



Saving
America's
"Most Important
Tool to Uncover
and Punish Fraud"



25 Facts That Rebut the Chamber
of Commerce's Proposal to
Undermine the False Claims Act

July 30, 2014



Authored by Stephen M. Kohn, Partner at Kohn, Kohn & Colapinto LLP, pro bono on behalf of NWC.
For additional information please email: contact@kkc.com.

Special thanks for the contributions of the following law clerks that provided instrumental assistance to this project:
Sarah Mahoney, KenDrell Collins, Jeanette Bayoumi, Nicole Jordan, Jeffrey Elkins, and Paul Lyons.

Cover art by Jeanette Bayoumi.

Table of Contents

Introduction.....	1
Fact #1: The False Claims Act Works	2
Fact #2: “Monetary Incentives Work” without “Negative Side Effects”	3
Fact #3: Whistleblowers Are Key to the DOJ’s Ability to Protect the Taxpayers from Fraud	4
Fact #4: Employees Are Very Reluctant to Report Fraud to Federal Law Enforcement	5
Fact #5: The False Claims Act and Related Laws “Make Reporting More Likely”	6
Fact #6: “Retaliation against Whistleblowers at All-Time High”	7
Fact #7: The FCA is the Most Effective Law for Protecting Employees from Retaliation	10
Fact #8: Limiting Whistleblower Rewards Would Undermine Public Policy and Interfere with Employee Disclosures	11
Fact #9: The FCA Does Not Need to be Amended in Order for Companies to Adopt Effective Rules for Internal Compliance	13
Fact #10: Laws Already Exist That Require Government Contractors to Operate Effective Internal Compliance Programs	15
Fact #11: The FCA Strongly Encourages Businesses to Maintain Effective Compliance Programs	16
Fact #12: Corporations Have Undermined Compliance Programs by Arguing That They Can Fire Employees Who Report Violations inside the Company	18
Fact #13: The Chamber’s True Position is that Corporate Compliance Programs Are a Tool for Corporate Attorneys to Collect Information to Protect the Company – Not the Public	22
Fact #14: Chamber-Endorsed “Compliance” Programs Can Use Information Obtained by the Whistleblower to Investigate and Fire the Whistleblower	23

Fact #15: Mandating Internal Disclosures Would Undermine the Effectiveness of Internal Compliance Programs	24
Fact #16: Mandating That Whistleblowers Report Violations of Law to Internally Constitutes an Obstruction of Justice	25
Fact #17: The FCA Saves the Government Litigation Costs and Does Not Encourage Frivolous Complaints	26
Fact #18: Barring Federal Employees from Using the FCA Will Promote Fraud	27
Fact #19: The Chamber’s Justification for Barring FCA Cases after Defendants Make a Disclosure to the Government Is a Green Light for Fraud	28
Fact #20: The Chamber’s Argument to Make it Harder to Prove Fraud Was Refuted Years Ago by the Reagan Administration	29
Fact #21: The Chamber Mischaracterized the SEC Rules for Whistleblowers	30
Fact #22: The FCA's Penalties Are Not Excessive	31
Fact #23: The Chamber's Proposal to Limit Recoveries To "Net Actual Damages" Is Not Needed	32
Fact #24: The FCA Does Not Permit Recovery for Violations Of "Any Fine-Print Regulatory Requirement	34
Fact #25: The FCA Promotes Free and Fair Market Competition	35
Conclusion	36
About the National Whistleblowers Center	37

Introduction

On March 2, 1863 President Abraham Lincoln signed into law the False Claims Act (FCA). It was modernized in 1986 and signed into law by President Ronald Reagan. In the words of the Chamber of Commerce, the FCA is “the government’s most important tool to uncover and punish fraud against the United States.”

The heart of the law is the recognition that whistleblowers are the key source of information on fraud in government programs. Because whistleblowers often face retaliation, and because the overwhelming majority of insiders are unwilling to risk their careers and jobs to report fraud against taxpayers, the FCA created incentives for employees to blow the whistle. Over time the FCA has been remarkably successful. Unfortunately, this success has generated opponents to the law that are intent on destroying this historically important whistleblower law.

The Chamber of Commerce’s Institute for Legal Reform filed a report misleadingly titled “Fixing the False Claims Act: The Case For Compliance-Focused Reforms.” This report sets forth a series of proposals that, if enacted into law, would undermine the FCA and leave whistleblowers without an effective law to protect them.

The National Whistleblower Center has carefully evaluated all of the Chamber’s proposals. None of them should be implemented.

The Chamber’s proposals would disqualify millions of American employees from coverage under the FCA. Furthermore, its proposals threaten the functionality of the FCA by increasing the burden of proof needed to demonstrate fraud, creating inappropriate barriers excluding the majority of whistleblowers from the embrace, cutting the damages available to employees who risk their entire careers to expose fraud against the taxpayers, eliminating entire categories of misconduct from the law’s jurisdiction and undermining the incentives included in the original law signed by President Lincoln which are the cornerstone to the law’s effectiveness.

The Chamber’s proposals, taken as a whole, would, in practice, repeal the modern reforms supported by a near unanimous Congress and President Regan and when he signed the 1986 amendments into law.

All of the Chamber’s recommendations should be *rejected*. Instead, Congress should heed the advice of respected experts and support the expansion of the FCA in order to facilitate its tools to fully protect the American taxpayer.

In this report, the NWC sets forth 25 facts that rebut the Chamber’s main anti-whistleblower proposals.

Fact #1

The False Claims Act Works

As demonstrated in the graph below, the FCA's reward provisions have worked, making even the Chamber of Commerce concede that the FCA is the "most important tool to uncover and punish fraud against the United States."

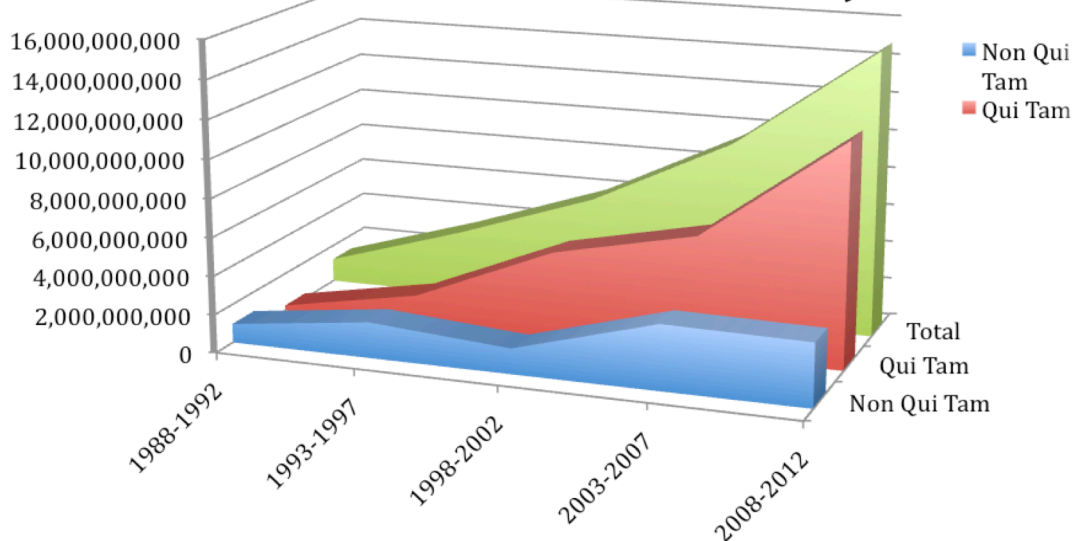
In the graph,¹ the *qui tam* recoveries (represented in orange) are those exclusively derived from whistleblower FCA disclosures. The recoveries obtained by the government that are not directly and explicitly tied to whistleblowers are represented in blue, (i.e. the "Non-*Qui Tam*" recoveries). As can be seen, the amount of actual recoveries obtained on behalf of the taxpayers from dishonest government contractors has grown significantly over the years, as employees have become aware of the FCA and utilized its *qui tam* procedures.

Significantly, the bare numbers set forth in the chart undervalue the effectiveness of the FCA's whistleblower recoveries. These numbers do not capture most of the criminal fines and penalties collected in FCA triggered prosecutions, the benefits obtained to the taxpayer through jailing notoriously corrupt contractors, the unquantifiable deterrent value of the FCA or fraud uncovered as an indirect result of whistleblower disclosures.

The threat of detection triggered by large FCA penalties and rewards is a powerful motivator for companies to ensure compliance with the law.

The Chamber's proposals would undermine twenty-five years of progress in combating fraud against the taxpayer.

Civil Fraud Recoveries as Reported by the Civil Division of the US DOJ



Fact #2

“Monetary Incentives Work” without “Negative Side Effects”

The University of Chicago Booth School of Economics² conducted the most comprehensive and objective study of whether the False Claims Act works. Their study was designed to “identify the most effective mechanisms for detecting corporate fraud” and was based on an “in-depth” study of “all reported fraud cases in large U.S. companies between 1996 and 2004.”

The Booth School’s conclusion is clear: *Qui tam* laws are key to effective fraud detection. Some of the key findings are:

“A strong monetary incentive to blow the whistle does motivate people with information to come forward.”

“Having . . . monetary rewards has a significant impact on the probability a stakeholder becomes a whistleblower.”

“[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits.”

“Monetary incentives seem to work well, without the negative side effects often attributed to them.”

The Chamber completely ignored the University of Chicago Booth School’s study.

“Qui tam laws are key to effective fraud detection.”

Fact #3

Whistleblowers Are Key to the DOJ's Ability to Protect the Taxpayers from Fraud

The need to protect the False Claims Act from hostile “reforms” was best stated in a bipartisan report issued on September 25, 2008, by the U.S. Senate Committee on the Judiciary.³ After studying the FCA, the Judiciary Committee endorsed none of the “reforms” urged by the Chamber of Commerce. Instead, the Committee recommended expanding its scope.

The Judiciary Committee concluded: *“The need for a robust FCA cannot be understated. . . . a great deal of fraud would go unnoticed absent the assistance of qui tam relators.”* The Committee confirmed *“the critical role that qui tam relators play in uncovering and prosecuting violations.”*

The Committee endorsed the findings reported by Pamela Bucy, a Bainbridge Professor of Law at the University of Alabama School of Law:

“Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring.

they will not find out about such fraud until it is too late, if at all. When law enforcement does find out about such fraud, it is very labor intensive to investigate.”

Michael Hertz, Deputy Assistant Attorney General, Civil Division, of the Department of Justice, also testified at the hearing.:

“Whistleblowers are essential to our operation. Without them, we wouldn’t have cases.”

Mr. Hertz confirmed that the publicity surrounding FCA payouts greatly contributes toward the government’s enforcement efforts, and a significant deterrent effect on those who may otherwise engage in fraud:

“In the wake of well-publicized recoveries attributable to the *qui tam* cases, those who might otherwise submit false claims to the Federal Government are more aware than ever of the ‘watchdog’ effect of the *qui tam* statute. We have no doubt that the Act has had the salutary effect of deterring fraudulent conduct.”

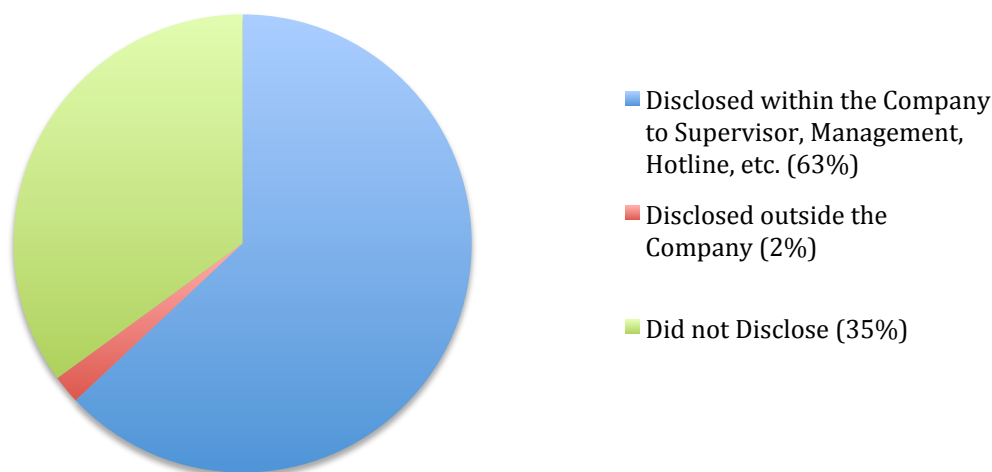


Fact #4

Employees Are Very Reluctant to Report Fraud to Federal Law Enforcement

Below are the actual reporting characteristics of all employees' reporting behavior in the U.S.

Initial Reporting Behavior of Employees Who Observed Misconduct 2011



* Based on the statistics reported in "Inside the Mind of a Whistleblower" Report by the Ethics Resource Center (2012).

As reported by the corporate-sponsored Ethics Resource Center, only 2% of all employees who are willing to report misconduct initially disclose that misconduct to anyone outside their company, including law enforcement.⁴

The FCA is the federal law that directly addresses this crisis in enforcement. A majority of employees are already willing to report fraud to their managers or compliance programs. That is not the problem.

The problem is that without laws such as the FCA, law enforcement agencies cannot gain access to the vast majority of employees who witness fraud against taxpayers.

The FCA is the most effective whistleblower law addressing this major problem. The Chamber's proposals would greatly exasperate the current failure of employees to properly report fraud to law enforcement. It would undermine 25 years of progress triggered by the FCA's whistleblower *qui tam* provisions.

Fact #5

The False Claims Act and Related Laws “Make Reporting More Likely”

The Ethics Resource Center (ERC), in its “National Business Ethics Survey of the U.S. Workforce 2013,” found that whistleblower reward laws, such as the False Claims Act, significantly increased the likelihood that employees would report fraud and misconduct “both internally and externally.”⁵

FCA attorneys or whistleblower-advocacy groups do not sponsor the ERC. Instead, major corporations such as Bechtel, BAE Systems, Lockheed Martin, Raytheon, United Technologies, and Walmart sponsor its surveys.

According to the ERC, whistleblower laws, such as the False Claims Act, resulted in a 30% increase in the likelihood of employees reporting misconduct internally and a 35% increase in employees reporting misconduct to the federal government. These findings are also supported by the DOJ’s statistics, which demonstrates how, over time, more and more employees are willing to risk their careers and report fraud to the government.

The Chamber’s recommendations, if adopted would result in a major decrease in the willingness of employees to disclose fraud to their employers and to the government.



Fact #6

“Retaliation against Whistleblowers at All-Time High”



The ERC also concluded that today, *“Retaliation against whistleblowers [is] at all-time high.”*⁶

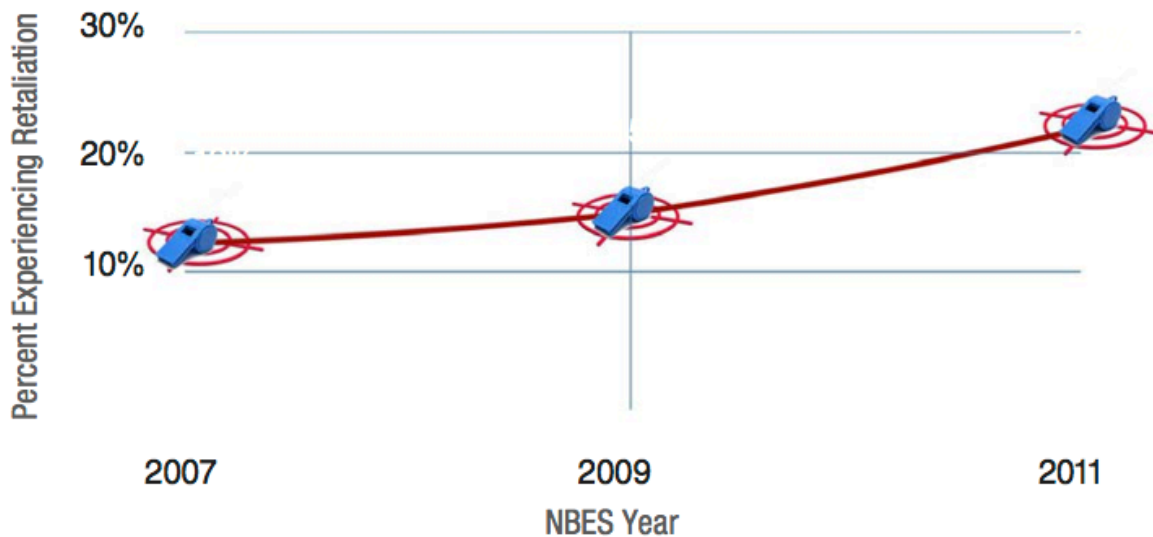
Nothing in the Chamber’s report constructively addresses this major problem, and nothing in the report is designed to ensure that employees who risk their careers to report fraud against the taxpayer can obtain justice.

Critically, by making it far harder for employees to qualify for rewards, the incentive on employers not to retaliate would be diminished.

The Chamber’s proposals, if accepted, would completely undermine the FCA incentive program and radically interfere with the government’s ability to access witnesses with inside knowledge of fraud.

“One of the most common reasons that employees choose not to report misconduct is fear of retaliation.”

RETALIATION AGAINST WHISTLEBLOWERS AT ALL-TIME HIGH*



* "National Business Ethics Survey" Report by the Ethics Resource Center, p15 (2011)⁷

According to the ERC's most recent findings:

“The more an employee persists in reporting a concern, the more likely he/she is to experience retaliation.”

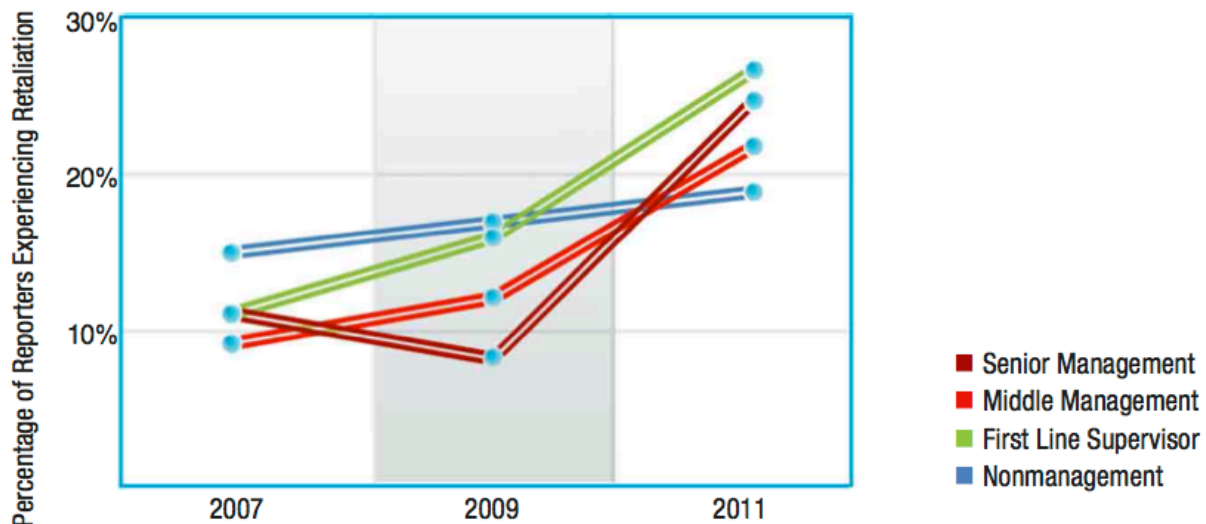
“Not only is retaliation on the rise nationally, it is rapidly becoming an issue even at companies with a demonstrated commitment to ethics.”

“One of the most common reasons that employees choose not to report misconduct is fear of retaliation.”

“40% of whistleblowers who go first to the hotline experience retaliation.”

“For the first time [since the ERC conducted its surveys] managers are now more likely to experience retaliation than non-management employees.”

SENIOR MANAGERS FACE GREATEST RISE IN RETALIATION *



*"Retaliation: When Whistleblowers Become Victims" Report by the Ethics Resource Center, p10

"The 'reforms' advocated by the Chamber not only fail to address this reality, they would undermine the most successful federal law which does."

A study from the University of Chicago Booth School reinforces these findings: Although **"employees clearly have the best access to information,"** the whistleblowers were **"fired, quit under duress, or had significantly altered responsibilities. In addition, many employee whistleblowers report having to move to another industry and often to another town to escape personal harassment."**

The study concluded: **"Not only is the honest behavior not rewarded by the market, but it is penalized. . . Given these costs, however, the surprising part is not that most employees do not talk; it is that some talk at all."**⁸

The "reforms" advocated by the Chamber not only fail to address this reality, they would undermine the most successful federal law which does.

Fact #7

The FCA is the Most Effective Law for Protecting Employees from Retaliation

As documented by the ERC and the Booth School studies, corporate culture remains hostile toward whistleblowers. The FCA and other whistleblower reward laws address both the short-term and long-term problems caused by the realistic fear experienced by employees who consider blowing the whistle.

- Reward laws create an incentive for employees to take a risk and report fraud.
- Reward laws establish safe and federally protected channels for reporting.
- Reward laws place a premium on raising concerns that are valid, well documented, and provable. Unlike retaliation laws, the only way to prevail in a reward law is to be right about the wrongdoing.
- Reward laws give employees a choice: report internally or report through a federal-protected channel that can offer real financial security. This creates powerful motivation for companies to compete with the federal programs by creating independent and effective compliance programs.
- Reward laws provide a safe channel for employees to report their allegations to law enforcement confidentially, and, if appropriate, obtain become a Confidential Informant.
- Reward laws permit employees who disclose their fraud-based allegations to the government to obtain protection from retaliation as government witnesses under the federal obstruction of justice laws.
- Reward laws permit the appropriate authorities to obtain evidence of fraud, and conduct effective investigations designed to protect the public interest, not to protect corporations from liability.

“Reward laws create an incentive for employees to take a risk and report fraud.”



Fact #8

Limiting Whistleblower Rewards Would Undermine Public Policy and Interfere with Employee Disclosures

Large whistleblower rewards are key to obtaining voluntary compliance with federal anti-fraud laws. Such rewards encourage employees to overcome their well-grounded fears that inhibit reporting and, specifically, encourage highly compensated employees to risk their careers to expose fraud and serve the public interest.

The Chamber's report makes it appear as if whistleblowers regularly make big windfalls when they file FCA cases. This is simply not true. Large rewards are few and far between. Since the FCA was amended in 1986, the average reward obtained by whistleblowers that filed a FCA case has been under \$465,000.⁹

Interestingly, the government does not publicize the fact that most FCA awards are either negligible or *very modest*. If one looks at the average reward and then takes into consideration a 20% chance of any recovery whatsoever, the federal and state taxes that relators must pay on their rewards, and the requirement to pay attorney fees and costs, the record actually demonstrates that relators are, on average, undercompensated.

The Chamber ignores the cruel financial reality facing most whistleblowers, and ignores the fact that many outrageous fraud cases result in criminal prosecution, and bankruptcy.

The fraudsters may go to jail, and their schemes are broken, but in these cases there is little or no recovery for the whistleblowers.

Large rewards serve the public interest. They trigger significant voluntary compliance, provide positive publicity for the programs, and are the key for inducing reluctant high-level and well-paid employees with inside knowledge of fraud to step forward. In order to recruit the best and brightest corporate managers, there is no cap on executive compensation. The same is true for the *qui tam* programs. Not every CEO is paid hundreds of millions of dollars, but the absence of a cap is an incentive for excellence and permits the free market to do what it does best – motivate positive actions.

Placing limits on whistleblower rewards would undermine the FCA. Since the overwhelming majority of *qui tam* rewards are very modest, the government needs to pay very large rewards on major cases in order to induce employees to provide inside information about major fraud to appropriate officials.

Modest rewards would not motivate the vast majority of reluctant employees to risk their entire career simply to stand a 20% chance of obtaining a small recovery. Potentially large rewards will motivate reluctant whistleblowers.

When President Lincoln signed the FCA into law in 1863, the rewards were set at 50%.¹⁰ Today, the average award paid to a whistleblower is only 15%. If anything, the actions of the Department of Justice should be questioned as to why their average award is set at the lowest possible level.

Rewards are designed to incentivize high-risk behavior that serves the government's and the taxpayer's best interests. These rewards have nothing to do with paying out compensation for damages an individual may suffer from a tort. Large rewards have nothing in common with the abuse of punitive damage awards or runaway jury verdicts.

The amount of damages owed to the government is carefully set forth in the statute and readily subject to policing by the courts. The amount of a reward is *not paid* by the taxpayer; rather, it comes out of the fines and penalties actually obtained from the government that can be directly attributed to the specific contribution of the whistleblower.

There is no empirical support for the Chamber's proposed award limits. Given the scarcity of such awards, even if these rare exceptions posed a problem, there would still be no justification for amending the Act simply to address such anomalies. Capping rewards undermines the entire purpose of the law. Arbitrary limits do not serve the public interest but discourage some of the most important potential sources of information on fraud against the government from ever coming forward.

“There is no empirical support for the Chamber's proposed award limits.”



Fact #9

The FCA Does Not Need to be Amended in Order for Companies to Adopt Effective Rules for Internal Compliance

The Chamber's report is predicated on a false and illogical dichotomy. The Chamber claimed that there was a need to weaken the FCA in order to strengthen corporate compliance. The opposite is true.

There is no need to weaken the FCA in order to have the business community implement effective fraud detection programs. There is no need to establish a government-sponsored agency to "accredit" compliance programs. Compliance professionals and fraud examiners have researched what it takes to implement effective compliance programs. These best practices are not a secret.

The Association of Certified Fraud Examiners created a highly respected "Fraud Prevention Checklist." This checklist is based on input from the association's 60,000 members. The ACFE checklist consists of eleven general categories of programs, including a total of 28 sub-categories.¹¹

Corporations can adopt these recommendations, without having government-sponsored accreditation and without destroying the False Claims Act.

In fact, any weakening of the FCA would be counterproductive and lessen the incentive for institutions to self-regulate.

Moreover, *nothing* in the Fraud Prevention checklist supports a finding that whistleblower protection laws should be weakened. Instead of gutting the highly effective FCA, the ACFE now looks at corporations that voluntarily pay whistleblower rewards as part of a comprehensive "Anti-Fraud Control."

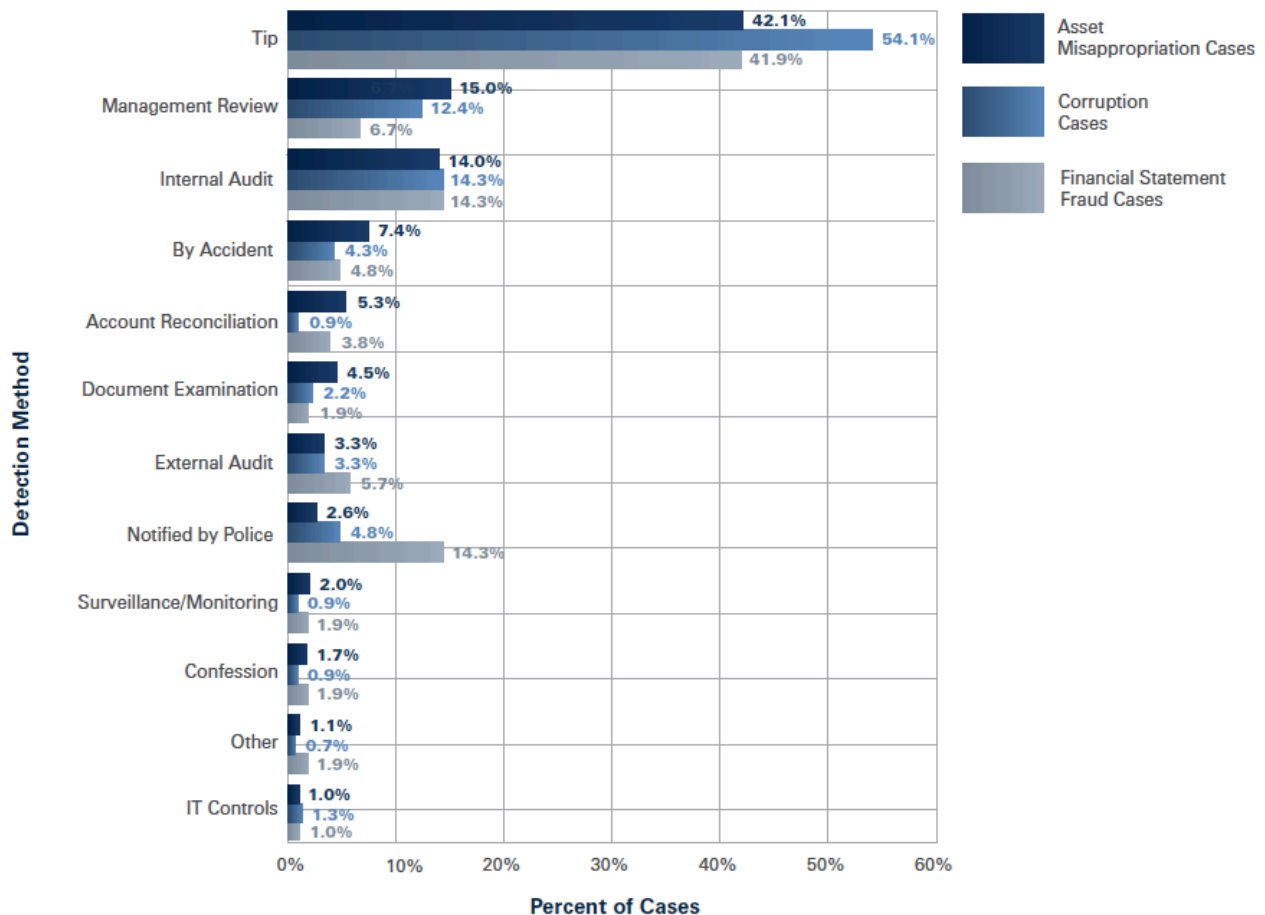
Corporate trade associations, such as the Chamber of Commerce, should play a leading role in urging their members to implement the checklist.

Based on years of experience, the current weaknesses in corporate compliance programs have been well documented by leading professionals within the compliance community. For example, the RAND Center for Corporate Ethics and Governance published "Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds: What the Policy Community Should Know."¹²

As part of this program, RAND published a paper by Donna Boehme, a highly respected compliance professional and the former Chief Compliance officer of two multinational corporations, including BP Oil. Ms. Boehme explained many problems experienced by compliance programs, why these programs fail, and what steps need to be taken in order to make compliance programs more effective.

The complex, costly, and ultimately absurd proposals put forward by the Chamber to create a best practices model is simply not needed. Compliance professionals and experts have already set forth the models needed for success. The Chamber has simply ignored this research.

Detection Method by Scheme Type



* "Report to the Nations on Occupational Fraud and Abuse" Report by the Association of Certified Fraud Examiners. p.19 (2012).

Fact #10

Laws Already Exist That Require Government Contractors to Operate Effective Internal Compliance Programs

Many of the “reforms” advocated by the Chamber of Commerce are predicated on promoting internal corporate compliance programs. The Chamber stated: *“[Businesses] should be incentivized to maintain effective compliance programs.”*

This justification for the “reforms” is unsupportable. First, all major federal contractors and publicly traded corporations are already required under federal law have effective internal corporate compliance programs. For federal contractors covered under the FCA, the Federal Acquisition Regulations (FAR) mandate such programs.¹³

Second, if there are problems with the FAR’s corporate compliance requirements, it is the FAR that should be amended.

Third, it is the existence of the FCA that provides companies with strong incentives to institute effective internal compliance programs.

All of the improvements for internal compliance programs suggested by the Chamber could and should be properly implemented as part of FAR rulemaking.

If the Chamber’s call for “reform” was not disingenuous, they would be working with their own members to fix their compliance programs, not lobbying Congress to undermine America’s “most important tool to uncover and punish fraud against the United States.”

Fact #11

The FCA Strongly Encourages Businesses to Maintain Effective Compliance Programs

Unlike the impression given in the Chamber's report, the FCA is *not* a negligence or strict liability law. As explained by the Department of Justice in its FCA Primer: *"A person does not violate the False Claims Act by submitting a false claim to the government."*¹⁴

This point was made perfectly clear in the 1986 Senate Report on the FCA: *"The Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence."*¹⁵

How can a company escape *all* liability under the FCA, even if it submits a false claim to the government?

The answer is simple: create internal controls that prevent or reduce the probability that a business can be accused, of promoting "deliberate ignorance" of fraudulent conduct.

Congress crafted the FCA to directly address the need for effective internal compliance programs. During the hearings held on the FCA in 1986, Congress heard many witnesses complain about retaliation within corporate compliance programs. Companies that negligently or innocently submitted false claims would be immune from liability. If, however, a whistleblower reported a concern, and the company tried to cover it up or failed to have proper internal controls, the company could not escape liability.

The 1986 Senate Report on the FCA spelled this out clearly:

"The Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence. But the Committee does believe the civil False Claims Act should recognize that those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate."



* * *

“While the Committee intends that at least some inquiry be made, the inquiry need only be ‘reasonable and prudent under the circumstances,’ which clearly recognizes a limited duty to inquire as opposed to a burdensome obligation. The phrase strikes a balance which was accurately described by the Department of Justice as ‘designed to assure the skeptical both that mere negligence could not be punished by an overzealous agency and that artful defense counsel could not urge that the statute actually require some form of intent as an essential ingredient of proof.’”

The “deliberate ignorance” standard was crafted with an eye toward ensuring that companies have strong internal controls. Indeed, Congress was well aware that corporate inspectors were often the target of retaliation and, in fact, endorsed the finding of a 9th Circuit Court of Appeals ruling that held that internal inspectors should be fully protected under anti-retaliation laws, even if they never contacted the government.¹⁶

The FCA is already designed to encourage businesses to create strong, independent, and effective compliance programs. As more cases are filed under the FCA, more companies will come to recognize that it is to their advantage to institute effective compliance programs.

“The FCA is already designed to encourage businesses to create strong, independent and effective compliance programs.”

Fact #12

Corporations Have Undermined Compliance Programs by Arguing That They Can Fire Employees Who Report Violations inside the Company

The Chamber of Commerce and its members have argued for the past 30 years that internal disclosures to corporate compliance programs or company managers are not protected whistleblower activities. This argument has undermined internal compliance programs. In 1984, Brown & Root fired a corporate compliance inspector and argued that whistleblowers who only reported their concerns within the company had no rights, and could be fired at-will.

In that case, Ronald Reagan's appointed Secretary of Labor ruled that internal disclosures were protected, and ordered the whistleblower to be reinstated. Brown & Root disagreed, and appealed the case to the U.S. Court of Appeals for the 5th Circuit. The court backed Brown & Root. The 5th Circuit explicitly held that in order to be a whistleblower, an employee must contact a "competent organ of government."¹⁷

Since that decision, corporations who are active members of the Chamber of Commerce have aggressively argued that contact with internal compliance programs is *not* a protected activity.

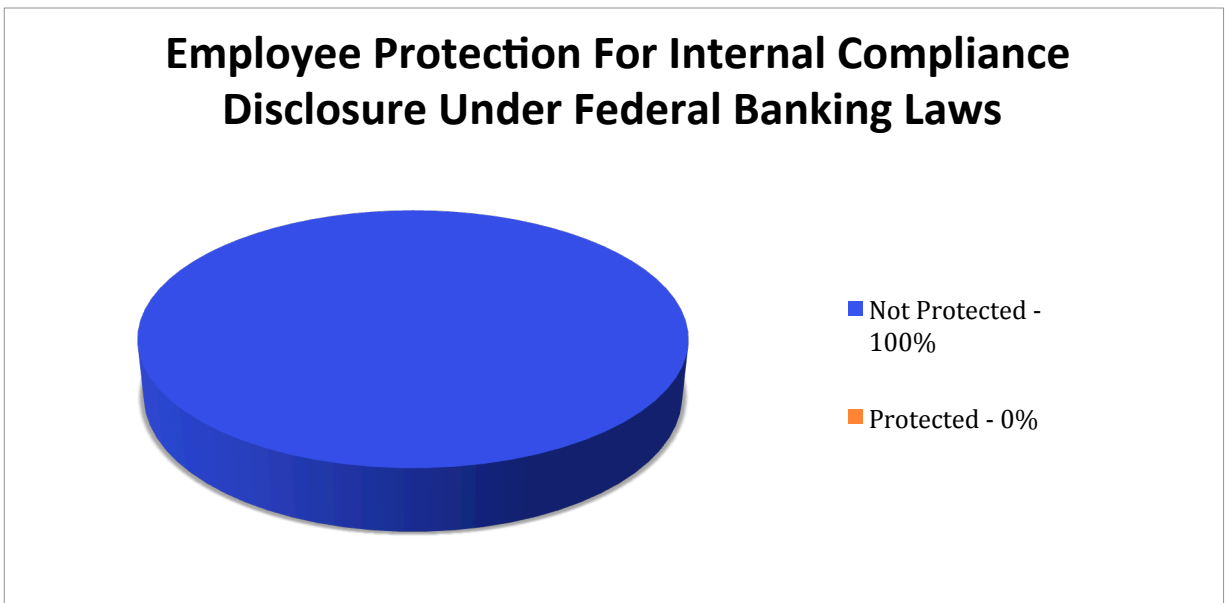
The FCA has not undermined internal compliance programs. Instead, it has been the Chamber of Commerce and its members who have aggressively, and successfully, urged courts to uphold the termination of whistleblowers who report their allegations of fraud to internal corporate compliance programs.

To demonstrate this point, we examined whistleblower cases decided under two long-standing laws that protect whistleblowers: the federal banking whistleblower protections laws and the FCA.



Banking Law Cases: Whistleblower protection provisions have existed under federal banking laws for over 20 years. In every case where the issue has been litigated, companies have argued that employees who disclosed bank fraud internally could be fired. The banks prevailed in all the cases. Whistleblowers who raised their concerns to their managers or to compliance programs lost their jobs.

False Claims Act Cases: A review of the False Claims Act revealed a similar pattern. Under the 1986 version of the FCA, every reported case in which internal whistleblowing was an issue, the employers argued that internal reporting of fraud was not protected. There is not one reported case in which a company argued that employees who disclosed allegations to compliance departments should be protected as a matter of law.



All of the published rulings under the banking whistleblower laws have held that internal disclosures are *not* protected. These findings are reflected in Chart of Cases Under Federal Banking Whistleblower Laws.¹⁸

Unfortunately, the employers' narrow views on protected activity prevailed in the vast majority of court cases filed under the FCA. Below is a circuit-by-circuit review of the controlling rule on internal protected disclosures under the 1986 version of the FCA various federal judicial circuits:

U.S. Federal Circuit Court Precedents: Where Corporations Have Undermined Compliance Programs

1st Circuit

• ***U.S. ex. rel. Karvelas v. Melrose-Wakefield Hospital*, 360 F.3d 220 (1st Cir. 2004)**: "Conduct protected by the FCA is limited to activities that 'reasonably could lead' to an FCA action [. . .] Karvela's statement that he reported his supervisors' destruction of incident reports of medical errors suggests a cover-up of regulatory failures but does not allege investigation or reporting of false or fraudulent claims knowingly submitted to the government."

2nd Circuit

• ***Rost v. Pfizer*, 2010 U.S. App. LEXIS 23787**: The Court refused to protect employees under the False Claims Act despite disclosures made to supervisors within Pfizer.

3rd Circuit

• ***Hutchins v. Wilentz*, 253 F.3d 176 (3rd Cir. 2001)**: "Simply reporting [a] concern of mischarging [. . .] does not establish that [plaintiff] was acting in furtherance of a qui tam action [. . .] He did not communicate that he was going to report the activity to government officials."

4th Circuit

• ***U.S. ex. rel. Owens v. First Kuwaiti*, 612 F.3d 724 (4th Cir. 2010)**: "Simply reporting his concern of mischarging [. . .] to his supervisor does not suffice to establish that [an employee] was acting in furtherance of a qui tam action [. . .] Any large enterprise depends on communication, so it is hardly surprising that Owens at times reported problems he thought he saw on the site."

5th Circuit

• ***Robertson v. Bell Helicopter*, 32 F.3d 948 (5th Cir. 1994)**: "Robertson admitted that he never used the terms 'illegal,' 'unlawful,' or 'qui tam action' in characterizing his concerns about Bell's charges [. . .] We conclude that Robertson's reporting did not constitute protected activity under the False Claims Act."

5th Circuit

• ***Sealed v. Sealed*, 156 Fed. Appx. 630 (5th Cir. 2005)**: "In his complaint, Appellant alleges he conducted the audit in his capacity as Director of Compliance. He also alleges that, in that capacity, he informed Appellee's chief compliance officer, as well as corporate managers, of his signature requirements and the results of his audit, and that he gave a presentation about the problem at the compliance retreat [. . .] plaintiff could not show retaliatory discharge where his investigations were part of his job and he never characterized his concerns as involving illegal, unlawful, or false-claims investigations."

6th Circuit

• ***McKenzie v. BellSouth Telecommunications*, 219 F.3d 508 (6th Cir. 2000)**: "Reporting concerns of mischarging a government project or investigating an employer's non-compliance with federal or state regulations was insufficient to constitute 'protected activity' [. . .] her numerous complaints on the matter were directed at the stress from and pressure to falsify records, not toward an investigation into fraud on the federal government."

7th Circuit

• ***Brandon v. Anesthesia & Pain Management*, 227 F.3d 936 (7th Cir. 2002)**: "It is true that Brandon used terms like 'illegal,' 'improper,' and 'fraudulent' when he confronted the shareholders about the billing practices [. . .] Brandon was simply trying to convince the shareholders to comply with Medicare billing regulations. Such conduct is usually not protected."

9th Circuit

• ***U.S. ex. rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996)**: "The record quite clearly shows Hopper was merely attempting to get the School District to comply with Federal and State regulations. Her numerous written complaints, seventy letters and over fifty telephone calls were all directed towards this end [. . .] she was not whistleblowing."

10th Circuit

• ***U.S. ex. rel. Ramseyer v. Century Healthcare*, 90 F.3d 1514 (10th Cir. 1996)**: "The amended complaint states that plaintiff [. . .] regularly communicated to her superiors information regarding non-compliance with the required minimum program components [. . .] we do not believe plaintiff has satisfied her burden of pleading facts which would put defendants on notice that she was taking any action in furtherance of an FCA action."

D.C. Circuit

• ***Hoyte v. American National Red Cross*, 518 F.3d 61 (5th Cir. 2008)**: "An employee's investigation of nothing more than his employer's non-compliance with federal or state regulations is not enough to support a whistleblower claim."

Fact #13

The Chamber's True Position is that Corporate Compliance Programs are a Tool for Corporate Attorneys to Collect Information in Order to Protect the Company - Not the Public

The Chamber of Commerce uses the phrase "corporate compliance" in a misleading and disingenuous manner. In a major U.S. Court of Appeals 2014 case, the Chamber's position on such internal compliance programs was clarified.¹⁹ The Chamber vigorously argued that such programs were, as a matter of law, part of a company's General Counsel. They argued that compliance departments were not independent investigatory bodies, but simply fact-finding bodies designed to provide information to company attorneys. As such, compliance investigations could operate in complete secrecy, and their findings could be kept secret from the government, even if subpoenaed.

In the appeals court case of *In re KBR*, the Chamber joined with the largest Iraq War defense contractor, KBR-Brown & Root, to successfully suppress the findings of KBR's compliance program.

The lower court had reviewed the compliance records and determined that the records proved that KBR engaged in serious fraud against the taxpayer.²⁰ However, the Chamber prevailed on appeal, and succeeded in suppressing the public release of these documents, because they were part of the confidential corporate attorney managed "compliance" program.

The Chamber's success in *KBR* is even more troubling, given the lower court's findings that were all reversed on appeal. The federal trial judge privately reviewed the "compliance" records and found them to be "eye-openers," demonstrating that KBR employees were "paid off" resulting in contracts being awarded that were "more expensive to the United States," despite "terrible performance" and "regular attempts to double bill."

But the appeals court agreed with the Chamber's argument, and held that the compliance department was, in fact, not independent, but was simply an arm of the company's General Counsel, with a mission to serve the best interests of its client.

Such programs, when stripped to their essence, are not compliance programs at all. They are simply arms of the corporation's legal department, with the mission of protecting the company from regulatory sanction or liability for fraud. They are the foxes that guard the chicken coops.



Fact #14

Chamber-Endorsed “Compliance” Programs Can Use Information Obtained by the Whistleblower to Investigate and Fire the Whistleblower

The so-called compliance programs advocated by the Chamber of Commerce are so riddled with conflicts of interest that the New York State Bar association has required that extensive warnings be provided to employees who provide information to these “compliance” programs.

Because the compliance program was simply an arm of the company’s lawyers, the New York Bar approved the following warning that needed to be read to employees who contacted the compliance department: *“I want to caution you that I am an attorney for the Company and not for you or other employees. Therefore, while I can record your complaint, I cannot and will not give you legal advice, and you should not understand our conversation to consist of such advice. I do advise you to seek your own counsel, however, as your interests and the Company’s may differ.”*²¹

Similar warnings are required by other state bar associations and recommended by the American Bar Association.²² These warnings are necessary because compliance programs advocated by the Chamber are designed to serve the best interests of the company, not the whistleblower. As a matter of law, the company can use the information obtained by the whistleblower to fire a whistleblower and to discredit the fraud allegations.

Nonetheless, the Chamber also urged the court in *KBR* to find that KBR’s practice of not providing explicit warnings to employees was acceptable under federal law. Under this precedent whistleblowers can be deceived into thinking they were talking to a truly independent compliance department, corporate counsel could in fact keep all their whistleblower concerns secret, and use the information obtained from the whistleblower to undermine the whistleblower.

Moreover, the Chamber also urged the court to uphold highly restrictive nondisclosure agreements. The NDA backed by the Chamber actually threatened employees with termination if they told anyone outside the company about their fraud allegations. These restrictive NDAs contained *no* exception for contacting the government, even if the employee had direct evidence that federal anti-fraud laws were being violated.²³

Make no mistake about it. The Chamber’s vision of appropriate “compliance” programs is in fact a compliance trap. The programs are so anti-whistleblower that even a Senior Counsel for General Electric Company urged his fellow corporate attorneys to give clear warnings to employees or face potential liability.²⁴

Fact #15

Mandating Internal Disclosures Would Undermine the Effectiveness of Compliance Programs

In its comprehensive rulemaking, the Securities and Exchange Commission also evaluated the cost-benefit analysis of “encouraging” internal reporting programs but *not* “mandating” these programs. The Commission correctly recognized that the competition between internal corporate programs and a well-managed government reward program would strongly encourage companies to institute effective compliance departments. If internal reports became mandatory, the positive pressure caused by competition would be lost.

This is a complete repudiation of the Chamber’s proposal to make reporting to “compliance” programs mandatory.

The Commission described this cost-benefit analysis as follows:

“[W]e believe that the final rules, by encouraging internal reporting without mandating it, allows whistleblowers to balance the potential increase in the probability and magnitude of an award by

participating in an effective internal compliance mechanism against the particular risks that may result from doing so. By allowing potential whistleblowers to make this assessment and encouraging them to report internally in situations where their tips will be appropriately addressed, the final rule should promote efficiency in how violations are reported and resolved. Furthermore, issuers who previously may have underinvested in internal compliance programs may respond to our rules by making improvements in corporate governance generally, and strengthening their internal compliance programs in particular.”²⁵

“The SEC correctly recognized that the competition between internal corporate programs and a well-managed government reward program would strongly encourage companies to institute effective compliance departments.”

Fact #16

Mandating That Whistleblowers Report Violations of Law Internally Constitutes an Obstruction of Justice

The Chamber's proposal that employees be compelled to report fraud to their bosses or to corporate counsel managed compliance programs violates numerous Supreme Court precedents, fundamental public policies, and the Federal Obstruction of Justice statute.

It is a fundamental right of citizens to report suspected criminal wrongdoing to law enforcement.²⁶ Any incentive to hide or delay the disclosure of illegality from the appropriate authorities is a violation of some of the most important and time-honored public policies in a democratic state.²⁷

Consistent with these policies, federal law creates a near *absolute* protection for employees who contact federal law enforcement agencies in order to report suspected violations of law.

The Federal Obstruction of Justice statute *criminalizes* any attempt to interfere with the "livelihood" of any person who reports truthful information to a law enforcement agency regarding a potential violation of law:

*"Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense shall be fined under this title or imprisoned not more than 10 years, or both."*²⁸

If a citizen witnesses a young mugger stealing a pocketbook, it would be absurd to require that witness to call the mugger's mother before notifying police. Corporate criminals should not be treated any better. If an employee witnesses a corporate crime, they should be encouraged to immediately report that crime to the police, and not be required to first report to the employer. That is the law and the tradition in the United States.

Fact #17

The FCA Saves the Government Costs and Does Not Encourage Frivolous Complaints

The Chamber's report alleges that the FCA "incentivize[s] the filing of frivolous lawsuits" and "generates unnecessary litigation costs for government and businesses." The report also implies that the over-filing of FCA claims is a problem as "litigation under the FCA has steadily increased."

These claims are completely unsupported.

First, the University of Chicago's Booth School of Economics' study debunked any allegation that the FCA increases the filing of frivolous litigation: "[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits."²⁹

Second, the FCA has a provision that requires federal courts to sanction relators who file frivolous lawsuits.³⁰ Since 1986, of the nearly 10,000 cases filed, only *eleven* cases of sanctions have been awarded. Six of those cases were against pro se filers who cited to the FCA as part of their absurd cases.³¹ The FCA's sanctioning authority permitted the courts to stop the abusive filings, whereas laws also abused by these filers did not permit sanctions.

The other five cases were also not whistleblower cases but frivolously argued issues such as copyright infringement or breach of private contracts previously rejected in other, similar courts.

Third, over-filing of *qui tam* lawsuits is not a problem. In 2013, a total of only 753 FCA cases were filed.³² This is an absolutely miniscule number compared to the total number of civil lawsuits (284,606), or even employment discrimination lawsuits (33,309) filed during the same time period.³³ The real problem is not that FCA cases are flooding the federal courts, but that not enough insiders with knowledge about fraud against federal programs are filing claims.

Finally, as reflected in the Congressional testimony of the U.S. Department of Justice, the *qui tam* suits do not cause the government "unnecessary litigation costs," but instead save the government (and therefore the taxpayer) significant amounts of money by providing the DOJ with high-quality information necessary to investigate complex and secretive fraud.³⁴

"The University of Chicago's Booth School of Economics' study debunked any allegation that the FCA increases the filing of frivolous litigation."



Fact #18

Barring Federal Employees from Using the FCA Will Promote Fraud

The Chamber proposed a blanket ban on the right of federal employees to use the FCA. The problem with this approach is twofold. First, in the nearly 30 years since the law was amended, federal employees have not used the law. The few instances cited to by the Chamber resulted in either the dismissal of the claim or, in one case, a well deserved, modest recovery. Of the billions and billions of dollars in fraud uncovered by whistleblowers under the FCA, the Chamber pointed to just one case in which a whistleblower obtained a modest reward of \$408,000.³⁵ In that case the employee had reported the fraud for nearly four years prior to filing her claim. She had reported it to managers, postal inspectors and the Inspector General. This was not the case of an employee gaming the system. It was the case of an employee trying to do the right thing.

The real problem has been the lack of federal employee involvement in the FCA. Federal employees are perfectly positioned to identify fraud by government contractors. However, it is well known that the Department of Justice opposes efforts by federal employees to use the law, and has argued in court that these employees should be blocked from obtaining rewards.

In 2008, the Senate Judiciary Committee carefully studied this problem and proposed a constructive amendment to the FCA. In a bipartisan proposal, the Judiciary Committee suggested a special procedure for encouraging federal employee use of the FCA. Under this procedure, federal employees would be required to report all allegations of fraud to the appropriate Inspector General (IG). Only if the IG failed to take action within one year, could the employee then independently pursue a FCA claim. This compromise was fully accepted by all parties, and thus, should be implemented.³⁶

The blanket gag promoted by the Chamber would only result in massive amounts of fraud going unreported. The bipartisan Senate proposal would encourage federal employees to report fraud to the Inspector General, encourage IGs to fully investigate these allegations, and only if the IG process failed to work, permit employees to go forward. Given the unique status of federal employees, this is a workable compromise.

“The blanket gag promoted by the Chamber would only result in massive amounts of fraud going unreported.”

Fact #19

The Chamber's Justification for Barring FCA Cases after Defendants Make a Disclosure to the Government Is a Green Light for Fraud

The Chamber argued on page 16 of their report that “under the current FCA a *qui tam* plaintiff who files suit after the defendant has already disclosed the same conduct to an agency Inspector General is entitled to proceed with the suit and receive a full bounty.”

This argument is false and very misleading. In Endnote 43, the Chamber cites to the case of *U.S. ex rel Spay v. CVS*, 913 F.Supp.2d 125 (E.D. Penn. 2012) to support this position.

This case, however, fully explains the absurdity of the Chamber's argument. In CVS, the company produced “data” to the government that would later be used to demonstrate Medicare. The data itself was meaningless. However, the whistleblower performed an audit based on the data. The audit documented six areas in which CVS had “illegally” submitted drug claims to Medicare for payment, including selling expired drugs, overcharging the government, paying for drugs prescribed by “doctors” with false identities, and billing the government for drugs sold over approved limits.

The whistleblower's audit uncovered 48,702 instances of CVS “fraudulently” billing the government and getting payment. The case concerned CVS' “regular and knowing” submission of “false or fraudulent” claims. Moreover, it alleged that CVS “intentionally and fraudulently thwarted” the mandatory anti-fraud program.

Before the Court, CVS raised the same argument as the Chamber now raises before Congress in its report. The argument was rebuffed as completely frivolous.

The district court judge explained: *“To now accept Defendants' theory would mean that by their very act of submitting their allegedly false claim via the PDE reports, Defendants have effectively shielded themselves from FCA liability. . . This clearly cannot be the correct result.”*

Under the Chamber's proposed “reform,” submitting a false claim to the government can result in immunity from liability.³⁷



Fact #20

The Chamber's Proposal to Make it Harder to Prove Fraud Was Refuted Years Ago by the Reagan Administration

The Chamber urges Congress to make it far harder to prove fraud in government contracting. The Chamber proposes to jettison the traditional requirement that the government should prove fraud by a "preponderance of evidence," and instead wants to force the government to prove fraud by "clear and convincing" evidence.

What the Chamber failed to mention is that this issue was hotly debated in 1986, and the Chamber's allies lost that debate. It was officials of the Reagan Administration who clarified this argument and insured that the government would not be handicapped when trying to stop fraud against the taxpayer.

President Reagan's Associate Deputy Attorney General testified before the Senate Judiciary Committee that, "because the False Claims Act is basically a civil, remedial statute, the traditional 'preponderance of evidence' standard of proof is appropriate."³⁸

The U.S. Supreme Court fully supported the Reagan Administration's position.³⁹ It is the same standard of proof used in other fraud cases.

Fact #21

The Chamber Mischaracterized the SEC Rules for Whistleblowers

The Securities and Exchange Commission (SEC), after engaging in the most comprehensive government review of whistleblower reward programs ever undertaken, rejected many of the same proposals now being rehashed by the Chamber. In 2010-11 the SEC solicited thoughtful and well documented comments related to structuring a rewards program for securities-fraud whistleblowers.

The Commissioners personally met with all the relevant stakeholders, including representatives from the Chamber of Commerce. The final rule, based on hundreds of detailed comments, including numerous comments from the Chamber of Commerce and its close allies, provides no support whatsoever for any of the Chamber's FCA-gutting recommendations.

In its report, the Chamber mischaracterized the SEC's final rules. The Chamber correctly noted that the SEC endorsed a number of rules promoting "regulatory incentives to encourage employees to report possible violations . . . to the company." However, the Chamber failed to point out that the SEC provided this encouragement *without placing any limits on the right of an employee to report concerns directly to the government.*⁴⁰

Many of the Chamber's recommendations are predicated on placing mandatory restrictions on the right of employees to report fraud to the government. The Chamber failed to point out that the SEC completely rejected these very same proposals, and with good reason.

"It is well established that employees are the single most important source for detecting fraud."

Fact #22

The FCA's Penalties Are Not Excessive

The Chamber argues that the penalty provisions of the FCA, which permit civil penalty awards from \$5,500 to \$11,000 per claim, should be removed. Further, it claims that “courts have almost uniformly concluded that a penalty should be awarded for each false claim submitted, which can result in an award of tens or hundreds of millions of dollars for large number of law-dollar claims.”⁴¹

This argument is false and misleading. The Chamber cited to, with approval, a district court case, which awarded no *damages whatsoever* in a case in which the company submitted 9,136 false or fraudulent claims, focused on a bid-rigging. The appeals court appropriately rejected the no-damages holding, which would have permitted the company to escape all liability after having submitted thousands of false claims to the government. The court, however, also rejected a strict application of the \$5,000-11,000 penalty provision.

Instead, the court correctly ruled that the FCA could not impose excessive fines or penalties on a defendant. But instead of permitting a fraudster (who also engaged in criminal bid-rigging as part of the scheme) to escape the penalties provision and profit from its fraud, the appeals court upheld a flexible approach for setting reasonable damages.

As the appeals court correctly reasoned:

“The District Court’s methodology cannot be said to have furthered the statutory purpose. Indeed, an award of nothing at all because the claims were so voluminous provides a perverse incentive for dishonest contractors to generate as many false claims as possible, siphoning ever more resources from the government. Though we agree that the number of false invoices presented is hardly a perfect indicator of the relative liability that ought to attach to each FCA defendant, injustice is avoided in the particular case by the discretion accorded the government and a relator to accept reduced penalties within constitutional limits, as ultimately adjudged by the courts.”⁴²

In the second case cited to by the Chamber of Commerce to justify its gutting of the FCA, the Federal District Court also prohibited the government from collecting excessive penalties. The court ruled that it was impermissible to collect the full civil fine for all 51 violations of law the defendant committed, and reduced the penalties permitted to a maximum amount of merely \$35,000, or just \$687 per violation.⁴³

Other courts have also reduced or eliminated per/violation penalties when they were deemed excessive.⁴⁴

Fact #23

The Chamber's Proposal to Limit Recoveries to "Net Actual Damages" is Not Needed

The Chamber of Commerce alleges that under the FCA, "courts have increasingly been willing to award the United States all amounts paid on a claim, without considering the actual out-of-pocket loss to the government and ignoring the benefits of goods and services that were received by the government."⁴⁵

This accusation incorrectly states the controlling law and is not accurate.

The actual rule is extremely clear: "[T]he Supreme Court has instructed that [the] 'Government's actual damages are equal to the difference between the market value of the [product] it received and retained and the market value that the [product] would have had if [it] had been the specified quality.'⁴⁶ This legal rule is not controversial and results in a fair assessment of damages in almost all FCA cases.

The Chamber's proposal would actually change the long-standing rule that permits the government to obtain adequate damages in cases when the United States receives *no value whatsoever* from the defendant who robbed from the taxpayer.

The current rule of law, universally accepted in the courts, only permits the United States to alter the "benefit of the bargain framework" outlined above in a very narrow group of cases in which "*the government proves that it received no value from the product delivered.*"⁴⁷

The Chamber's defense of contractors, who take federal monies, commit fraud, and provide "no value" whatsoever to the taxpayers after taking the taxpayer's money, is inexplicable.

The case for which the Chamber rests its argument exposes the dangerous nature of the so-called "reform." The grant program for which the defendant defrauded was intended to "help small businesses maintain and strengthen the competitive free enterprise system." Rather, the company used this program designed to help small businesses to illegally enrich themselves at taxpayer expense.

As to the "benefit" obtained by the United States in exchange for the company obtaining hard-earned taxpayer money, the court explained that "the contracts entered into between the government and Defendants did not produce a tangible benefit. . . these were not, for example, standard procurement contracts where the government ordered a specific product."



Significantly, the product produced by the fraudsters was not even owned by the government: “[T]he purpose of the grant program was to enable small businesses to . . . commercially market their products. The Government’s benefit of the bargain was to award money to eligible deserving small businesses . . . [which] was lost as a result of the Defendants’ fraud.”⁴⁸

Thus, the Defendant illegally took taxpayer money, to develop a product that the government would not own, and that they could thereafter sell for a profit on the market. The defendants not only stole from the taxpayer, but also used their ill-gotten gain to obtain a competitive advantage in the free market over companies that did not lie to obtain a grant.⁴⁹

Why would the Chamber of Commerce want to support such fraudulent activity?

“Why would the Chamber of Commerce want to support such fraudulent activity?”

Fact #24

The FCA Does Not Permit Recovery for Violations of “Any Fine-Print Regulatory Requirement”

The Chamber’s claim that “any fine-print regulatory requirement” can result in FCA liability is patently false and misrepresents the FCA. In the very first case cited to by the Chamber to justify its argument, the court was very careful to “caution” that liability under an implied certification theory cannot be interpreted “expansively and out of context.” The court explained that the FCA “was not designed for use as a blunt instrument to enforce regulatory compliance,” and that law should not be interpreted in an “expansive fashion” that would “improperly broaden the Act’s reach.”⁵⁰

As the court reasoned, if the theory was to be applied at all, it could only be applied “when the underlying statute or regulation... expressly states that the provider must comply in order to be paid.” Furthermore, a plaintiff would have to prove knowledge and intent.

It is not surprising that the court *rejected* the implied certification claim at issue in the case cited to by the Chamber, given the very standard of proof.⁵¹

The second case cited by the Chamber met the same fate. The court rejected liability simply because the company violated Medicare marketing regulations.⁵²

This holding is consistent with other cases cited to by the Chamber in its parade of horrors. The 6th Circuit Appeals Court explained that in addition to proving regulatory violations, a whistleblower would also have to prove that the contractor “presented compelling evidence” that the defendant “knew or recklessly disregarded” the risk that the law was intended to prevent.⁵³

The theory of liability postulated by the Chamber has been uniformly rejected by every court: “When a violator of government regulations is ineligible to participate in a government program and that violator persists in presenting claims for payment that the violator knows the government does not owe, that violator is liable under the Act . . . The FCA does not create liability merely for a health care provider’s disregard of Government regulations . . .”⁵⁴



Fact #25

The FCA Promotes Free and Fair Market Competition

In its historic and massive whistleblower rulemaking proceeding, the SEC came to the conclusion that a robust rewards system was essential to protect honest business and promote fair competition. After rejecting many of the proposals now being rehashed by the Chamber of Commerce to a different body, the SEC concluded:

We do not believe the final rules will impose undue burdens on competition and, indeed, **we believe the rules may have a potential pro-competitive effect. Specifically, by increasing the likelihood that misconduct will be detected . . . the rules should reduce the unfair competitive advantages that some companies can achieve by engaging in undetected violations.**⁵⁵

The Chamber's proposals will have a perverse effect on the markets. Honest contractors will be placed at a competitive disadvantage to those who are willing to break the rules. Under the Chamber's proposal, almost all instances of fraud will never be reported to the government. For the few that would be, the Chamber wants an insurance policy that they will not be held accountable for breaking the rules and outbidding honest companies. The Chamber's proposals would require that the company's lawyers and managers (including those directly responsible for breaking the law) learn that these crimes were uncovered by whistleblowers *before* the government learns of the criminal activity. Thus, the fraudsters would be positioned to cover them up, shift the blame, or mitigate their liability before they are properly sanctioned.

"The Chamber's proposals will have a perverse effect on the markets. Honest contractors will be placed at a competitive disadvantage to those who are willing to break the rules."

Conclusion

After carefully studying the enormous success the False Claims Act has had on fraud detection, the University of Chicago's Booth School of Economics' study on whistleblowing concluded that laws such as the FCA should be expanded, not destroyed.

"A natural implication of our findings is that the use of monetary rewards providing positive incentives for whistle blowing is the possibility of *expanding the role for monetary incentives.*"

"The idea of extending the *qui tam* statute to corporate frauds (i.e. providing a financial award to those who bring forward information about a corporate fraud) is very much in the Hayekian spirit of sharpening the incentives of those who are endowed with information."⁵⁶

The Chamber's proposals are not designed to serve the public interest, to increase fraud detection, or to protect whistleblowers. They are designed to protect the few dishonest corporations who lie and cheat to obtain government contracts and those who steal from the taxpayer. The Chamber's proposals should be rejected in their entirety. Instead, the recommendations of the Senate Judiciary Committee and the University of Chicago's Booth School study of Economics' should be embraced, and whistleblower reward laws should be *expanded*, not gutted and undermined.

About the National Whistleblowers Center

The National Whistleblowers Center (NWC) is a non-partisan, non-profit organization based in Washington, D.C. See our web page at: www.whistleblowers.org. Since 1988 the NWC has advocated for the protection of employees to lawfully disclose fraud and violations of law to the appropriate authorities. You may contact the NWC at ars@whistleblowers.org.

Stephen M. Kohn serves *pro bono* as the Executive Director of the NWC. Mr. Kohn is a partner at the Washington, D.C. law firm of Kohn, Kohn and Colapinto, LLP, and has specialized in representing whistleblowers from all political parties and perspectives for 30 years, including the successful representation of nationally recognized whistleblowers such as Dr. Frederic Whitehurst (whose disclosures vastly improved the integrity and quality of the FBI crime lab), Ms. Linda Tripp (holding officials accountable who illegally released information from her security file in an attempt to discredit her allegations of presidential misconduct), and Mr. Bradley Birkenfeld (whose documentation of illegal Swiss banking practices resulted in the recovery of billions of dollars for U.S. taxpayers). In 1985, Mr. Kohn wrote the first legal treatise on whistleblower law. His seventh book on whistleblowing is *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's right and Protecting Yourself* (Lyons Press, 3rd ed. 2013). You may contact Mr. Kohn at contact@kkc.com.

Endnotes

1. [Fraud Statistics](#), U.S. Department of Justice (2013), [hereinafter DOJ Statistics].
 2. Alexander Dyck, Adair Morse & Luigi Zingales, [Who Blows the Whistle on Corporate Fraud?](#) University of Chicago, 2006.
 3. [S. Rep. No. 110-507 \(2008\)](#).
 4. *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey*, Ethics Resource Center, 2012.
 5. *National Business Ethics Survey of the U.S. Workforce: Eighth in a Longitudinal CrossSectional Study on Workplace Ethics*, Ethics Resource Center, 2014, at 35.
 6. *When Whistleblowers Become Victims: A Supplemental Report of the 2011 National Business Ethics Survey*, Ethics Resource Center, 2012.
 7. *National Business Ethics Survey of the U.S. Workforce*, Ethics Resource Center, 2011.
 8. Dyck, *supra* note 2.
 9. DOJ Statistics, *supra* note 1.
 10. [31 U.S.C. §§ 3729-3733](#) (enacted in 1863 by Congress during the U.S. Civil War, and signed by President Abraham Lincoln).
 11. *Report to the Nations on Occupational Fraud and Abuse: 2012 Global Fraud Study*, Association of Certified Fraud Examiners, 2012.
 12. Michael D. Greenberg, [Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds: What the Policy Community Should Know](#), RAND Institute for Civil Justice Center (2009).
 13. Gen. Serv. Admin., [1 F.A.R. 52.203-13](#) (Dep't of Defense Mar. 2005).
 14. [The False Claims Act: A Primer](#), United States Department of Justice.
 15. [S. Rep. No. 99-962, at 35 \(1986\)](#).
 16. *Id.* (citing *Mackwiack v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162-64 (9th Cir. 1984)).
 17. *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984).
 18. [Cases Under Federal Banking Whistleblower Laws](#) (12 U.S.C. § 1790b; 12 U.S.C. § 1831j; 31 U.S.C. § 5328).
 19. *In re Kellogg Brown & Root, Inc.*, No. 14-5055 (D.C. Cir. June 27, 2014).
 20. [United States ex. rel. Barko v. Halliburton Co.](#), No. 1:05-CV-01267 (D.D.C. Feb. 21, 2014); [United States ex. rel. Barko v. Halliburton Co.](#), No. 1:05-CV-1276 (D.D.C. Mar. 11, 2014).
 21. [NY Eth. Op. 650](#) (1993).
 22. [Upjohn Warnings: Recommended Best Practices when Corporate Counsel Interacts with Corporate Employees](#), ABA Best Practices (July 17, 2009).
 23. Scott Higham, [SEC Urged to Restrict Employee Nondisclosure Agreements](#), Washington Post (July 18, 2014).
 23. Practices (July 17, 2009), available at http://www.fr.com/files/uploads/bios/Mateja_William/ABA_Upjohn_Task_Force.pdf.
-

24. The Senior Counsel for General Electric was the lead author of a paper delivered to an ABA section for corporate attorneys that warned: “What is clear that counsel who fail to give the warnings . . . expose themselves to criticism by the courts, professional discipline and even civil liability. Given these realities, it is imperative that all counsel – internal and external – scrupulously inform employees at all levels of the organization of the potential conflicts of interest and do so in a way where the warnings cannot be contested.” Jeffrey Eglash, Senior Counsel GE, et. al., *Avoiding the Pitfalls of Internal Corporate Investigations: Proper Use of Upjohn Warnings*, ABA Section of Litigation Corporate Counsel CLE Seminar (Feb. 11-14, 2010).
25. [Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, No. 34-64545](#) (Aug. 12, 2011)
26. *In re Quarles*, 158 U.S. 532, 535 (1895). (“It is the duty and right . . . of every citizen . . . to communicate to the executive officers any information which he has of the commission of an offense against those laws”); *Vogel v. Gruaz*, 110 U.S. 311 (1884). (“It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws” and the law should “encourage him” to perform this “duty without fear of consequences.”).
27. *Id.*
28. 18 U.S.C. § 1513(e).
29. Dyck, *supra* note 2 (“We find that the percentage of frivolous suits is *lower*” and “there is no evidence that stronger (“incentives to blow the whistle lead to more frivolous suits.”).
30. 31 U.S.C. § 3730(d)(4).
31. *Carter v. Subway Store*, 2012 U.S. Dist. LEXIS 26377 (E.D. Mich. Feb. 29, 2012); *Pugach v. M&T Mortg. Corp.*, 2008 U.S. Dist. LEXIS 117231 (E.D.N.Y. July 2, 2008); *United States ex. rel. Vuyyuru v. Jadhav*, 2007 U.S. Dist. LEXIS 63014 (E.D. Va. Aug. 24, 2007); *United States ex. rel. J. Cooper & Assoc. v. Bernard Hodes Group, Inc.*, 422 F. Supp. 2d 225 (D.D.C. 2006); *United States ex. rel. Bain v. Ga. Gulf Corp.*, 208 Fed. Appx. 2008 (5th Cir. 2006); *United States ex. rel. Jimenez v. Health Net, Inc.*, 2005 U.S. Dist. LEXIS 41675 (D. Co. Aug. 18, 2005); *United States ex. rel. Tingley v. 900 Monroe, LLC*, 2003 U.S. Dist. LEXIS 11630 (W.D. Mich. June 13, 2003); *United States ex. rel. Stewart v. Fleet Fin. Group*, 1999 U.S. Dist. LEXIS 13624 (W.D. Mich. 1999); *Millner v. ITT Aerospace/Communications Div. of ITT Corp.*, 1997 U.S. App. LEXIS 19091 (7th Cir. July 21, 1997); *United States ex. rel. Minna Ree Winer Children’s Class Trust v. Regions Bank*, 1996 U.S. Dist. LEXIS 7142 (E.D. La. May 16, 1996); *Herbert v. Nat’l Acad. of Scis.*, 1992 U.S. Dist. LEXIS 14063 (D.D.C. Sep. 15, 1992).
32. *DOJ Statistics, supra* note 1.
33. *U.S. District Courts Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit* (2012-2013).
34. [S. Rep. No. 110-507 \(2008\)](#).
35. *United States ex. rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2003).
36. [S. Rep. No. 110-507 \(2008\)](#).

37. In the second case relied upon by the Chamber, *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (9th Cir. 1992), the case was dismissed under the current law, and no “reform” was necessary to ensure that relators in fact bring original information to the attention of the government.
38. S. Rep. No. 99-962 (1986).
39. *Herman & McLean v. Huddleston*, 459 U.S. 375, 388-89 (1983) (holding that the preponderance standard was appropriate for numerous government fraud cases, including securities fraud and anti-trust violations).
40. [Securities Whistleblower Incentives and Protections, SEC Final Rule, 76 FR 34300](#) (June 13, 2011).
41. *Fixing the False Claims Act: the Case for Compliance-Focused Reforms*, U.S. Chamber Institute for Legal Reform (2013) [hereinafter Chamber Report].
42. *U.S. ex rel. Bunk v. Gosselin World Wide Moving*, 741 F.3d 390, 408 (4th Cir. 2013).
43. *U.S. ex rel. Smith v. Gilbert Realty*, 840 F. Supp. 71 (E.D. Mich. 1993).
- Other courts have also reduced or eliminated per violation penalties when they were deemed excessive. See *U.S. v. Mackby*, 261 F.3d 821 (9th Cir. 2000)(prohibiting the government from imposing excessive penalties under the FCA’s civil penalty and treble damage provisions); *U.S. v. Advance Tool Co.*, 902 F.Supp. 1011 (W.D. Missouri 1995) (reducing penalties from a potential \$3.4 million to \$365,000); *Presley v. Koch Indus.*, 57 F.Supp.2d 1122 (N.D. Okla. 1999) (requiring that courts not approve excessive penalties based on the “particular factual setting”) *U.S. ex rel Presley v. Koch Indus.*, 57 F.Supp.2d 1122 (N.D. Okla. 1999) (requiring that courts not approve excessive penalties based on the “particular factual setting”).
45. Chamber Report, *supra* note 41 at 35-36.
46. *U.S. v. Sci. Applications*, 626 F.3d 1257, 1279 (D.C. Cir. 2010).
47. *Id.*
48. *U.S. ex. rel. Longhi v. Lithium Power*, 575 F.3d 458, 473 (9th Cir. 2009).
49. No cases support the position urged by the Chamber. See *U.S. ex rel Feldman v. van Corp.*, 697 F.3d 78, 88 (2d Cir. 2012)(“nothing of tangible value” obtained by the government); *U.S. v. Karron*, 750 F.Supp.2d 480, 493 (S.D.N.Y. 2011)(defendant “cannot establish that the Government received any ascertainable benefit”).
50. *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001).
51. *Id.* at 693 (defendant “did not implicitly certify” performance and “even were the Medicare claims objectively false, plaintiff has not shown defendants submitted the claims with the requisite scienter”).
52. *U.S. ex. rel. Wilkins v. United Health*, 659 F.3d 295, 311 (3rd Cir. 2011).
53. *U.S. ex. rel. Augustine v. Century Health*, 289 F.3d 409, 416 (6th Cir. 2002).
54. *McNutt ex. rel. U.S. v. Haleyville*, 423 F.3d 1256, 1259 (11th Cir. 2005).
55. [SEC Final Rule, 76 FR 34300](#).
56. Dyke, *supra* note 2.



3238 P Street, NW
Washington, DC 20007

202.342.1903
www.whistleblowers.org