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Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol2012/iss1/8

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A Modest Practitioner Proposal: Striking a Balance in Whistleblower Lawsuits

Lisa M. Noller

One of the questions posed by the participants in this “Combating Corruption” Symposium is whether law enforcement has responded to changing economic times and motives by bringing a greater number of prosecutions for activities that occurred during the financial crisis. The more accurate question might be why the public perceives inadequate prosecution rates when lawsuits brought by whistleblowers are at an all-time high. Indeed, now that Congress has expanded the relators’ toolkit to include an emboldened False Claims Act (FCA) and new whistleblower provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), wrongdoers should expect consequences for acting corruptly. Those engaged in fraud and abuse should now expect not only to repay the government, but also to pay millions of dollars in bounties to private citizen whistleblowers, most of whom suffered no losses of their own. In addition to these statutory changes, tough economic times have provided further incentives for whistleblowers to come forward; having already been laid off by the targets of their lawsuits, many whistleblowers have nothing to lose.

Though it is critically important that the government uncover and recover corruptly obtained payments, increased efforts by whistleblowers have produced some shameful instances of overreaching by law enforcement.¹ Whistleblower lawsuits are in-

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¹ For example, recent prosecutions for health care offenses have expanded so greatly that toward the end of an investigation prompted by a whistleblower, the Department of Justice in 2010 charged an in-house lawyer with obstructing justice and lying to the government, when she had lawfully relied on the advice of counsel during a qui tam investigation. United States v Stevens, 771 F Supp 2d 556, 558–60 (D Md 2011). The suit against Stevens was dismissed at the close of the government’s case. See Antonia F. Giuliana, Former GSK In-House Counsel Lauren Stevens Acquitted, FCA Alert (Kelley Drye & Warren LLP May 10, 2011), online at http://www.fcaalert.com/2011/05/articles/former-gsk-
creasingly touted and have largely expanded unchecked, but cause such perverse incentives that they should be reined in immediately. The steadily increasing number of FCA and Dodd-Frank actions brought by “relators,” many of whom are disgruntled employees and former employees, have unnecessarily diverted scarce resources without netting a full recovery for the federal fisc, since the government is required by statute to share a portion of all recoveries with the relator. While the government should continue its vigilant investigation of fraud and abuse of taxpayer dollars, whistleblower statutes should be tailored to encourage reporting while avoiding unnecessary windfalls.

Perhaps instead of asking why too few individuals are being prosecuted for fraud, we should be challenging the statutory framework available to whistleblowers, which provides a windfall to uninjured private citizens while denying prosecutors and law enforcement officers the full breadth of available resources to silence the public outcry and to deter others in any appreciable way. Part I of this Article reviews the history of the FCA and the Dodd-Frank whistleblower provisions, including the government’s expanding focus and increasing collections. Part II argues that the FCA and Dodd-Frank, while laudable in their pursuit of justice, are not the most efficacious use of taxpayer money. Part II also argues that lowering incentives for relators (including utilizing internal reporting and collaboration with compliance officers) and increasing law enforcement resources would produce the same result—only more efficiently.

I. A BRIEF HISTORY OF THE FCA AND THE DODD-FRANK WHISTLEBLOWER PROVISIONS

A. The FCA

Hardly a day proceeds without a government press release trumpeting a significant FCA settlement among the government, a relator-plaintiff, and an entity or individual that allegedly

inhouse-counsel-lauren-stevens-acquitted/ (visited Sept 10, 2012) (reporting that the presiding judge “believ[ed] that it would be a miscarriage of justice to permit th[ese] case to go to the jury”). In other investigations, corporations have reached multimillion dollar settlements, but executives have been pursued for misdemeanors for simply being “responsible corporate officers” or, in other words, persons in positions in which they are assumed to “know better.” See, for example, David Voreacos and Janelle Lawrence, Health Care Prosecution Losses Mar U.S. Marketing Probe, Bloomberg Businessweek (Bloomberg 2012), online at http://www.businessweek.com/news/2012-03-14/health-care-prosecution-losses-mar-u-dot-s-dot-marketing-probe#p1 (visited Sept 10, 2012).

2 For statistics reflecting this increase, see Part IC.
submitted millions of dollars in false claims to the government to obtain money or property to which the individual or entity was not entitled. Before discussing a brief history of the Act and suggesting ideas for improvement, it is worth noting that the aims of the FCA are laudable. In remarks to Congress in 1998, a high-ranking supervisor in the Department of Health and Human Services explained the importance of the FCA:

The False Claims Act is an invaluable tool in the Government's continuing effort to control health care fraud and abuse. In an era when the long-term solvency of Medicare is in doubt, and when our audits reveal huge losses due to improper payments, and when taxpayers, the Congress, and the Administration are rightfully demanding a more concerted law enforcement effort, it would not be wise to weaken the protections afforded by the False Claims Act.3

Those words ring true today. Due to scarce Department of Justice (DOJ) resources, the government is unlikely to uncover on its own the extent of fraud that can be exposed by private attorneys general. Indeed, as this Article notes in Part IC, the federal government has recovered over $30 billion since the FCA was amended and expanded in 1986. Nonetheless, this “success” can have unintended and undesirable consequences: relators have gotten rich, while the government remains poor. Understanding the perverse incentive structure requires a brief historical overview.

1. The current statute.

The current version of the federal4 FCA imposes civil liability on any person who 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,”


4 Most states also have enacted provisions similar to the FCA. This article focuses only on the federal statute.
among other acts.\textsuperscript{5} The penalty for violating the FCA is steep: civil liability of $5,500 to $11,000 \textit{per false claim}, plus three times the amount of damages that the government recovers based on the false claim, and any penalties and interest.\textsuperscript{6} A claim is broadly defined to include any request or demand for money or property presented to a government agent.\textsuperscript{7} To encourage private citizens to bring fraud to the government's attention, plaintiff-whistleblowers, dubbed "relators," may "bring a civil action for violations of section 3729 for the person and for the United States Government," even though the private citizen has suffered no damages of his own.\textsuperscript{8}

To proceed, the relator files a lawsuit with a court under seal and provides a copy to the government.\textsuperscript{9} The US Attorney's Office in the district where the suit was brought or the DOJ then has sixty days (or more, for good cause shown)\textsuperscript{10} to decide whether to intervene in the lawsuit and pursue the claim alongside the relator.\textsuperscript{11} If the government elects to intervene, the relator passively remains part of the suit as a qui tam plaintiff, yet the government lawyers lead the litigation, including all discovery, motion practice, and trial.\textsuperscript{12} If the government elects not to intervene in the lawsuit for any reason (including its lack of merit or an incredible relator), the relator may proceed on his own.\textsuperscript{13}

The FCA incentivizes private citizens to bring fraud to the attention of the government by providing that a successful relator may recover a bounty, a portion of the government's recovery now ranging from 15 to 25 percent of the damages and penalties,
at the government’s discretion and as approved by the court. Successful qui tam relators may also recover all costs, expenses, and attorneys' fees, which the defendant must pay.

2. “Lincoln's Law.”

Congress enacted the FCA in 1863 in response to enterprising fraudsters who took advantage of the government's wartime expenditures. During the Civil War, the government's resources were strapped and it relied on the private marketplace to obtain items ranging from guns and ammunition to horses and medicine. Corrupt businessmen took advantage of the government by charging artificially high prices for goods and services, delivering low-quality items, and billing multiple times for the same product. The FCA replaced two entities. The first, the President's Committee on the Conduct of the War, was a group of politicians charged with unearthing waste and corruption, but which also "muddled, accused men wrongly, roused fear and suspicion, and left ranklings." The second, the Congressional Committee on Government Contracts, was also charged with identifying and pursuing those who defrauded the government. In a December 1861 report to Congress, the Congressional Committee wrote, "even in this time of trial, cheating in clothes, blankets, flour, bread, everything, is universal." One businessman agreed, bragging, "[y]ou can sell anything to the government at almost any price you've got the guts to ask." The committees monitored profiteering and publicly derided those who plundered the treasury; however, it was not until Congress passed the FCA in 1863 that penalties for government fraud were codified.

The original FCA outlawed defrauding the government and provided a civil penalty of double the amount of damages suffered by the government, plus a $2,000 forfeiture by the wrong-doer for each false claim submitted. Under the original FCA,
any person could submit a lawsuit on behalf of the government alleging that someone had submitted a false claim for money or property and then reap up to 50 percent of any award.\textsuperscript{21} These private parties, called relators, could stand in the government’s stead in what was labeled a qui tam action, short for the Latin phrase \textit{qui tam pro domino rege quam pro se ipso in hac parte sequitur}, meaning “who as well for the king as for himself sues in this matter.”\textsuperscript{22} The original FCA also criminalized the submission of false claims to the federal government, a provision later severed and codified separately.\textsuperscript{23}

3. Amendments to the FCA.

The statute remained virtually unchanged until 1943, when Congress overhauled the FCA in response to a case then before the Supreme Court, \textit{United States v Hess}.\textsuperscript{24} In \textit{Hess}, the relator filed a civil suit based upon a previously returned indictment of Hess for collusively bidding state contracts partially funded with federal money.\textsuperscript{25} The Supreme Court upheld a lower court award to the relator, despite that he had no original information about the fraud.\textsuperscript{26} In response to \textit{Hess}, Congress revised the statute to increase government oversight of qui tam suits and reduced the relator’s share of the recovery to 25 percent if the government declined to intervene and to 10 percent if the government pursued the case.\textsuperscript{27} Congress also prohibited qui tam suits based on information already in the government’s possession.\textsuperscript{28}

\textsuperscript{21} False Claims Act of 1863 § 6, 12 Stat at 698.
\textsuperscript{22} Black’s Law Dictionary defines a qui tam action as:

\begin{quote}
 an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution.
\end{quote}

\textsuperscript{24} 317 US 537 (1943).
\textsuperscript{25} Id at 539.
\textsuperscript{26} Id at 545.
\textsuperscript{27} Lumm, Comment, 45 Wake Forest L Rev at 529 (cited in note 20).
\textsuperscript{28} Id. This “public disclosure” bar is codified at 31 USC § 3730(e)(4)(A).
In response to the 1943 amendments, courts interpreted the narrower FCA as prohibiting all qui tam suits where the government already was aware of the alleged fraud, even where the government knew of the fraud because of the relator's information.\(^29\) Not surprisingly, this resulted in fewer FCA lawsuits, since relators were legally required to be the only source of the information presented to support their lawsuits.\(^30\) Congress reacted in 1986 with sweeping changes to the FCA.\(^31\) It amended the statute to include increased damages (including treble damages and greater penalties), a lesser standard of scienter (imposing liability for "reckless disregard for the truth or falsity of the claim," in addition to actual knowledge), and a greater bounty for the relator.\(^32\) The 1986 amendments also clarified the "original source" doctrine, allowed relators to sue for "knowing" violations of the statute as well as a reckless disregard for the truth or falsity of the claim, and greatly expanded incentives for whistleblowers, increasing the amount of recovery to $5,000 to $10,000 per claim.\(^33\) Congressional comments reflect that the 1986 amendments were added to encourage "private individuals who are aware of fraud being perpetrated against the Government to bring such information forward."\(^34\)

Reviews of the 1986 FCA amendments allege the changes were spurred by widespread fraud by defense contractors who took advantage of increased defense spending during the Cold War.\(^35\) Notably, though the 1986 amendments increased the financial incentives for private persons to bring FCA lawsuits and

\(^{29}\) See, for example, *State of Wisconsin v Dean*, 729 F2d 1100, 1104 (7th Cir 1984) (holding that even though the relator, the state of Wisconsin, had uncovered Medicaid fraud, it could not pursue a qui tam suit because the federal government previously had learned of the fraud when Wisconsin reported it as required by regulation).

\(^{30}\) See Brollier, Note, 67 Ohio St L J at 694 (cited in note 16) (noting that before 1986, citizens filed an average of six qui tam lawsuits per year).


expanded their ability to do so, Congress also did not increase funding for the DOJ to review, analyze, and litigate these actions. In other words, Congress chose to respond to increased fraud by focusing greater attention on private enforcement methods.

Congress most recently expanded the scope of the FCA through enactment of the Fraud Enforcement and Recovery Act of 2009 (FERA).\textsuperscript{36} Among other changes, FERA expanded the FCA to impose liability for “reverse false claims”—false statements made to avoid paying an obligation to the government\textsuperscript{37}—to broaden antiretaliation provisions allowing recovery by contractors and agents, and to expand “retaliation” to include negativity in the terms and conditions of employment.\textsuperscript{38}

FERA also gave the DOJ the authority to use Civil Investigative Demands (CIDs) to investigate matters, including FCA cases, prior to filing suit.\textsuperscript{39} The government may now issue a CID to anyone who the government has reason to believe may be “in possession, custody, or control of any documentary material or information relevant to a false claims law investigation.”\textsuperscript{40} This power has been delegated to all US Attorney’s Offices, allowing Assistant US Attorneys (AUSAs) to obtain sworn testimony, documents, and interrogatory responses from individuals prior to the government’s filing of a lawsuit.\textsuperscript{41} Giving the government this power enables it to rely even less on the allegations made by relators, since prosecutors can develop their own information to corroborate allegations. After the introduction of the CID process, a relator is even less involved in the investigation of his own lawsuit, yet his potential financial reward remains the same.

\textsuperscript{36} Pub L No 111-21, 123 Stat 1617 (2009), codified in various sections of Titles 18 and 31.
\textsuperscript{37} FERA § 4, 123 Stat at 1621, codified at 31 USC § 3729(a)(7).
\textsuperscript{38} FERA § 4, 123 Stat at 1621, codified at 31 USC § 3730(h).
\textsuperscript{39} FERA § 4, 123 Stat at 1621, codified at 31 USC § 3733(a)(1).
\textsuperscript{40} FERA § 4, 123 Stat at 1621, codified at 31 USC § 3733(a)(1).
\textsuperscript{41} 28 CFR Part O, Subpart Y, Appendix § 5 (“Authority relating to Civil Investigative Demands issued under the False Claims Act is hereby delegated to United States Attorneys in cases that are delegated or assigned as monitored to their respective components.”).
B. Dodd-Frank Whistleblower Provisions

In response to the financial crisis that began in 2008, Congress enacted Dodd-Frank,\textsuperscript{42} to "Create a Sound Economic Foundation to Grow Jobs, Protect Consumers, Rein in Wall Street and Big Bonuses, End Bailouts and Too Big to Fail, [and to] Prevent Another Financial Crisis."\textsuperscript{43} The legislation addressed many issues, but relevant to this Article are those Dodd-Frank provisions colloquially known as the "Dodd-Frank Whistleblower Provisions." In August 2011, Securities and Exchange Commission (SEC) commissioners announced final rule changes to the Securities Exchange Act of 1934 (the "Exchange Act"),\textsuperscript{44} which changes implemented the whistleblower program Congress prescribed in Dodd-Frank.\textsuperscript{45} While the SEC had announced proposed rules in November 2010, the Commission sought input during the notice and comment period and business and legal communities lobbied the SEC for further support of internal compliance programs. In particular, businesses and lawyers sought a requirement that a relator first inform his employer’s compliance departments before filing a claim with the SEC. As a result, the SEC made slight modifications to the proposed rules to incentivize internal reporting.

Section 922 of Dodd-Frank added new Rule 21F to the Exchange Act, titled "Securities Whistleblower Incentives and Protection."\textsuperscript{46} Patterned after the FCA, Rule 21F directs the SEC to pay awards to whistleblowers who: (i) voluntarily provide the SEC; (ii) with original information; (iii) that leads to the successful enforcement by the SEC of a federal court or administrative action; (iv) where the SEC obtains monetary sanctions totaling more than $1 million.\textsuperscript{47} The SEC’s formal announcement trumpeted Rule 21F as a program "primarily intended to reward indi-
individuals who act early to expose violations and who provide significant evidence that helps the SEC bring successful cases."\textsuperscript{48}

Rule 21F-2(a) and the accompanying regulations define a whistleblower as follows: "You are a whistleblower if, alone or jointly with others, you provide the Commission with information . . . [that] relates to a possible violation of the Federal securities laws."\textsuperscript{49} A whistleblower must be an individual; a company or another entity is not eligible to receive a whistleblower award.\textsuperscript{50} Rule 21F-8 sets forth categories of individuals who are \textit{ineligible} to receive a whistleblower award, including: employees of regulatory or self-regulatory agencies, the Public Company Accounting Oversight Board, and law enforcement agencies; individuals convicted of a criminal violation related to the Commission's action; persons who obtained the information through an audit of a company's financial statements; and, individuals who knowingly made false statements or representations in connection with their dealings with law enforcement or the SEC.\textsuperscript{51}

In short, while the whistleblower can be almost any individual with a hunch that a violation of the securities laws has been committed, he cannot be an individual trying to turn corporate compliance into financial gain, purely for gain's sake. However, otherwise exempt persons such as compliance and audit personnel may become whistleblowers where: disclosure may prevent substantial injury to the entity or to investors; the entity is engaging in conduct that will impede an investigation; or, at least 120 days have elapsed since the company became aware of a whistleblower complaint.\textsuperscript{52}

Rule 21F-5 states that, if all conditions are met, the SEC will pay an award of at least 10 percent and not more than 30 percent of the total monetary sanctions collected in successful SEC and related actions.\textsuperscript{53} The rules permit the SEC to aggregate multiple SEC cases arising out of a common set of facts as a single action.\textsuperscript{54}


\textsuperscript{49} 17 CFR § 240.21F-2(a) (emphasis added). This definition is broader than the FCA's definition, since it includes relators who suspect a "possible" violation of the securities laws.

\textsuperscript{50} 17 CFR § 240.21F-2(a).

\textsuperscript{51} 17 CFR § 240.21F-8(c).


\textsuperscript{53} 17 CFR § 240.21F-5(c).

\textsuperscript{54} See 17 CFR § 241.21F-5(c).
rules, the final 21F-5 rules also provide that when determining the amount of an award, a whistleblower’s voluntary participation in a company’s internal compliance and reporting systems is a factor that can increase the amount of an award and that a whistleblower’s interference with internal compliance and reporting is a factor that can decrease the amount of an award.55

Rule 21F-6 provides that, in considering the amount of an award, the SEC will consider: (1) the significance of the information provided to the success of the SEC action or related action; (2) the degree of assistance provided by the whistleblower and his or her legal representatives in the SEC action or related action; (3) the SEC’s “programmatic interest” in deterring violations of the securities laws by making whistleblower awards; and, (4) whether an award otherwise enhances the SEC’s ability to enforce the federal securities laws, protect investors, and encourage the submission of high-quality information by future whistleblowers.56 Awards will vary based on the Commission’s assessment of these factors.57

The final Rule 21F Exchange Act rules do not require whistleblowers first to report violations internally to qualify for a bounty. But to slightly incentivize potential whistleblowers to work with their employers’ compliance departments, the rules: (1) do not preclude recovery for whistleblowers who report violations to the company, if the company then self-reports to the SEC; (2) allow recovery for whistleblowers who report to the SEC and their employer at the same time; and, (3) provide that whistleblowers’ voluntary participation in their employers’ internal reporting system may increase a whistleblower’s award.58 In response to comments made by corporate compliance personnel and the legal community, the final rule extends the time period during which a whistleblower who reports to the Commission after first reporting internally receives “credit” as if he or she had reported to the Commission on the date of the internal reporting, from 90 to 120 days.59

55 See 17 CFR § 240.21F-6(a)(4),(b)(3).
56 17 CFR § 240.21F-6.
57 See 17 CFR § 240.21F-6.
C. Record-High Recoveries from Record-High Lawsuits

1. The bountiful FCA.

On December 19, 2011, in the year of the twenty-fifth anniversary of the 1986 amendments to the FCA, the DOJ announced it had recovered a record $3 billion in FCA cases in fiscal year 2011.\(^{60}\) It was the second year in a row the DOJ collected over $3 billion, bringing the total recovered since January 2009 to $8.7 billion.\(^{61}\) In a press release, the DOJ noted that amounts recovered included $2.8 billion under the whistleblower provisions of the FCA and $30 billion under the FCA since the 1986 amendments. Assistant Attorney General Tony West proclaimed that, "Twenty-eight percent of the recoveries in the last 25 years were obtained since President Obama took office,"\(^{62}\) a steep increase in a short amount of time. The DOJ's announcement also noted that since the 1986 amendments, relators have filed more than 7,800 qui tam lawsuits, 638 of which were filed in 2011.\(^{63}\) West also highlighted that the government obtained significant recoveries from a few large settlements, including $900 million from eight drug manufacturers and $750 million from GlaxoSmithKline.\(^{64}\)

The announcement also touted twenty-one criminal convictions under the Food, Drug and Cosmetic Act.\(^{65}\) While at first glance this number seems small by comparison, many of these twenty-one convictions likely were of executives convicted under the expanding Responsible Corporate Officer Doctrine, which holds executives responsible for failing to prevent fraud committed by those who work for a company.\(^{66}\)

According to fraud statistics maintained by the DOJ, in 2011, the relators' share of the $3 billion in fraud recovery totaled $532,193,735, or 17.5 percent of all recoveries.\(^{67}\) Of the


\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) DOJ, Press Release, Justice Department Recovers $3 Billion (cited in note 60).

\(^{65}\) Id.

\(^{66}\) The Responsible Corporate Officer Doctrine is codified at 21 USC § 331, and its misdemeanor provisions were upheld in United States v Park, 421 US 658 (1975) (upholding a corporate officer's misdemeanor conviction despite delegation of oversight, because in his position, he was responsible for all acts of the corporation).

more than $30 billion recovered since 1986, relators have pocketed $3,418,672,503, or slightly more than 11 percent of all money.\textsuperscript{68} As an example of a relator’s recovery, in one 2010 case, Allergan settled a qui tam suit in which the relators alleged the company had promoted Botox for headaches, pain, spasticity, and cerebral palsy, none of which was a use approved by the Food and Drug Administration.\textsuperscript{69} The relators and their attorneys received $37.8 million to cover their bounty, legal costs, and expenses.\textsuperscript{70} Assuming the lawyers representing the individual relators had typical contingent fee contracts (in other words, contracts which allowed them to recover 25 to 33 percent of their clients’ awards), the attorneys received $9.45 to $12.47 million, despite that the government intervened and performed the lion’s share of the work litigating the case.

Relators’ success is largely correlated to whether the government intervenes in an FCA suit. Since 1987, the average annual intervention rate has been 22 percent. In the 1,300 cases in which the DOJ has intervened, 95 percent of those cases settled or received a favorable judgment for the relators. By contrast, of the approximately 4,000 cases in which the DOJ declined to intervene, courts dismissed 94 percent.\textsuperscript{71} In the remaining 6 percent of non-intervention cases, the average settlement was $13.3 million lower.\textsuperscript{72} It typically takes the DOJ thirteen months to evaluate a qui tam lawsuit and to decide whether to intervene on the relator’s behalf.\textsuperscript{73} During this time, AUSAs must prioritize these cases ahead of others (regardless of the relative merit of each) because the FCA requires an intervention decision be made within sixty days of filing suit, unless the court grants an extension of time for good cause.\textsuperscript{74}

\textsuperscript{68} Id.
\textsuperscript{70} Id.
\textsuperscript{71} DOJ, Fraud Statistics—Overview (cited in note 67).
\textsuperscript{72} Id. The average recovery in intervention cases was $15.6 million, versus $2.3 million in non-intervention cases.
\textsuperscript{74} See 31 USC § 3730(b)(2).
2. The new kid on the block starts strong.

Section 924(d) of Dodd-Frank requires the SEC’s Office of the Whistleblower to report annually to Congress on whistleblower complaints and the Commission’s responses. In November 2011, the SEC issued its inaugural annual report on the Dodd-Frank Whistleblower Program. Because the final rules implementing the Dodd-Frank Act did not become effective until August 12, 2011 and the SEC’s fiscal year ended September 30, 2011, the report included only seven weeks of data and described just 334 whistleblower submissions. The report listed eleven different complaint categories. The largest percentage of whistleblower submissions—25.2 percent—was identified as nondescript “other” and “blank” violations. “Market Manipulation” comprised 16.2 percent of the submission complaints, followed by “Offering Fraud” at 15.6 percent and “Corporate Disclosure & Financials” at 15.3 percent. The Foreign Corrupt Practices Act category, which pundits have expected to comprise a significant portion of whistleblower submissions under Dodd-Frank, accounted for only 3.9 percent of the submissions. Though there is no published data regarding recoveries, the fact that almost fifty people a month have submitted claims to the SEC is an indication the public is eager to collect the bounties the agency has offered.

On February 15, 2012, the director of the SEC’s Regional Office in Boston reported that since the whistleblower provisions of Dodd-Frank went into effect in August 2011, the SEC has been receiving nearly seven tips a day. While he emphasized he was not speaking on behalf of the agency as a whole, if these numbers are correct, the rate of reporting has increased dramatically since the 2011 annual report.

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75 Dodd-Frank § 924(d), 124 Stat at 1850, codified at 15 USC § 78u-6(g)(5).
77 Id at 5.
80 Martha Kessler, Whistleblowers: SEC Receiving Nearly Seven Tips Daily, Director of Boston Regional Office Says, 44 BNA Sec Reg & L Rep 8 (Feb 20, 2012).
II. STRIKING A BALANCE BY MODIFYING THE SIGNIFICANT WINDFALLS TO BOUNTY HUNTERS

Avoid lawsuits beyond all things; they pervert your conscience, impair your health, and dissipate your property.

Jean de la Bruyère

A. Perverse Incentives

An appropriate, efficient enforcement scheme should incentivize compliance at the lowest possible cost. If the crime rate on Main Street were the same regardless of whether two or four police officers patrol the street, few would rationally urge the government to budget for four. However, the economics of whistleblower lawsuits defy such logical expenditures of public funds—a relator is entitled to the same percentage recovery, regardless of whether he has unearthed a false claim worth $1 or $1 million. As one court has noted,

The history of the False Claims Act’s qui tam provisions demonstrates repeated attempts by Congress to balance two competing policies. On the one hand, the qui tam provisions seek to encourage “whistleblowers to act as private attorneys-general” in bringing suits for the common good. On the other, the provisions seek to discourage opportunistic plaintiffs from bringing parasitic lawsuits whereby would-be relators merely feed off a previous disclosure of fraud. 82

While this statement was made in the context of evaluating the tension between the FCA and the public disclosure bar, the same observation can be made regarding whistleblowers in general: there is a tension between revealing fraud for the greater good and revealing a suspicion of fraud, without regard to collateral damage.

82 Walburn v Lockheed Martin Corp, 431 F3d 966, 970 (6th Cir 2006) (citations omitted). See also United States v Laboratory Corporation of America, Inc, 290 F3d 1301, 1313 n 24 (11th Cir 2002). The Eleventh Circuit explained:

When a plaintiff does not specifically plead the minimum elements of their allegation, it enables them to learn the complaint’s bare essentials through discovery and may needlessly harm a defendants’ goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, are baseless allegations used to extract settlements; this is especially so in cases involving the False Claims Act.

Id.
eral consequences, because it is an opportunity to get rich. If whistleblowers were interested in reducing fraud, they could report perceived wrongdoing to their supervisors, corporate compliance officers, or in-house attorneys, all of whom know the personnel, industry, and law better than a federal law enforcement officer or attorney. But the possibility of flat rate, million-dollar recoveries must be too good to pass up and current and former employees have too much to gain financially to act with principle and principle alone.

Since the 1986 FCA amendments, the United States Sentencing Commission and the DOJ have claimed that, when making charging and settlement decisions relating to corporations, the government will review and consider whether an entity under scrutiny has a meaningful and effective compliance program.\(^8\) The SEC, too, has claimed publicly that in deciding how to penalize a corporation for wrongdoing, the Commission will consider whether the entity has a preexisting culture of compliance that encourages self-reporting and remediation when an entity learns of wrongdoing.\(^8\) These pronouncements are aligned with the Sarbanes-Oxley Act of 2002,\(^8\) which mandated that all publicly traded companies must implement and maintain a meaningful and effective compliance program to ensure compliance with securities laws. The government’s message is a clear requirement that corporations should police themselves. This carrot approach to enforcement makes sense in a competitive marketplace; effective, proactive compliance should save money by reducing lost profits resulting from corruption, the cost of litigation, discipline of employees, and other costs associated with crime. As one author has written, any such costs incurred by a company—including negative publicity, lost shareholder value, and attorneys’ fees—will be paid by the public in the end, either imposed on customers or the government itself.\(^8\)


\(^8\)See Brollier, *Note*, 67 Ohio St L J at 706–07 (cited in note 16). See also Lumm,
The notion of self-policing is not novel in and of itself; market protagonists have touted it for years. The difference in the whistleblower world is that companies have paid attention, and since 1986, the law-abiding entities have taken significant steps to avail themselves of the benefit of having an effective and meaningful compliance program, should wrongdoing prevail despite the presence of a robust program.\textsuperscript{87} In January 2011, the Ethics Resource Center, the Ethics and Compliance Officers Association, and the Society of Corporate Compliance and Ethics jointly released a report detailing the results from a survey of 1,223 ethics and compliance professionals whose companies had implemented corporate compliance programs.\textsuperscript{88} An overwhelming majority of the survey respondents—86.9 percent—report they regularly provide ethics and compliance updates to corporate leadership; 70 percent said they “always” or “sometimes” referenced DOJ enforcement actions in delivering this message, in an effort to reinforce the importance of corporate compliance with the law.\textsuperscript{89} Compliance officers who did not report enforcement decisions to their leadership indicated it was because they found the DOJ website difficult to manage and they welcomed more assistance from the government.\textsuperscript{90} Almost every person surveyed responded that it would be beneficial if the DOJ specifically published the benefits of effective compliance programs (in fewer charges brought or settlements made), particularly as these programs factored into the government’s decision making, and the weight given to preexisting programs versus remediative ones.\textsuperscript{91} Compliance professionals largely agreed that if the DOJ would share general statistics on the consideration given to ethics and compliance programs in enforcement decisions, descriptions of cases in which compliance programs were mitigating factors in enforcement decisions, and information about the benefits of an effective program, they could implement these considerations.

\textsuperscript{87} Of course, the primary reason to implement a compliance program is to encourage a culture of compliance, ideally avoiding any repercussions from noncompliance.


\textsuperscript{89} Id at 4–5.

\textsuperscript{90} Id.

\textsuperscript{91} Id at 6.
into their companies’ programs, to the benefit of corporate compliance in general. In sum, companies pay attention to government enforcement actions and do their best to adapt by implementing relevant modifications over time.

The increase in attention paid to corporate compliance is a trend the DOJ and the SEC should encourage, as the costs of compliance would be borne by the private sector rather than by the public in the form of expensive government investigations and litigation. Corporations forced to spend money to settle an FCA lawsuit may draw that money from a compliance department budget. And money spent on private enforcement is money not paid to shareholders (including institutional shareholders such as public pension funds). Unfortunately, the lure of FCA and Dodd-Frank whistleblower lawsuits and multimillion dollar recoveries undermines corporate compliance programs. Consider the perverse incentives for a whistleblower: if he reports perceived fraud internally, he may be heralded as a company hero for doing the right thing, eliminating fraud and abuse and saving the company the expense of a lengthy lawsuit. However, he is at the same time passing up the opportunity to sue and recover millions of dollars without having to do much work other than watch government attorneys do their jobs. In addition, antiretaliation provisions in the FCA and Dodd-Frank ensure the whistleblower can continue to draw a salary while snitching on his employer. Not surprisingly, if one spends five minutes surfing the internet for whistleblower counsel, one will see there are plenty of lawyers vying for the opportunity to advise a whistleblower to sue his employer—at a contingent fee of 25 to 30 percent of the recovery.

As the payments to whistleblowers increase, the strength of even the best corporate compliance program diminishes, since the company pays twice—once to establish a program it meaningfully hopes will detect fraud and abuse and again when a ne'er-do-well employee hell bent on corruption finds a loophole.

Public comments to the SEC in response to the first version of the Dodd-Frank whistleblower provisions encouraged the SEC to partially remedy this issue by requiring whistleblowers to first report their concerns internally and giving the company a discrete amount of time to investigate and remediate the problem; however, the final rules promulgated by the SEC did not include this suggestion. Instead, the SEC opted for a structure that

merely encourages whistleblowers to report internally first, because the size of their awards will depend in part on whether they first informed their companies. Nonetheless, the SEC's rules do not delineate how much credit a whistleblower may receive for internal reporting, and if he does inform his employer of wrongdoing, he runs the risk that his employer will remediate immediately, thus decreasing his chance at a loss of at least $1 million, the threshold required to bring a successful claim under the Act.

B. A Modest Practitioner's Proposal

It is too bad the SEC missed an opportunity for a grand whistleblower experiment. Encouraging a whistleblower to report internally before filing a lawsuit would accomplish the goals Judge Gibson announced in Walburn v Lockheed Martin Corporation: encouraging the common good while at the same time discouraging opportunistic plaintiffs. I believe that by making slight but necessary changes to the FCA and the Dodd-Frank whistleblower provisions, fraud and abuse will be sufficiently deterred, and those responsible for uncovering it will be sufficiently rewarded for their efforts. These changes are meant to supplement compliance programs, which I assume law-abiding companies already will have implemented on their own, and will further prevent wrongdoing through vigilance and remediation.

First, I recommend a cap on whistleblower recoveries. The DOJ fraud statistics indicate there is no shortage of whistleblowers and I believe they would not be deterred by the promise of a smaller, yet still sizable, recovery in meritorious cases. The cap could be accomplished by lowering the percentage of recovery available to a relator, to a more reasonable 5 to 10 percent range of the recovered monies, taking into consideration the effort expended by the relator, whether he suffered retaliation for his whistleblowing, and the amount of money alleged and also recovered by the government. Even awards in the low end of this range would have reaped a bounty of $150,000,000 to whistleblowers since 1986, including a $3 million award to the Allergan plaintiffs. In other words, 5 percent of fraud proceeds is still a

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93 See 17 CFR § 240.21F-6(a)(4) (specifying that the SEC "will assess whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems").
94 431 F3d 966 (6th Cir 2005).
95 Id at 970.
sizable bounty and certainly a strong incentive to do the right thing. Moreover, any plaintiff insufficiently motivated by the potential of a recovery of several hundred thousand or millions of dollars (depending on the size of the fraud) is motivated more by greed than by good faith and is only denying the government monies which belonged to the federal treasury and not to the plaintiff. Limiting the amount of money whistleblowers may recover will increase the amount of money repaid to the government, from whose coffers it came in the first place. This money could be used to hire additional law enforcement personnel or fund other worthy government antifraud programs. I would also maintain the current state of the FCA and Dodd-Frank antiretaliation provisions, which discourage employers from punishing those who first present their concerns to internal compliance officers.

Second, Congress should amend the FCA and the Dodd-Frank whistleblower provisions to include a jurisdictional requirement that to recover any reward at all, relators must first report fraud and abuse internally to a corporate compliance officer. This requirement is consistent with other agencies’ requirements that employees raise their concerns first through the administrative process, then (on appeal) to the federal judicial system. Requiring internal review will likely result in companies and whistleblowers identifying and remediating issues on their own or through a coordinated and cooperative presentation to the government. That should free DOJ and SEC resources spent investigating the thousands of qui tam and Dodd-Frank complaints filed and provide more time for law enforcement agents and attorneys to intervene in more than the 22 percent of cases in which they now elect to intervene. Imposing this juris-

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96 In January 2011, Attorney General Eric Holder announced a hiring freeze and a reduction in “non-essential” spending. See Eric Holder, Memorandum for all DOJ Employees re Budget Implications for the Department of Justice Workforce (Jan 21, 2011), online at http://abcnews.go.com/images/Politics/AG%20Memo%20re%20Budget%20Implications%20for%20the%20DOJ%20Workforce.pdf (visited Sept 10, 2012). As a former AUSA who worked through budget restrictions in the mid-2000s, I was not motivated by the fact that qui tam relators and their attorneys who had done little work on “their” lawsuits after filing the initial complaint were reaping huge rewards as a result of my long hours on weekends without the benefit of air conditioning (in summer) or heat (in winter). Thankfully, neither I nor other AUSAs are motivated by money.

97 For example, the Equal Employment Opportunity Commission requires an administrative charge to be filed before an individual can bring a lawsuit for Title VII employment discrimination. See 29 CFR § 1601.1 et seq.

98 DOJ, Fraud Statistics—Overview (cited in note 67). The DOJ and SEC have not published their reasons for declining to intervene in whistleblower lawsuits. The biggest
dictional requirement would also support the policies often articulated by the DOJ and the SEC—namely, crediting companies whose compliance programs were designed to identify and remediate wrongdoing. Congress could set a statutory period of time for a company to internally investigate and remediate the problems identified by the whistleblower—perhaps one year—and if the company failed to act promptly, the relator could be entitled to recover a significant percentage of any judgment or settlement amount. During the time a compliance department is conducting its investigation, the statute of limitations for recovery could be tolled, thus protecting the whistleblower if the target of his complaint dragged its heels or otherwise acted in bad faith to reduce the relator’s recovery.

Accordingly, I propose that companies whose culture of compliance is serious and meaningful should incentivize their employees themselves. If I am correct that some whistleblowers would do the right thing for its own sake or for a reward less than the millions of dollars routinely awarded, then companies should be able to incentivize their employees to blow the whistle internally for a more modest recovery. For example, a corporation could—as part of its existing and robust compliance program—offer a financial reward to any employee who identifies fraud and abuse. That company could additionally reward the whistleblower with a promotion for his vigilance, or a tiered prize, depending on the value of company savings earned by ceasing fraudulent practices. In any case, the putative relator could recover his bounty immediately and without the hassle of finding and meeting with attorneys, filing a lawsuit, and waiting years until the conclusion of his court case to get paid. As the saying goes, a bird in the hand is worth two in the bush.

III. CONCLUSION

A historical review demonstrates there is a need for private attorneys general to assist the government in uncovering fraud and abuse. While many entities strive to act with integrity, some companies and individuals do not, and the government cannot be everywhere at once. Nonetheless, while the goals of the FCA and the Dodd-Frank whistleblower statute are laudable, they may be

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reached through means more consistent with historical priorities: that is, returning as much money as possible to the government that is entitled to it and not wasting resources to explore meritless lawsuits. To achieve these goals more efficiently, whistleblower rewards should be capped and relators should be incentivized to report any fraud and abuse internally.