legal services that Relators and their counsel provide.

Whistleblowers' own descriptions of their motivations support this premise, since rarely, if ever, do whistleblowers state that they brought *qui tam* lawsuits in order to benefit financially. If financial gain is not a principal motivation, then "lottery jackpot" awards of tens or hundreds of millions of dollars are not necessary to incentivize whistleblowers to come forward with relevant and useful information. To the extent that Relators face financial hardship as a result of bringing *qui tam* lawsuits, the award cap model proposed below provides generous compensation and will not degrade the effectiveness of the FCA. The award cap model is also designed to guarantee *qui tam* counsel financial rewards that are adequate to compensate them for the risks they undertake in bringing suit.

Prior Legislative Proposal for Award Cap

Congress has previously considered the benefits of a cap on Relator awards. In April 2009, during the legislative effort that led to the enactment of the Fraud Enforcement and Recovery Act ("FERA") amendments to the FCA,[17] Senator Jon Kyl (R-AZ) proposed a cap on Relator awards precisely to address the issue of government overpayment in situations where the government stood to recover large dollar amounts under the FCA. He offered several alternative models, in the form of proposed caps of $5 million, $10 million, $20 million, or $50 million, or, alternatively, 300 percent of the expenses that a Relator incurs in prosecuting the action.[18] Senator Kyl noted that the U.S. Treasury would save hundreds of millions of dollars if such a cap were enacted and that the FCA's existing straight-percentage recovery provision had led to Relators being "grossly overcompensated" in certain cases.[19] Though none of these proposed amendments were enacted, one of the principal sponsors of the FERA legislation, Senator Charles Grassley (R-IA), noted that the issue of a cap on Relator awards was a legitimate subject for discussion and one which should be further considered.[20]

Providing an Adequate Incentive for Relators

In determining the amount of money necessary to provide an appropriate incentive for individuals to come forward with information about alleged fraud, one must examine the available data concerning whistleblower motivations.

Perhaps the most exhaustive study conducted to date concerning the factors that motivate whistleblowing behavior under the FCA is a 2010 *New England Journal of Medicine* study for which the authors interviewed twenty-six Relators involved in seventeen cases brought against pharmaceutical manufacturers.[21] None of the Relators interviewed stated that the FCA's financial bounty had motivated his or her decision to file a *qui tam* suit. Instead, the Relators stated that they were motivated by personal ethical standards, by a desire to prevent risks to public health, by a duty to bring criminals to justice, or by a sense that filing suit would protect them from retaliation or other legal consequences.[22]

Numerous other accounts of Relators' motivations in filing FCA lawsuits reinforce these findings. For example, one *qui tam* website explains that Relators "simply believe that what they observed is wrong.

17 Fraud Enforcement and Recovery Act of 2009, P.L. 111-21, 123 Stat. 1617.

18 *See* Proposed Amendments 986, 987, 988, and 989 to S. 386, 155 Cong. Rec. S4588-02, S4589 (daily ed. Apr. 22, 2009) (Sen. Kyl).

19 *See* 155 Cong. Rec. S4604-04, S4610 (daily ed. Apr. 23, 2009) (Sen. Kyl).

20 *See id.* at S4612 (Sen. Grassley).

21 Aaron S. Kesselheim, David M. Studdert & Michelle M. Mello, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies,* 362:19 New Engl. J. Med. 1832 (May 13, 2010).

22 *Id.* at 1834-35. The study's authors identified seventeen cases brought against pharmaceutical manufacturers, and conducted interviews with sixty-two percent of the whistleblowers in those cases to discern the whistleblowers' motivations and experiences. Of the Relators interviewed, five received less than $1 million in recoveries after attorneys' fees and taxes; thirteen received between $1 million and $5 million; and seven received more than $5 million. The study concluded that nearly all of the insiders first tried to "fix matters internally" by talking to superiors or filing an internal complaint. *Id.* at 1832, 1834.

They believe that reporting it is the right thing to do."[23] One Relator said that although he was concerned it could end his career, "I always found myself believing that it was the right thing to do."[24] Another Relator said: "I could not afford for this situation not to be handled correctly – especially when distribution of growth hormone for off-label purpose is a felony."[25] The Relator who received the $96 million award described at the beginning of this paper stated: "[y]ou have to believe in your heart this is the right thing . . . in my case, I was very, very concerned about patient safety."[26] A prominent *qui tam* attorney concurs in the nature of whistleblower motivation: "In my experience, whistleblowers are driven by a singular goal: they want to right the wrongs they see being committed against the taxpayers."[27]

Thus, there is good reason to believe that many Relators are strongly motivated to provide information about alleged fraud to the government absent the prospect of any substantial monetary reward.[28] If taken at face value, their statements would lead to the conclusion that a substantial reduction in the size of awards would not materially reduce the incentive for Relators to come forward. However, many have contended that when employees blow the whistle on alleged fraud committed by their employers, the employees face a realistic prospect of losing their job, and frequently can face the loss of all future employment opportunities in their profession or industry.[29] Though in many cases Relators are not company insiders but are instead non-employees working for a competitor, vendor, or supplier of the defendant,[30] the prospect of financial loss suggests that some form of financial payment would be necessary to induce employees or others to file a *qui tam* suit, even if they are already inclined to do so for altruistic reasons.

It would be plausible for the government to establish a Relator award regime that continues to tie the amount of the award to the amount of the government's recovery, but provides for a cap on the overall size of the award based upon a general expectation of the amount of money necessary to replace the Relator's (hypothesized) loss of lifetime income potential. We propose that in determining the amount of the award cap, Congress should be guided by an analysis of the amount necessary to guarantee that the typical Relator with information concerning a high-dollar-value fraud scheme will be able to maintain his or her standard of living even if the Relator is never again able to find work as a result of whistleblowing.

In most high-dollar-value matters, it is reasonable to assume that the Relator will be a corporate insider who is a mid-career or mid-level executive or professional. Many high-dollar-value FCA cases involve fraud within the pharmaceutical, health care, construction, oil and gas, and defense contracting industries. Table 4 sets forth the mean compensation for an executive or professional in each of these industries, including both wages and benefits, based on information available from the Bureau of Labor Statistics. The following figures are generous; other individuals working within the relevant industries who have asserted *qui tam* suits in the past (*e.g.*, billing clerks, sales managers) typically earn substantially less than the amounts reflected here.[31]

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23 *See* Getnick & Getnick LLP, *Why Become a Whistleblower,* http://www.quitamhelp.com/static/stories/stories.html (last visited Oct. 17, 2011).

24 *See* Charles Haddad & Amy Barret, *A Whistle-Blower Rocks an Industry,* Bloomberg Businessweek (June 24, 2002), http://www.businessweek.com/magazine/content/02_25/b3788094.htm.

25 Peter Rost, *The Whistleblower: Confessions of a Health Care Hitman* at 199 (Soft Skull Press, 2006).

26 *See* Flam, *supra* n. 1.

27 Testimony of James B. Helmer, Jr., Before the House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property, and Subcommittee on Commercial and Administrative Law, Hearing on the "False Claims Act Corrections Act of 2007," at 4 (June 19, 2008), http://judiciary.house.gov/hearings/pdf/Helmer080619.pdf (hereinafter "Helmer Testimony").

28 There is reason to believe that notwithstanding their assertions to the contrary, at least some Relators are substantially motivated by the prospect of financial reward. As one FCA treatise has noted, "Social-psychology research on reward systems indicates that monetary rewards, when properly structured, will motivate individuals to report misconduct that might otherwise have gone unreported." *See* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government,* at 15-16 (2d ed. 2010).

29 *See, e.g., id.* at 18. See also 155 Cong. Rec. S4613 (Sen. Grassley) ("whistleblowers who want to do the patriotic thing actually jeopardize their professional future"); Kesselheim, et al., *supra* n. 21 at 1836 (Relators reported "devastating" financial consequences as well as "personal problems" as a result of filing suit).

30 A number of Relators who have realized substantial recoveries are third parties not employed by the defendant. For example, a small Florida pharmacy known as "Ven-A-Care" initiated several *qui tam* actions against pharmaceutical companies, and received approximately $380 million in recoveries from those cases. *See* Abigail Field, *More Proof that Whistleblowing on Medicaid Fraud Works,* Daily Finance (Feb. 4, 2011), http://www.dailyfinance.com/2011/02/04/whistle-blowers-recover-taxpayer-money-from-drug-company-overchar/. There is no indication that Ven-A-Care's business was adversely affected by its qui tam activities.

31 *See* United States Dep't of Labor, Bureau of Labor Statistics ("BLS"), Occupational Employment Statistics, May 2010, http://bls.gov/oes/current/oessrci.htm#62. Statistics derived from the following data: Figures for General Medical and Surgical Hospitals: NAICS Code 622100, SOC Codes 29-0000 et seq., 31-0000 et seq.; Figures for Medical Equipment and Supplies Manufacturing: NAICS Code 339100, SOC Code 43-0000 et seq.

Table 4: Mean Annual Compensation of Mid-Level Executives and Professionals[32]

Industry	Employee Category	Mean Wages (May 2010)	Mean Annual Compensation Including Benefits (May 2010)
General Medical and Surgical Hospitals	General Internist	$159,840	$228,343
Pharmaceutical and Medicine Manufacturing	General/Operations Manager	$146,300	$209,000
Computer and Peripheral Equipment Manufacturing	General/Operations Manager	$142,820	$204,029
Oil and Gas Extraction	General/Operations Manager	$139,750	$199,643
Medical Equipment and Supplies Manufacturing	General/Operations Manager	$133,000	$190,000
Engine, Turbine, and Power Transmission Equipment Manufacturing	General/Operations Manager	$131,420	$187,743
Nonresidential Building Construction	General/Operations Manager	$125,590	$179,414
General Medical and Surgical Hospitals	General/Operations Manager	$111,150	$158,786
Nursing Care Facilities	General/Operations Manager	$90,510	$129,300
Pharmaceutical and Medicine Manufacturing	Accountant/Auditor	$76,400	$109,143

It is reasonable to assume that a Relator in a position to uncover information concerning a high-dollar-value fraud scheme will be a mid-career professional, with roughly twenty-five years left before retirement.

Next, one needs to calculate the lump sum that an individual in one of these positions would need in the present to replace his or her future expected earnings. It is reasonable to assume that a Relator in a position to uncover information concerning a high-dollar-value fraud scheme will be a mid-career professional, with roughly twenty-five years left before retirement.[33] Thus, Table 5 sets forth the lump-sum present-day amount that would be needed for an individual to replace his or her expected compensation over twenty-five years. For purposes of simplicity, this table conservatively assumes that the individual would realize a rate of investment return on the lump sum award that equals the individual's expected wage increases over time.[34]

Table 5: Lump Sum Needed to Replace Twenty-five Years of Lost Compensation

Annual Compensation to be Replaced	Lump Sum Needed
$228,343	$5,708,575
$209,000	$5,225,000
$204,029	$5,100,725
$199,643	$4,991,075
$190,000	$4,750,000
$187,743	$4,693,575
$179,414	$4,485,350
$158,786	$3,969,650
$129,300	$3,232,500
$109,143	$2,728,575

32 *See id.* Statistics derived from the following data on the BLS website: Figures for General Medical and Surgical Hospitals: NAICS Code 622100, SOC Codes 11-1021, 29-1063. Figures for Computer and Peripheral Equipment Manufacturing: NAICS Code 334100, SOC Code 11-1021. Figures for Oil & Gas Extraction: NAICS Code 211000, SOC Code 11-1021. Figures for Medical Equipment and Supplies Manufacturing: NAICS Code 339100, SOC Code 11-1021. Figures for Engine, Turbine, and Power Transmission Equipment Manufacturing: NAICS Code 333600, SOC Code 11-1021. Figures for Nonresidential Building Construction: NAICS Code 236200, SOC Code 11-1021. Figures for Pharmaceutical & Medicine Manufacturing: NAICS Code 325400, SOC Codes 11-1021, 13-2011. Figures for Nursing Care Facilities: NAICS Code 623100, SOC Code 11-1021. Benefits have been calculated based on BLS data showing that, as of July 2011, benefits constitute thirty percent of overall compensation. *See* BLS, Employment Cost Index – July 2011 (July 29, 2011), http://www.bls.gov/news.release/pdf/eci.pdf.

33 For example, the Relator who received the $96 million award was fifty-one years old when she received the award. *See* Peter Loftus, *Whistleblower's Long Journey,* The Wall Street Journal (Oct. 28, 2010), http://online.wsj.com/article/SB10001424052702303443904575578713255698500.html.

34 In fact, most actuaries would likely assume that investment earnings over a twenty-five year period would likely exceed end-of-career wage growth. If such actuarial assumptions were employed, the lump sum amounts needed to replace twenty-five years of income could be substantially lower than the figures reflected in Table 5.

As Table 5 reflects, the typical Relator at the very high end of the compensation scale would need roughly $5 million to $5.7 million as a lump-sum payment. Based on this information, Congress could reasonably set an award cap in the range of $5 million. However, the reality is that Relators do not retain the full amount of their awards. Relators are generally obligated to pay a contingent fee to their attorneys, typically amounting to forty percent of the award they receive from the government, and they are also obligated to pay federal and state taxes on the award.[35] Accordingly, Table 6 illustrates the amount that would be necessary to put just over $5 million in the hands of a Relator, net of contingent fee payments to counsel and federal and state taxes. As Table 6 indicates, a payment of $15 million would be sufficient to give the Relator the necessary lump sum to leave him or her with $5.4 million. For these purposes, we have assumed that the combined federal and state tax rate would be forty percent.[36]

Table 6: *Qui Tam* Award Worksheet

$15 million	Relator award
– $6 million	40% contingent fee paid to counsel
$9 million	Net Relator award
– $3.6 million	40% state and federal taxes
$5.4 million	Net Relator award

The foregoing analysis suggests that a $15 million award cap should provide an adequate incentive for Relators to come forward with information about fraud. This amount is, if anything, overly generous in continuing to induce desired whistleblowing behavior for several reasons.

First, in many *qui tam* cases, Relators assert retaliation and other personal claims that are entirely independent of the FCA claims. As a result, a Relator often receives from the defendant amounts in settlement of these retaliation or other personal claims, in addition to the statutory percentage of the government's recovery under the FCA. In some cases, these amounts can amount to very significant multi-million dollar sums.[37]

Second, the $5.4 million net award would, for many Relators, amount to a vastly more beneficial sum than the individual's expected lifetime earnings, for many reasons:

- Many Relators are employed in positions that provide them with far less than $200,000 in compensation, so the $5.4 million award would provide them with far greater income than their compensation would provide.
- Many Relators will be older than forty and would not need to replace twenty-five years of lost income.
- Many Relators will be able to find employment notwithstanding their involvement in a *qui tam* matter and will supplement the $5.4 million with additional income through continued employment.
- Taxes paid by Relators on investment earnings (capital gains, dividends, and interest) would likely be lower than taxes paid by Relators on their wages if they had continued to work.

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35 *See, e.g., Campbell v. Comm'r of Internal Revenue,* No. 10-13677, 2011 WL 4467629, at *2-3 (11th Cir. Sept. 28, 2011) (noting that Relator's attorneys were paid a forty percent contingent fee by the Relator, and holding that Relator awards are subject to income taxation).

36 Courts have determined that Relator awards constitute gross income. *See, e.g., id.* (collecting cases). Assuming that Relator awards constitute ordinary income, they would be subject to the current marginal tax rate of thirty-five percent for all amounts over $379,000 (married filing jointly). State income tax rates vary widely, but generally fall between zero and ten percent. According to the National Bureau of Economic Research, the average marginal state tax rate on wages in 2009 was 4.49 percent. *See* http://www.nber.org/~taxsim/state-marginal/avrate.html.

37 *See, e.g., United States ex rel. Killingsworth v. Northrop Corp.,* 25 F.3d 715, 718 (9th Cir. 1994) (noting that defendant agreed to pay $2.7 million to Relator in settlement of retaliation claim). Unfortunately, there are no publicly available statistics on such amounts attributable to retaliation and other personal claims; the DOJ does not maintain such statistics. *See* DOJ Fraud Statistics.

It is perhaps counterintuitive that Relators' counsel receive a contingent fee in addition to the statutory recovery of fees, but these dual fees are routinely recovered and often mean that counsel recover very substantial amounts in successful cases.

- A guaranteed $5.4 million payment would leave Relators in a far more secure position than those who continue to work over a twenty-five year period, since employees face the risks of job loss, employer bankruptcy, demotion, less-than-expected wage growth, and other contingencies that can impede a secure income stream.

In short, almost all Relators who receive a net $5.4 million lump sum award will have a more secure financial future than an individual who remains in the work force over a twenty-five year period.

Finally, it is worth noting that receiving $5.4 million net of taxes leaves the Relator, by any metric, exceedingly rich. In 2009, the median annual family income in the United States was $49,777.[38] An individual earning $159,000 or more falls in the top five percent of households in the country.[39] There is no reason to believe that a secure income of this magnitude over a twenty-five year period would be insufficient to induce Relators to provide information to the government.

Providing an Adequate Incentive for *Qui Tam* Attorneys

A separate but equally important question is how to establish the Relator award cap so that Relators' counsel have an adequate incentive to continue to file and prosecute *qui tam* suits. Currently, Relators' counsel are compensated through two discrete payments: (1) the FCA provides that in successful *qui tam* matters, Relators receive their attorneys' fees and costs from the defendants; and (2) Relators almost always retain their counsel on a contingent fee basis, pursuant to which counsel typically receive forty percent of the Relator's recovery.[40] It is perhaps counterintuitive that counsel receive a contingent fee in addition to the statutory recovery of fees, but these dual fees are routinely recovered, and often mean that counsel recover very substantial amounts in successful cases.[41] A cap on the Relator's award would act as a cap on the attorney's contingent fee recovery – although it would have no effect on the attorney's recovery of statutory fees and costs from the defendant.

Relators' counsel often assert that, like their clients, they are involved in bringing *qui tam* cases because of their commitment to the public interest, and not for financial remuneration. For example, a leading *qui tam* attorney observed in written testimony to Congress in 2008:

> I often hear suggestions made by those aligned with the FCA defense bar that *qui tam* attorneys view the FCA as some kind of get-rich-quick opportunity. I know most of the lawyers who are part of the small *qui tam* bar, and not one of them shares this view. In reality, it is exceedingly difficult to succeed as a *qui tam* lawyer, and those that are able to do so have found that there is absolutely nothing quick about the process . . . . For the few of us who fight these fights, we find them worthwhile because our clients are true patriots.[42]

Another prominent *qui tam* attorney stated, "Some things you do because they're really worthwhile and important."[43] Thus, there is reason to believe that a desire to act in the public interest motivates many lawyers who specialize in *qui tam* cases, and not the prospect of substantial monetary rewards. If taken at face value, these statements suggest that a substantial reduction in the size of awards to counsel would not materially reduce the incentive to file suit.

However, notwithstanding assertions to the contrary, most attorneys that bring *qui tam* cases are likely significantly motivated by the prospect of financial reward. Additionally, Relators' counsel frequently

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38 United States Census Bureau, *Money Income of Households,* Table 690, Statistical Abstract of the United States: 2012, at 452, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0690.pdf.

39 *See* Internal Revenue Service, 2008 Tax Statistics, SOI Bulletin Article – Individual Income Tax Rates and Tax Shares, Table 5 (top five percent of wage earners had Adjusted Gross Income (AGI) of at least $159,619 in 2008), *available at* http://www.irs.gov/taxstats/indtaxstats/article/0,,id=133521,00.htm.

40 *See, e.g., Campbell,* 2011 WL 4467629, at *2-3 (noting that Relator's attorneys were paid a forty percent fee by the Relator); *Neal v. Honeywell,* 191 F.3d 827, 833 (7th Cir. 1999) (same).

41 In one case where the Relators' attorneys had been awarded statutory attorneys' fees and had also recovered twenty-five percent of the Relators' share pursuant to a contingent fee arrangement, the Sixth Circuit was troubled that the total amount recovered by the attorneys might be so great as to raise ethical concerns, and suggested this concern might be a basis for a reduction in the statutory fee award. *See United States ex rel. Taxpayers Against Fraud v. General Elec. Co.,* 41 F.3d 1032, 1046-48 (6th Cir. 1994).

42 Helmer Testimony, *supra* n. 27 at 3-4.

43 *See* David Rose, *The People vs. the Profiteers,* Vanity Fair, Nov. 2007 (quoting Alan Grayson), http://www.vanityfair.com/politics/features/2007/11/halliburton200711.

point out that they take on significant risk in filing *qui tam* suits, and that because of the nature of *qui tam* suits, they will likely have several cases that are unsuccessful for every case that is successful. The question then becomes: how much money is sufficient to provide a concrete incentive for counsel to continue to assert *qui tam* matters, especially in light of the risk that many of their *qui tam* suits will prove unsuccessful?

The answer to this question is found in the existing FCA, which provides that a successful Relator "shall" be awarded attorneys' fees, expenses, and costs. Because this award is mandatory, an attorney bringing a successful *qui tam* case will be compensated fully for his or her fees and expenses.[44] In many cases, the attorney will recover millions of dollars in attorneys' fees and expenses.[45] In addition, as explained above, pursuant to the representation agreement between the Relator and the attorney, the attorney will typically receive forty percent of the Relator's award. With an award cap of $15 million, the attorney would receive an additional $6 million.

There are several metrics that suggest that the combination of statutory attorneys' fees plus the prospect of up to $6 million is a sufficient incentive for counsel to continue to file *qui tam* suits and to compensate them for the risk of unsuccessful suits. First, since many *qui tam* attorneys view their activities as filing suits to vindicate the public interest, it is worthwhile looking to the kind of compensation that public interest attorneys receive. Available data suggests that public interest attorneys receive a median salary of $62,500 per year.[46] The compensation of *qui tam* attorneys, even with a $15 million cap on Relator recoveries, can be expected to vastly exceed that amount.

Similarly, one can compare the overall compensation of *qui tam* attorneys with the salaries of DOJ lawyers who also work on FCA cases, often side-by-side with *qui tam* counsel. A senior DOJ attorney in the District of Columbia who is a member of the Senior Executive Service can earn up to $179,700 per year.[47] The median duration of FCA litigation where the DOJ intervenes is thirty-eight months, but ranges from four months to over fifteen years.[48] Thus, a DOJ counsel working full-time on the average thirty-eight month intervened case would receive $570,000 for his or her contribution to the litigation. In an outlier case involving litigation for over fifteen years, a DOJ attorney could receive as much as $2.8 million. Again, the compensation of *qui tam* attorneys, even with a $15 million cap on Relator recoveries, can be expected to vastly exceed the amount that the government pays its attorneys in the DOJ to prosecute fraud cases.

Savings That Can Be Achieved by a $15 Million Cap

If the FCA had included a $15 million cap on Relator awards over the past quarter century, the government would have saved at least $674 million in the ten largest cases alone.

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44 Of course, courts will scrutinize *qui tam* plaintiffs' fee petitions and decline to award amounts that are unreasonable or unsupported. Similarly, in matters that are settled, the defendant and the *qui tam* plaintiff will negotiate the reasonable amount of fees and costs to be paid by the defendant.

45 *See, e.g., United States ex rel. Miller v. Bill Harbert Int'l Constr.,* No. 1995-cv-1231, slip op., Doc. No. 971 (Aug. 12, 2008) (awarding more than $7.5 million in attorneys' fees and expenses), order modified on May 12, 2011 by Doc. No. 1089 (reducing award to just over $6 million); *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.,* No. 04-cv-01224, 2011 WL 2174413, at *7 (D. Colo. June 2, 2011) (awarding more than $2.2 million in attorneys' fees and expenses); *Neal v. Honeywell,* 191 F.3d 827, 833 (7th Cir. 1999) (affirming award of $1.47 million in attorneys' fees and costs).

46 *See* NALP Bulletin *New Findings on Salaries for Public Interest Attorneys* (Sept. 2010) at http://www.nalp.org/assoc_pi_sal2010.

47 Office of Personnel Management, *Rates of Basic Pay for Members of the Senior Executive Service,* Salary Table No. 2011-ES, http://www.opm.gov/oca/11tables/pdf/es.pdf.

48 GAO FCA Presentation, *supra* n. 15.

Table 7: Savings from $15 Million Award Cap in Top 10 Cases[49]

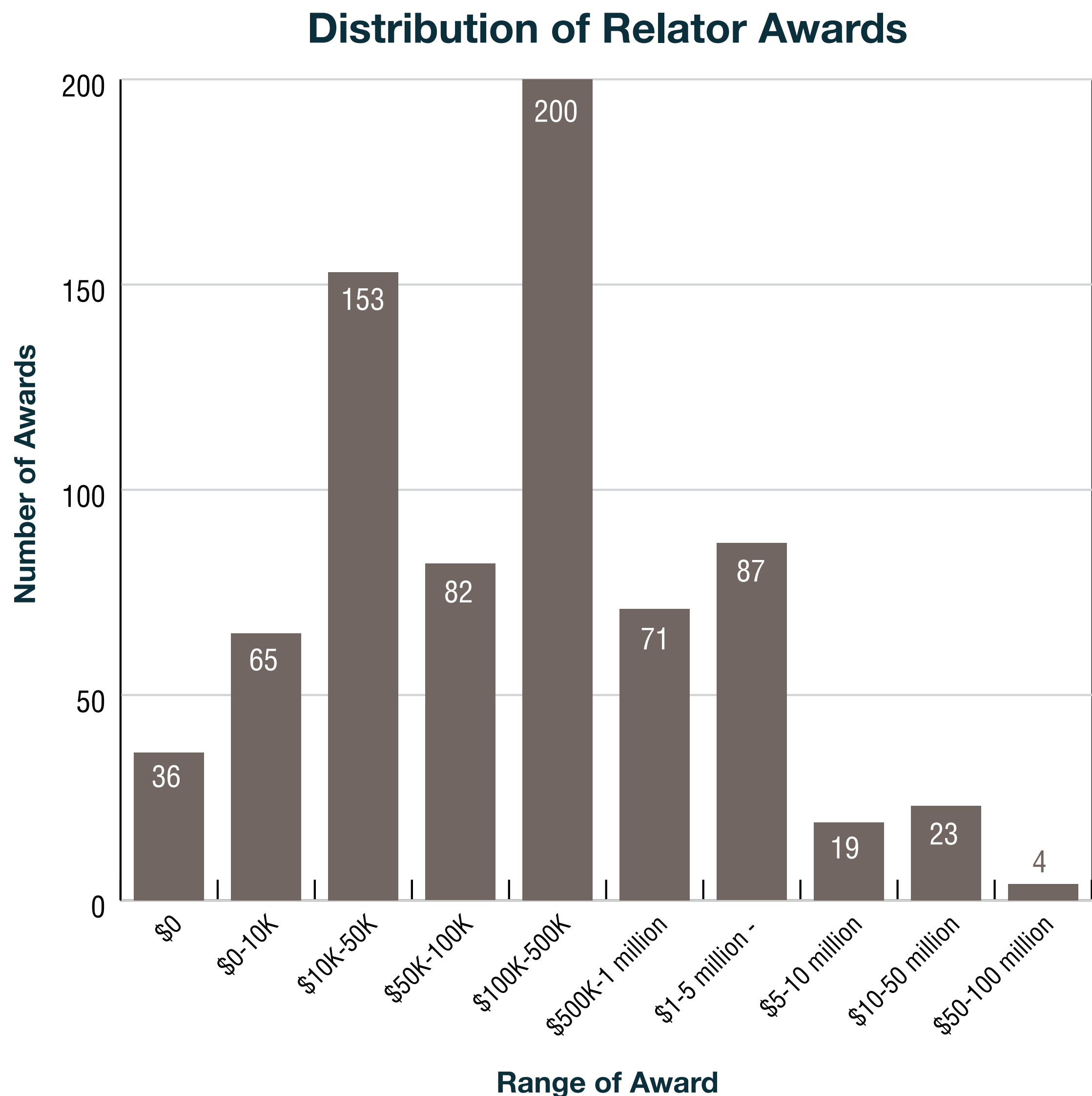
	ALLEGED WRONGDOING	DATE	TOTAL GOVERNMENT FCA RECOVERY	RELATOR SHARE	RELATOR SHARE IF SUBJECT TO $15M CAP	AMOUNT SAVED BY AWARD CAP
1	Off-label marketing, kickbacks, and pricing	2009	$1,000,000,000	$102,365,512	$15,000,000	$87,365,512
2	Billing violations	2006	$900,000,000	$90,000,000	$15,000,000	$75,000,000
3	Billing violations	2000	$745,000,000	$74,500,000	$15,000,000	$59,500,000
4	Kickbacks and overcharging	2008	$650,000,000	$68,752,000	$15,000,000	$53,752,000
5	Kickbacks and overcharging	2003	$631,000,000	$151,591,500	$15,000,000	$136,591,500
6	Manufacturing	2010	$600,000,000	$96,000,000	$15,000,000	$81,000,000
7	Off-label marketing and kickbacks	2005	$567,065,000	$51,863,000	$15,000,000	$36,863,000
8	Pricing	2001	$559,483,560	$95,112,205	$15,000,000	$80,112,205
9	Billing violations	2009	$540,000,000	$10,000,000	$10,000,000	$0
10	Off-label marketing	2009	$438,171,544	$78,870,877	$15,000,000	$63,870,877
TOTAL			$6,630,720,104	$819,055,094	$145,000,000	$674,055,094

Modest Effect of Proposal

The Relator share cap proposed here is not radical and should not be expected to have any effect in the vast majority of situations where an individual is deciding whether to file a *qui tam* action. In the vast majority of *qui tam* cases, the total Relator's share will fall well under $15 million. In fact, as Table 8 demonstrates, there were only twenty-seven *qui tam* cases over the first eighteen years after the 1986 FCA amendments where a Relator was awarded more than $10 million. Thus, there were fewer than twenty-seven cases in which a $15 million cap would have operated to reduce the amount awarded to the Relator. In more than ninety-six percent of cases, the $15 million cap would have had no effect on the Relator recovery.

49 Table 7 identifies the top ten FCA recoveries, as reported on the website of Taxpayers Against Fraud ("TAF"), a leading organization representing the interests of *qui tam* plaintiffs and counsel. *See* Taxpayers Against Fraud, Top 20 Cases, http://www.taf.org/top20.htm (last visited Oct. 18, 2011). However, this table drops the tenth case and substitutes the eleventh case from the TAF website, because the federal government's overall recovery was actually larger in the eleventh case, according to the DOJ Civil Division website. *See generally* http://www.justice.gov/civil/common/press_room.html. The total federal government FCA recovery is often an aggregate recovery in several related cases settled simultaneously. In most cases, the DOJ press releases also identified the total Relator share that the government paid in these matters, though the press releases did not consistently specify the breakdown of federal and state government portions of Relators' shares. Additional information regarding Relators' recoveries was obtained through publicly available settlement agreements. For the second and third listed matters, Relator award amounts were not identified at the time of the DOJ press releases and were not available through other public sources, so we conservatively estimated the Relator award at ten percent of the government recovery. Finally, we note that the awards were often shared among several Relators. Based on the limited information in the DOJ press releases it appeared that in most matters the multiple Relators were prosecuting actions asserting related violations, and thus the $15 million cap should be applied to the overall shared recovery, rather than applying a separate $15 million cap for each separate Relator. In drafting the text of an award cap, Congress would likely need to consider language to guard against Relators who might seek to evade the consequences of the cap by splitting their claims into multiple lawsuits.

Table 8: Distribution of Relator Awards[50]



Accordingly, there is no reason to believe that the institution of a $15 million cap on awards will leave individuals with an inadequate incentive to come forward with information about fraud. To the contrary, the current FCA already provides an enormous and effective incentive that has induced thousands of individuals to come forward. The vast majority of individuals will have exactly the same incentive whether or not there is a $15 million award cap in place.

If anything, the $15 million cap will create a disincentive for the most undesirable kind of *qui tam* case. Many meritless cases are currently filed by Relators and counsel who have a "lottery" view of the FCA and are willing to initiate frivolous lawsuits in the hope of winning the lottery with an eye-popping recovery. By eliminating pure windfalls for Relators and their counsel, the cap will prompt a more sober assessment of cases by responsible would-be Relators and attorneys. The cap will discourage irresponsible *qui tam* actions by plaintiffs and attorneys who may be lured by the prospect of large sums to pursue otherwise meritless cases in the hope of extracting large settlements.

50 GAO FCA Presentation, *supra* n. 15.

Changes in federal law over the past twenty years have driven significant improvements in the sophistication and effectiveness of companies' internal compliance programs.

PROPOSAL TWO: PROVIDING AN INCENTIVE FOR EMPLOYEES TO REPORT INTERNALLY THROUGH CORPORATE COMPLIANCE PROGRAMS

The FCA provides no incentive for employees to report concerns about potential fraud internally to their employers. To the contrary, the statute contains a structural disincentive to internal reporting, in the form of a "first to file" provision, which specifies that only the first Relator who files suit concerning an alleged fraud will be eligible for a bounty.[51] Since the statute creates a "race to the courthouse," a potential Relator will have no incentive to take the extra step of reporting internally. In this regard, the FCA is completely out of sync with the following statutory and regulatory mechanisms that incentivize internal reporting and more robust corporate compliance programs.

- *Federal Sentencing Guidelines*. Promulgated in 1991, the Sentencing Guidelines for Organizations provide a strong incentive for all companies to maintain effective internal reporting and compliance programs. A company can reduce potential penalties for wrongdoing (and perhaps avoid prosecution) if it has an "effective compliance and ethics program" that is well-publicized and monitored by the company's board and that protects whistleblowers from retaliation.[52] Recent 2010 amendments create further incentives for companies to provide for direct reporting from the Chief Compliance Officer to the Board of Directors, and for the Board to promptly report wrongdoing to the government.[53]

- *Department of Health and Human Services Office of Inspector General Guidance*. In the late 1990s, the Office of Inspector General began developing model compliance programs for various sectors of the health care industry to develop "a higher level of ethical and lawful conduct throughout the entire health care community" and to "encourage the development and use of internal controls to monitor adherence to applicable statutes, regulations, and program requirements."[54]

- *Sarbanes-Oxley Act of 2002*. Section 301 of Sarbanes-Oxley requires publicly traded companies to establish internal compliance systems that meet stringent criteria, including internal channels for employees to report organizational misconduct.[55]

- *Federal Acquisition Regulation*. The Federal Acquisition Regulation ("FAR"), applicable to all government contracts, was amended in 2008 to require that a corporation receiving government contracts have a compliance program.[56]

- *Dodd-Frank Law*. The Dodd-Frank law and the recent SEC rules implementing the whistleblower reward provisions of the law contain several significant incentives for employees to first report their concerns about violations of the federal securities laws to the company: (i) if they report first to the company, and then either the company or employee reports to the SEC within 120 days of that first internal report, the employee's "place in line" will date from his/her first internal report to the company; (ii) if a monetary sanction does result, the employee will likely get a larger reward (within the ten percent to thirty percent range) if they reported first to the company (and less if he or she did not); and (iii) if the company ultimately reports to the SEC a broader set of concerns than the employee initially had, the employee will get full credit for the entire set of concerns reported by the company.[57]

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51 *See* 31 U.S.C. § 3730(b)(5).

52 *See* U.S. Sentencing Guidelines Manual § 8B2.1.

53 *See* 75 Fed. Reg. 27388, 27394 (May 14, 2010) (changes effective November 1, 2010).

54 U.S. Dep't of Health & Human Servs., Office of Inspector Gen., Compliance Guidance, http://oig.hhs.gov/compliance/compliance-guidance/index.asp (last visited Oct. 17, 2011). The OIG has issued compliance guidance for hospitals (1998 and 2005); home health agencies (1998); clinical laboratories (1998); third-party medical billing companies (1998); durable medical equipment, prosthetics, orthotics and suppliers (1999); hospices (1999); Medicare managed care organizations (1999); nursing facilities (2000 and 2008); physician practices (2000); ambulance suppliers (2003); pharmaceutical companies (2003); and recipients of Public Health Service research awards (2005).

55 *See* 15 U.S.C. § 78j-l(m)(4)(B).

56 *See* 48 C.F.R. § 52.203-13, Contractor Code of Business Ethics and Conduct.

57 *See* Final Rule: Implementation of the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, SEC Release No. 36-64545 (May 25, 2011), 76 Fed. Reg. 34300 (June 13, 2011). An analysis of these regulations, which were modeled in part on the FCA, is beyond the scope of this paper.

There are very powerful arguments that when a corporation makes a disclosure of fraud to a federal government Office of Inspector General, all *qui tam* actions based on allegations of the same fraud should be foreclosed.

These changes in federal law over the past twenty years have had a significant cumulative effect and have driven significant improvements in the sophistication and effectiveness of companies' internal compliance programs. Employees have become increasingly comfortable in recent years with the idea of reporting fraud through internal compliance programs. As one recent study concluded, the share of internal reports that concerned fraud increased from 10.9 percent in 2006 to 20.2 percent in the first quarter of 2010.[58] Another survey demonstrates that the percentage of employees who reported misconduct when they saw it increased from fifty-eight percent to sixty-three percent between 2007 and 2009, with almost all of that reporting directed internally.[59] These developments suggest a dramatic increase in employee confidence that company compliance systems will protect their confidentiality and address potential fraud.

The FCA should be amended to provide strong incentives for employees to report internally before filing *qui tam* lawsuits. An absolute prohibition on any *qui tam* suit filed by employees who had failed to report their concerns about fraud internally to their employers would provide the strongest incentive. Alternatively, the statute could be amended to afford Relators who failed to report internally a reduced potential share, capped at ten percent of the government's recovery (and subject to the $15 million cap discussed above). This amendment could be effectuated through a very simple change to the statute. The FCA already provides that a Relator who bases his or her action primarily on publicly disclosed information can receive a maximum ten percent share of the government's recovery, "taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation."[60] The FCA can easily be amended to provide for a similar limitation on the Relator's share when the Relator fails to report his or her allegations through an available corporate compliance program.

While skeptics might contend that this amendment would have the effect of reducing the number of *qui tam* suits, evidence suggests otherwise. The 2010 *New England Journal of Medicine* study concluded that "[n]early all (eighteen of twenty-two) insiders first tried to fix matters internally by talking to their superiors, filing an internal complaint or both."[61] Similarly, a 2010 National Whistleblowers Center study of *qui tam* cases filed between 2007-2010 determined that "89.7 percent of employees who would eventually file a *qui tam* case initially reported their concerns internally, either to supervisors or compliance departments."[62] This study concluded that "the overwhelming majority of employees who eventually file *qui tam* cases first raise their concerns within the internal corporate process."[63]

Thus, amending the FCA to provide a concrete monetary incentive for whistleblowers to report concerns internally should not have any deleterious effect on whistleblowing. At most, it would induce the handful of whistleblowers who would not otherwise report internally to do so. If Relators failed to report internally because of legitimate concerns about the efficacy of internal reporting mechanisms or the risk of retaliation, these factors could be considered in determining the appropriate award, up to the full ten percent.

In short, there are strong policy reasons to align the FCA with the litany of other statutes and regulations encouraging strong internal compliance programs and internal reporting, and very little apparent chance that an amendment incentivizing internal reporting would reduce the number of *qui tam* suits.

58 *See* The Network, *2010 Corporate Governance and Compliance Hotline Benchmarking Report,* at 12, available at http://www.tnwinc.com/downloads/2010BenchmarkingReport.pdf.
59 *See* Ethics Resource Center, *2009 National Business Ethics Survey,* at 35-36 (November 2009), *available at* http://www.ethics.org/nbes/files/nbes-final.pdf.
60 31 U.S.C. § 3730(d)(1).
61 *See* Kesselheim, et al., *supra* n. 21 at 1834.
62 *See* National Whistleblowers Center, *Impact of* Qui Tam *Laws on Internal Compliance: A Report to the Securities Exchange Commission,* at 4 (December 17, 2010), *available at* http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/nwcreporttosecfinal.pdf.
63 *See* Kesselheim, et al., *supra* n. 21 at 1834.

The government has enlisted contractors, subcontractors, grantees , and other recipients of federal funds as its agents to identify and report potential fraud and abuse in contracts and other federally funded programs.

PROPOSAL THREE: FORECLOSING *QUI TAM* ACTIONS WHEN THE DEFENDANT HAS ALREADY MADE A DISCLOSURE

Under the current FCA, a *qui tam* plaintiff who files suit after the defendant has already disclosed the very same conduct to an agency Inspector General is entitled to proceed with the suit and receive a full bounty under the statute. This possibility exists even though the disclosure has been made to the government authority responsible for investigating fraud and even though the party making the disclosure is required to "cooperate fully" in the investigation. There are very powerful arguments that when a corporation makes a disclosure of fraud to a federal government Office of Inspector General all *qui tam* actions based on allegations of the same fraud should be foreclosed.

Mandatory Disclosure Requirement for Government Contractors

In 2008, the FAR was amended to require Federal contractors to disclose violations of certain federal criminal procurement laws, violations of the FCA, and significant overpayments.[64] The mandatory disclosure rule has several relevant provisions.

- Most contractors and subcontractors are required to have a written "Contractor Code of Business Ethics and Conduct," as well as an ongoing business ethics awareness and compliance program, and an internal control system.[65] Although many of the major defense contractors have had such programs for twenty years or more, many mid-size companies and smaller businesses previously did not have elaborate ethics and compliance programs.
- Most contractors and subcontractors must comply with a contract clause which requires, among other things, timely written disclosure to the agency OIG whenever the contractor has "credible evidence" that a "principal," employee, agent, or subcontractor has committed a violation of certain criminal laws or the FCA in connection with a government contract. The contractor's internal control system must provide for timely disclosure, and for "[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective actions," including "providing access to employees with information." [66] This clause is applicable to many subcontractors as well.
- A contractor can be suspended or debarred for a "knowing failure" by a "principal" to timely disclose to the government credible evidence of specified criminal violations, violations of the False Claims Act, or any "significant" overpayment.[67] The disclosure obligations exist until three years after final payment on any government contract.

Disclosure Requirement for Federal Health Care Programs

The Patient Protection and Accountable Care Act ("PPACA") of 2010 created new obligations for any individual or entity that receives an "overpayment" from Medicare or Medicaid to report and return the overpayment to the Secretary of the Department of Health and Human Services, the state, or fiscal intermediary and notify the same of the reason for the overpayment.[68] This PPACA provision imposes a deadline for reporting the discovery of, and returning any overpayment, of the later of sixty days from the date of identification or the date that any corresponding Medicare or Medicaid cost report is due, if applicable. PPACA defines overpayment as "any funds that a person receives or retains under [Medicare] or [Medicaid] to which the person, after applicable reconciliation, is not entitled" and clarifies that the retention of any overpayment after the deadline is an "obligation" for purposes of FCA liability.

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64 73 Fed. Reg. 67064 (Nov. 12, 2008). Similar mandatory disclosure provisions were made applicable to grants and cooperative agreements.
65 48 C.F.R. § 52.203-13.
66 73 Fed. Reg. 67064, 67901-92.
67 48 C.F.R. § 9.406-2, Causes for Debarment; 48 C.F.R. § 9.407-2, Causes for Suspension.
68 P.L. 111-148, § 6402, 124 Stat. 119.

The Supreme Court's decision in Schindler serves the underlying purpose of the public disclosure provision, which bars government payments to Relators when Relators get information from the government, rather than providing information to the government.

Effect of Disclosure Requirements

As a result of these new mandatory disclosure requirements, the government has dramatically increased its capability to identify and investigate potential fraud. With the new mandatory requirement that contractors and grantees adopt and maintain internal control systems designed to identify abusive practices and fraud within their own organizations early and the mandatory requirement that contractors timely report potential violations to the OIG, the government has enlisted the contractors, subcontractors, grantees, and other recipients of federal funds as its agents to identify and report potential fraud and abuse in contracts and other federally funded programs. The additional requirements that reports be "timely" and that "full cooperation" be afforded ensure that the contractor or grantee will work to assist and support the investigative authorities.

In addition, the requirements for business ethics and awareness compliance programs and controls directly address the concern that insiders need encouragement to break the perceived "conspiracy of silence." The specific obligations to timely disclose "credible evidence" of fraud or abuse ensures that reporting will be prompt and that internal investigations will be diligently pursued – especially since failure to do so will result in suspension or debarment. The rule requires contractors and grantees to function as the agents of the OIGs to identify and root out fraud and abuse early.

As a result of these mandatory disclosure requirements, the government has created channels for significantly more information concerning potential violations of the FCA than were available in the past. Moreover, the information is provided to the agency OIGs – the very offices that often investigate alleged FCA violations that Relators assert.

When information about fraud is already in the hands of the OIG as the result of a corporate self-disclosure, there is no reason to pay a Relator for the same or similar information. The FCA should be amended to provide that Relator awards in this situation should be capped at ten percent of the Government's recovery if there has already been a corporate disclosure, depending on whether the Relator brings any new information to the table. As with the proposed cap on Relator awards where the Relator failed to report suspected fraud through available internal mechanisms, this cap relating to corporate self-disclosures could be effectuated through a very simple amendment to the FCA.

PROPOSAL FOUR: THE FCA SHOULD NOT BE AMENDED TO OVERTURN THE SUPREME COURT *SCHINDLER* DECISION

Since 1986, the FCA has included a provision barring *qui tam* actions that are based upon public disclosures of information in certain listed sources, including the news media and government reports, audits, and investigations.[69] This provision, known as the "public disclosure bar," serves the purpose of guarding against "parasitic" *qui tam* lawsuits that offer no fresh information to the United States, but instead provide information that is already in the public domain or known to the government.[70] This provision was substantially amended in 2009, to narrow the scope of the bar and to provide the DOJ with a "veto" over any attempt to dismiss *qui tam* actions on the basis of the public disclosure bar.

In 2011, the Supreme Court held that the government's written response to a Relator's FOIA request is a government "report" and therefore constitutes the kind of public disclosure that can bar a *qui tam* lawsuit. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011). In dissent, Justice Ginsburg suggested that the Court's decision was "worthy of Congress' attention,"[71] and several *qui tam* attorneys have called for legislation to overturn the decision.

The call for a legislative response to the *Schindler* case is based on a fundamental misunderstanding of the purpose of the public disclosure bar. The public disclosure bar seeks to ensure that the United States does not pay individuals for information that is already in the hands of the government (in the form of government reports, audits, and investigations), or readily accessible to the government (in the form of news media reports). Simply put, the statute properly seeks to avoid providing compensation to individuals who have no information of value to provide the government.

Viewed through this lens, the Supreme Court's decision in *Schindler* is correctly decided. The decision serves the underlying purpose of the public disclosure provision, which bars government payments to Relators when Relators get information from the government, rather than providing information to the government. There is no reason for any amendment to the law to overturn this sensible decision.

Moreover, there are several other reasons that legislation to overturn the *Schindler* decision is unnecessary. First, Congress amended the public disclosure bar in 2009 to provide the DOJ with a veto over any defendant's attempt to dismiss a *qui tam* plaintiff on public disclosure grounds. Thus, if there is a situation in which a Relator derives information from a FOIA request but nonetheless deserves a payment for his or her contribution, the DOJ has the power to ensure that the Relator can proceed and remain eligible for a government payment in the form of a share of the proceeds.

Second, situations where a Relator bases his or her suit on information derived from FOIA does not appear to arise often, and it would be a waste of effort to rewrite the statute to address such a limited universe of cases. A representative of Taxpayers Against Fraud, a leading *qui tam* organization, observed he could not recall any successful cases that depended on FOIA documents, noting, "They may be out there, but they are rare and they are not likely to be large – extraordinary rewards in an FCA case generally depend on extraordinary evidence, and most of that evidence comes from company insiders and is not dependent on a FOIA request."[72]

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69 31 U.S.C. § 3730(d)(4).

70 "The goals of the 1986 Amendments Act were (1) to encourage those with information about fraud against the government to bring it into the public domain; (2) to discourage parasitic *qui tam* actions by persons simply taking advantage of information already in the public domain; and (3) to assist and prod the government into taking action on information that it was being defrauded." *United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.,* 276 F.3d 1032, 1042 (8th Cir. 2002).

71 131 S. Ct. at 1898 (Ginsburg, J. dissenting).

72 *See* Ken Stier, *High Court Decision Yields Positive Outcome on Use of Whistleblower Docs,* Boardmember.com (Aug. 9, 2011), http://www.boardmember.com/Print.aspx?id=6501 (quoting Patrick Burns, Taxpayers Against Fraud).

CONCLUSION

Given the evidence that whistleblower motivation is not necessarily financially driven, there is no evidence that the government must pay Relators "jackpot" sums in order to incentivize them to come forward. An award cap of $15 million will afford Relators a generous amount for their contributions and will afford *qui tam* counsel a significant incentive to continue investing in *qui tam* cases. Together with amendments to eliminate or cap Relator awards where the Relator fails to take advantage of internal reporting mechanisms or where the defendant previously disclosed alleged misconduct to the government, these modest changes to the FCA will ensure that when the government recovers funds for an FCA violation, the benefits of the settlement or judgment flow where they should – to the government and in turn to the taxpayer.

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
1615 H Street, N.W.
Washington D.C. 20062-2000
Phone: 202-463-5724 | Fax: 202-463-5302
InstituteForLegalReform.com