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Protecting Whistleblowing (and Not Just Whistleblowers)

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NOTE

PROTECTING WHISTLEBLOWING (AND NOT JUST WHISTLEBLOWERS)

Evan J. Ballan*

When the government contracts with private parties, the risk of fraud runs high. Fraud against the government hurts everyone: taxpayer money is wasted on inferior or nonexistent products and services, and the public bears the burdens attendant to those inadequate goods. To combat fraud, Congress has developed several statutory frameworks to encourage whistleblowers to come forward and report wrongdoing in exchange for a monetary reward. The federal False Claims Act allows whistleblowers to file an action in federal court on behalf of the United States, and to share in any recovery. Under the Dodd-Frank Act, the SEC Office of the Whistleblower investigates tips provided by whistleblowers and, in the event of a successful prosecution, pays an award to the tipster. The False Claims Act and SEC program both protect whistleblowers from retaliatory action from their employer. But the SEC program goes a step further: SEC Rule 21F-17 also prevents an employer from taking any action to interfere with the reporting of fraud. In this way, the SEC program protects not only whistleblowers, but also whistleblowing itself. It's time for the False Claims Act to catch up. Congress should look to SEC Rule 21F-17 as a model for how it could amend the False Claims to establish a cause of action against contractors who take steps to chill or restrict their employees from bringing forward claims of fraud. In doing so, it will vindicate the original intent and purpose of the False Claims Act and encourage whistleblowers to come forward and put an end to corporate wrongdoing. Protecting whistleblowing benefits the government, taxpayers, and whistleblowers—and ensures that the False Claims Act remains an effective instrument in the fight against fraud.

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INTRODUCTION

When the government contracts with private parties, the specter of fraud always looms. The massive amounts of money at stake in government contracts, combined with an often-overburdened infrastructure with limited oversight, make federal contracting a field particularly ripe for abuse. As government activity increases, so too does the use of third parties to provide procurement and contracting services. But with increased reliance on third-party contractors comes a heightened risk that those services are tainted by fraud. Fraud against the government hurts everyone. Taxpayer money is wasted on inferior or nonexistent products and services, and the public bears the burdens attendant to those inadequate goods. The costs of fraud include not only direct financial loss, but also potential endangerment of public health and national security: major fraud prosecutions have involved the sale of adulterated or misbranded drugs to Medicare and Medicaid patients,¹ or the provision of defective supplies to the military.²

To combat such wrongdoing, the government has developed an arsenal of legislative and administrative tools designed to detect fraud against the government and punish those who perpetrate it. Perhaps the most potent of these tools is the federal False Claims Act. The False Claims Act (“FCA”) has been described as “the government’s most effective civil tool to ferret out fraud and return billions to taxpayer-funded programs.”³ Congress implemented the FCA during the Civil War in the face of widespread fraud against the government. Its unique *qui tam* provisions allow an individual whistleblower to initiate a claim against a wrongdoer on behalf of the government, and to share in a portion of any ultimate recovery. In this way, the FCA provides a compelling incentive for those with knowledge of fraud to

1. *E.g.*, Press Release, U.S. Dep’t of Justice, Abbott Labs to Pay \$1.5 Billion to Resolve Criminal & Civil Investigations of Off-Label Promotion of Depakote (May 7, 2012), <https://www.justice.gov/opa/pr/abbott-labs-pay-15-billion-resolve-criminal-civil-investigations-label-promotion-depakote> [https://perma.cc/UR6S-2ZXW].

2. *E.g.*, Press Release, U.S. Dep’t of Justice, ATK Launch Systems Inc. Settles False Claims Product Substitution Case for Nearly \$37 Million (Apr. 23, 2012), <https://www.justice.gov/opa/pr/atk-launch-systems-inc-settles-false-claims-product-substitution-case-nearly-37-million> [https://perma.cc/8SUQ-D63G].

3. Press Release, U.S. Dep’t of Justice, Justice Department Recovers over \$3.5 Billion from False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), <https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015> [https://perma.cc/QVT6-GBZW] (quoting Principal Deputy Assistant Attorney General Benjamin C. Mizer).

come forward. Today, the FCA remains an active and effective enforcement mechanism: in 2015 alone, FCA litigation resulted in over \$3.5 billion in recovery to the United States.⁴

Like other whistleblowing statutes and programs, the FCA contains antiretaliation provisions that aim to protect would-be whistleblowers by prohibiting employers from taking retaliatory action against an employee for engaging in whistleblowing activity. This makes sense—such provisions increase the likelihood that insiders will report wrongdoing, thus protecting the government and taxpayers at large from fraud and abuse. They also protect employees from suffering personal harm for serving the public interest in combating fraud.

By contrast, the SEC whistleblower program—which Congress developed in response to the 2008 financial crisis—includes antiretaliation protections similar to those in the FCA that protect whistleblowers from professional or personal backlash. But the SEC has also established a rule that prohibits employers from taking any action that interferes with whistleblowing activity. The SEC has used this rule to target a wide range of activity, including confidentiality agreements, employment agreements, and severance agreements, that might chill whistleblowers from pursuing legitimate claims. In other words, unlike the FCA, the SEC rules protect not only *whistleblowers*, but also *whistleblowing* itself.

It's time for the FCA to catch up. Congress should amend the FCA to enact similar prohibitions against antiwhistleblowing activity so that the Act continues to serve as a robust tool to deter and combat government fraud. By doing so, Congress could ensure that, like the SEC program, the FCA best serves its public interest aims by protecting whistleblowing, and not just whistleblowers.

Part I of this Note provides a history and overview of the FCA and the SEC Office of the Whistleblower. It also examines one of the SEC program's rules, Rule 21F-17, which targets antiwhistleblowing activity. Part II focuses on the antiretaliation provisions of the FCA. It shows that the FCA provisions are less robust than the SEC rules because of the FCA's narrower focus on protecting whistleblowers. Part III argues that judges and lawmakers should recognize the important—but distinct—functions that whistleblower-protection and whistleblowing-protection laws accomplish, and implement this framework in their decisionmaking and legislating processes. To begin that reform, Congress should look to SEC Rule 21F-17 as a model and implement a similar cause of action within the FCA. Focusing on protecting both whistleblowers and whistleblowing promotes the underlying purpose and intent of the law and bolsters the ability of the government to root out and combat fraud.

4. *Id.*

I. FIGHTING FRAUD: A TALE OF TWO WHISTLEBLOWER PROGRAMS

This Note focuses on two major bodies of modern whistleblower law in the United States: actions under the FCA, which are litigated in federal courts, and the administrative SEC whistleblower program, which was established by the Dodd-Frank Act. Both are tools Congress created to use information provided by whistleblowers to identify and prosecute fraud. Indeed, the SEC whistleblower program was based on the fraud-combatting success of the FCA and borrows much of its design. But the programs operate in fundamentally different ways and offer different protections. This Part provides an overview of the history and functioning of each program and an overview of one of the rules governing the SEC whistleblower program: Rule 21F-17.

A. *The False Claims Act*

The roots of the FCA stretch back to the early days of the American Civil War.⁵ Amid the massive wartime effort, the United States saw a substantial increase in government spending, accompanied by a shift in responsibilities from the local to federal level for contracting with third parties for war-related supplies.⁶ In the consolidated procurement effort, “the various Northern states . . . [gave] up independent procurement authority to the U.S. bureaus,” which in turn entered into “thousands of agreements with hundreds of prime contractors all over the country.”⁷ Centralizing this contracting activity offered a number of economic efficiencies, but it also gave rise to a new problem: rampant fraud in the procurement process. As the use of outside contractors became “routine and essential to the Union’s war effort,”⁸ purchasing contracts for Union army supplies were plagued by “unimaginable levels of fraud.”⁹ Soldiers were hindered by a slew of defective and substandard clothing and equipment, including shoes, uniforms, coats, blankets, guns, ammunition, and even horses.¹⁰

5. See *United States v. Bornstein*, 423 U.S. 303, 309 (1976) (“The Act was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War.”).

6. William Sims Curry, *Ethics in Contracting*, in *GOVERNMENT CONTRACTING: A PUBLIC SOLUTIONS HANDBOOK* 148, 148–51 (Robert A. Shick ed., 2016) (describing some of the “nefarious contracting practices discovered during the civil war”); see also MARK R. WILSON, *THE BUSINESS OF CIVIL WAR: MILITARY MOBILIZATION AND THE STATE, 1861–1865*, at 108 (2006).

7. WILSON, *supra* note 6, at 107–08 (describing contracting as “routine and essential to the Union’s war effort”).

8. *Id.* at 107.

9. Mark Greenbaum, *The Civil War’s War on Fraud*, N.Y. TIMES: OPINIONATOR (Mar. 7, 2013, 12:22 PM), <http://opinionator.blogs.nytimes.com/2013/03/07/the-civil-wars-war-on-fraud/> [<http://perma.cc/S5G3-TKPP>].

10. *Id.*; see also *How a Law from the Civil War Fights Modern-Day Fraud*, NPR: PLANET MONEY (Oct. 1, 2014, 4:21 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=352819369> (on file with the *Michigan Law Review*) (“Soldiers complained about shoddy uniforms that would dissolve in rain, gunpowder in cannons and in guns wouldn’t fire and a

Congress enacted the legislation that would become the FCA on March 2, 1863.¹¹ The statute—titled “An Act to Prevent and Punish Frauds upon the Government of the United States”—prohibited the making or presentment of “false, fictitious, or fraudulent” claims against the government and its officers.¹² It enumerated a range of fraudulent conduct, including making false vouchers, oaths, or signatures; forging papers; conspiring to defraud; stealing or embezzling; delivering false receipts; and concealing property.¹³ A person found guilty of violating the statute was subject to a term of imprisonment between one and five years and liable to the government for the amount of \$2,000 plus double the amount of actual damages sustained.¹⁴

Finally, and most importantly, the statute allowed a suit to be “brought and carried on by any person, as well for himself as for the United States.”¹⁵ An individual who brought suit under the statute would be entitled to one-half of the amount recovered, plus the costs of bringing the suit, and the government would receive the other half of the award.¹⁶ The statute allowed whistleblowers to bring suit on behalf of the United States, and to receive a bounty in the event of a successful claim. This sort of law is known as a *qui tam* statute and was designed to incentivize individual whistleblowers (also known as “informers” or “relators”) to privately prosecute public wrongs.¹⁷

Michigan Senator Jacob Howard, who introduced the bill on the floor, characterized the fraud epidemic in stark terms. He described contracting fraud as a “great evil”¹⁸ and “one of the crying evils of the period” and announced that “our Treasury is plundered from day to day by bands of conspirators, who are knotted together . . . for the purpose of defrauding and plundering the Government.”¹⁹ Senator Howard also discussed the decision to use the *qui tam* mechanism, stating that its effect was to “hold out to a confederate a strong temptation to betray his coconspirator” based upon the “old-fashioned idea of . . . ‘setting a rogue to catch a rogue,’ which is the

lot of it was mixed with sawdust. They would get horses that were withered, that were weak, and even in some cases, blind.”).

11. An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863).

12. *Id.* § 1.

13. *Id.*

14. *Id.* § 3.

15. *Id.* § 4.

16. *Id.* § 6.

17. See generally NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 28–31 (2013); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539 (2000); Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81. *Qui tam* statutes enjoyed widespread use in England in the Middle Ages and early modern period, but had generally fallen into disfavor in the United States. See Note, *supra*, at 83–101.

18. CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863) (statement of Sen. Howard).

19. *Id.* at 955.

safest and most expeditious way I have ever discovered of bringing rogues to justice.”²⁰

Senator Howard did not see whistleblowers as individuals who performed a brave and noble act at the risk of personal consequence. Rather, to Howard, informants were “rogue[s]” and “coconspirator[s]” whose allegiances could be bought by the government if the price was right.²¹ It is no surprise, then, that this early version of the statute did not contain any provisions involving retaliation against whistleblowers or protecting their interests in any way. It was not until much later that Congress would recognize the importance of protecting those who came forward to expose wrongdoing.

The twentieth century saw significant transformation of the FCA. Increased federal spending in the wake of the New Deal and during World War II resulted in new opportunities for fraud, and the courts saw a corresponding surge in *qui tam* litigation, accompanied by new controversy.²² Concerns arose over a growing number of so-called “parasitic” actions: after the government would indict a contractor for fraud, someone would file an FCA lawsuit alleging the exact same conduct that formed the basis of the indictment, in the hopes of receiving a bounty for frauds already known.²³ These actions did little to promote the reputation of whistleblowers and their lawyers, who began to look less like champions of the public, and more like opportunists hoping to get rich quick.

In 1943, then—Attorney General Francis Biddle first urged Congress to repeal the FCA in its entirety.²⁴ He feared that whistleblower litigation was no longer serving a legitimate purpose, but instead was a tool for abuse by plaintiffs and their attorneys.²⁵ Biddle complained that many lawsuits under the statute had become “mere parasitical actions, occasionally brought only after law-enforcement officers have investigated and prosecuted persons guilty of a violation of law and solely because of the hope of a large reward.”²⁶ Congress declined to repeal the FCA and instead enacted a series of

20. *Id.* at 955–56.

21. Senator Howard did note that informants were “not confined” to the class of coconspirators and could even include the district attorney. *Id.* at 955.

22. *United States ex rel. Findley v. FPC-Boron Emps.’ Club*, 105 F.3d 675, 679–80 (D.C. Cir. 1997), *abrogated on other grounds by Rockwell Int’l Corp. v. United States*, 579 U.S. 457 (2007).

23. See Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN ST. L. REV. 77, 82–83 (2011); Ryan G. Hassanein, *Revamping the False Claims Act*, LAW360 (Aug. 5, 2009, 1:00 PM), <https://www.law360.com/articles/110289/revamping-the-false-claims-act> [<http://perma.cc/FH4C-QQWT>].

24. S. REP. NO. 77-1708, at 2 (1942).

25. See *id.*; H.R. REP. NO. 78-263, at 1–2 (1943). For a particularly egregious example of a parasitic action and a discussion by the Court of the problem, see *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

26. S. REP. NO. 77-1708, at 2; H.R. REP. NO. 78-263, at 1–2; see also CHARLES DOYLE, CONG. RESEARCH SERV., R40785, *QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 6–7* (2009), <https://fas.org/sgp/crs/misc/R40785.pdf> [<https://perma.cc/8Q6P-SAER>]; Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the*

amendments designed to address Biddle's concerns.²⁷ Following the 1943 amendment and the end of World War II, FCA litigation decreased significantly.²⁸

Congress amended the FCA again in 1986, amid a resurgence of public outcry about fraud against the government. Rumors of contracting run amok and extravagant expenditures—including one report that the Department of Defense spent \$640 on a toilet seat—generated widespread criticism of the way that the government was spending taxpayer money and prompted new calls for reform.²⁹ In response, Congress expanded and bolstered the FCA, “usher[ing] in the golden age of the whistleblower.”³⁰ Among other changes,³¹ the FCA, for the first time, included provisions protecting whistleblowers from retaliation and created a private right of action for retaliation claims. Specifically, the FCA provided protection for employees who were “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment . . . for lawful acts done . . . in furtherance of an action under this section.”³² An employee who experienced the retaliation prohibited by the provision could bring a retaliation action against her employer for “all relief necessary to make the employee whole,” including, where appropriate, reinstatement, back pay, and special damages.³³

The FCA has seen widespread use following the 1986 amendments³⁴—an unsurprising outcome in light of the broad expansions that the amendments implemented, coupled with the government's increasing reliance on

Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act, 24 PUB. CONT. L.J. 237 (1995).

27. These included a requirement that an informant provide the government with a disclosure statement of “substantially all” material evidence supporting her claim at the time of filing suit; the introduction of the so-called “public disclosure bar,” which precludes an action that is primarily based on information that is already in the public domain; and a reduction in the amount of the reward that a relator could receive. 31 U.S.C. § 232(C) (1946); *see also* DOYLE, *supra* note 26, at 7.

28. *See* *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010).

29. *See* William D. Hartung, *Only the Pentagon Could Spend \$640 on a Toilet Seat*, NATION (Apr. 11, 2016), <https://www.thenation.com/article/only-the-pentagon-could-spend-640-on-a-toilet-seat/> [<https://perma.cc/44HB-ELVM>]; Jack Smith, *\$37 Screws, a \$7,622 Coffee Maker, \$640 Toilet Seats; : Suppliers to Our Military Just Won't Be Oversold*, L.A. TIMES, (July 30, 1986), http://articles.latimes.com/1986-07-30/news/vw-18804_1_nut [<https://perma.cc/9J24-WUBP>]; *Dept. of Hundred-Dollar Toilet Seats*, N.Y. TIMES (Feb. 18, 1986), <http://www.nytimes.com/1986/02/18/us/dept-of-hundred-dollar-toilet-seats.html> (on file with the *Michigan Law Review*).

30. *How a Law from the Civil War Fights Modern-Day Fraud*, *supra* note 10.

31. *See generally* False Claims Amendments Act, Pub. L. No. 99-562, 100 Stat. 3153 (1986); S. REP. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266; H.R. REP. No. 99-660 (1986).

32. § 4, 100 Stat. at 3158.

33. *Id.*

34. The Fraud Enforcement and Recovery Act, passed by Congress in 2009, again amended the Act to clarify and reinforce parts of the 1986 amendments, but the retaliation

contracting and outsourcing.³⁵ The United States relies more than ever on widespread privatization of public services, such as health care, prisons, education, and even ambulance services.³⁶ In recent years, FCA litigation has resulted in blockbuster verdicts and settlements in the health-care,³⁷ defense,³⁸ and banking³⁹ industries, among others.

By all accounts, the FCA is alive and well today. In 2014, the Department of Justice announced that it had obtained a record \$5.69 billion in settlements and judgments from over 700 whistleblower cases.⁴⁰ Senator Chuck Grassley, an outspoken advocate of the FCA, has called it “hands down, the most effective tool the government has to fight fraud against the taxpayers,” arguing that “without whistleblowers, the government simply does not have the capability to identify and prosecute the ever-expanding and creative schemes to bilk the taxpayers.”⁴¹ Indeed, as more government money flows through more contracts with more private entities, it is likely that the FCA will be a robust area of litigation for years to come.⁴²

provisions in the Act remain substantially unchanged. *See* 31 U.S.C. § 3730(h) (2012); DOYLE, *supra* note 26, at 7–8.

35. *See generally* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009).

36. *See id.*; Danielle Ivory et al., *When You Dial 911 and Wall Street Answers*, N.Y. TIMES: DEALBOOK (June 25, 2016), <https://www.nytimes.com/2016/06/26/business/dealbook/when-you-dial-911-and-wall-street-answers.html> (on file with the *Michigan Law Review*).

37. *E.g.*, Press Release, U.S. Dep’t of Justice, GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report> [<https://perma.cc/8KC4-JKKB>].

38. *E.g.*, Press Release, U.S. Dep’t of Justice, United Technologies Corporation Liable for over \$473 Million for Inflating Prices on Aircraft Engines Sold to Air Force (June 20, 2013), <https://www.justice.gov/opa/pr/united-technologies-corporation-liable-over-473-million-inflat-ing-prices-aircraft-engines> [<https://perma.cc/398L-5YWW>].

39. *E.g.*, Michael Corkery & Jessica Silver-Greenberg, *Morgan Stanley Reaches \$1.25 Billion Mortgage Settlement*, N.Y. TIMES: DEALBOOK (Feb. 4, 2014, 6:22 PM), <http://dealbook.nytimes.com/2014/02/04/morgan-stanley-reaches-1-25-billion-mortgage-settlement> [<https://perma.cc/HZL4-LF67>].

40. Press Release, U.S. Dep’t of Justice, Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014), <https://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014> [<https://perma.cc/DB9T-JAAP>].

41. Press Release, U.S. Senator Chuck Grassley, Grassley: False Claims Act Is Our Most Important Tool to Fight Fraud Against Taxpayers (Apr. 28, 2016), <http://www.grassley.senate.gov/news/news-releases/rassley-false-claims-act-our-most-important-tool-fight-fraud-against-taxpayers> [<https://perma.cc/JNW8-AYLA>].

42. Many states have passed substantially similar statutes that allow individuals to file suit for fraud perpetrated against state government and agencies. *See, e.g.*, New York False Claims Act, N.Y. STATE FIN. LAW §§ 187–194 (McKinney 2014); *see also* States with False Claims Acts, TAXPAYERS AGAINST FRAUD EDUC. FUND, <http://www.taf.org/states-false-claims-acts> [<https://perma.cc/7QPD-J577>]. For the sake of simplicity, this Note does not address specific provisions of state FCA analogs (except briefly in Part IV), but much of the same analysis contained elsewhere would apply with equal force to state laws.

B. *The SEC Whistleblower Program*

In stark contrast to the trenches of the Civil War, the backdrop of the birth of the SEC whistleblower program was the infamous financial crash of 2008, whose aftermath revealed widespread high-risk and fraudulent activity by some of the largest financial institutions in the United States.⁴³ In the wake of the crash, Congress sought to ensure that the sort of wrongdoing that contributed to the massive market failure would never happen again.⁴⁴ In 2010, it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act,⁴⁵ which the Obama Administration characterized as “[t]he most far reaching Wall Street reform in history.”⁴⁶

Dodd-Frank enacted a sweeping new regime of regulation and oversight in the financial sector. Among its many reforms, it established a new whistleblower program to offer incentive awards to those who provide the SEC with information about violations of securities regulations and created a new office within the SEC to administer the process.⁴⁷ Under the SEC program, individuals with knowledge about securities fraud may submit a tip to the SEC Office of the Whistleblower. Unlike claims under the FCA, there are no *qui tam* provisions that allow the whistleblower to initiate an action in court directly against the alleged violator. Instead, the SEC investigates tips it receives and determines whether to initiate an enforcement action. If information provided by a tipster leads to the SEC bringing an action that results in monetary sanctions in excess of \$1 million,⁴⁸ then the whistleblower is entitled to receive an award in the amount of 10% to 30% of the sanctions imposed.⁴⁹ As of August 2016, the SEC has received more than 14,000 tips, awarded over \$107 million to thirty-three whistleblowers, and obtained more than \$504 million in sanctions from individuals and entities committing securities fraud.⁵⁰

43. See generally ANDREW ROSS SORKIN, *TOO BIG TO FAIL* (2010); James B. Stewart, *Eight Days: The Battle to Save the American Financial System*, *NEW YORKER* (Sept. 21, 2009), <http://www.newyorker.com/magazine/2009/09/21/eight-days> [<https://perma.cc/7V4E-BEJM>].

44. See, e.g., ALAN S. BINDER, *AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE, AND THE WORK AHEAD* (2013); MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2011).

45. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

46. *Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE, <https://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform> [<https://perma.cc/7YWD-RARZ>].

47. See Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(a)(1) (2012).

48. *Id.*

49. *Id.* § 78u-6(b)(1).

50. Press Release, U.S. Sec. & Exch. Comm’n, SEC Whistleblower Program Surpasses \$100 Million in Awards (Aug. 30, 2016), <https://www.sec.gov/news/pressrelease/2016-173.html> [<https://perma.cc/E8ZX-UYHA>].

The Dodd-Frank Act also required the SEC Office of the Inspector General to conduct a study of the whistleblower program and produce a report.⁵¹ The report was to address, among other things, “whether . . . it would be useful for Congress to consider empowering whistleblowers . . . to have a private right of action to bring suit based on the facts of the same case, on behalf of the Government and themselves, against persons who have committe[d] securities fraud.”⁵² In other words, Congress asked the SEC to consider whether its whistleblower program should look more like the FCA.

In 2013, the Office of the Inspector General released its report detailing the study’s results.⁵³ The report was skeptical of the *qui tam* model: it warned that such a program “could attract unscrupulous bounty hunters” and might result in “undesirable outcomes such as frivolous litigation, collusion between plaintiffs and defendants, and delays in bringing a suit for the purpose of increasing the bounty award amount.”⁵⁴ The program, as it existed, equipped the SEC with a “gatekeeping mechanism” to protect against “harmful, profit-seeking [claims] from reaching the judicial system.”⁵⁵

The SEC ultimately concluded in its report that it was “premature” to adopt a private right of action because it would be a “[f]undamental change[] in the current approach” that “would disrupt the system that is currently in place.”⁵⁶ The Office of the Inspector General proposed gathering additional data and reconsidering the program’s effectiveness, and then revisiting the issue in another two or three years.⁵⁷ As of 2017, the SEC has yet to include a private right of action, and the whistleblower program operates in fundamentally the same manner as it did at its inception.

C. Rule 21F-17

The SEC whistleblower program has antiretaliation provisions that largely mirror those of the FCA: “No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment”⁵⁸ And a whistleblower who is subject to such discrimination or discharge has a private right of action in federal court.⁵⁹ But the SEC

51. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 922(d)(1), 124 Stat. 1376, 1848–49 (2010).

52. *Id.*

53. OFFICE OF AUDITS, U.S. SEC. & EXCH. COMM’N, NO. 511, EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM (2013), <https://www.sec.gov/oig/reportspubs/511.pdf> [<https://perma.cc/BMK7-GC4Q>].

54. *Id.* at 28–29.

55. *Id.* at 29.

56. *Id.* at 30.

57. *Id.*

58. 15 U.S.C. § 78u-6(h)(1)(A) (2012).

59. *Compare id.* § 78u-6(h)(1), with 31 U.S.C. § 3730(h) (2012). There is, however, some disagreement about the criteria that make an individual a “whistleblower” subject to protection under the statute. See Ed Beeson, *Three Little Words: Confusion over Dodd-Frank Is Leaving*

also promulgated Rule 21F-17 in 2011, which provides that “[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.”⁶⁰ The SEC implemented Rule 21F-17 because “efforts to impede an individual’s direct communications with Commission staff about a possible securities law violation would conflict with the statutory purpose of encouraging individuals to report to the Commission.”⁶¹

The SEC has taken this rule quite seriously and has used it to initiate a number of enforcement actions. In April 2015, the SEC brought its first 21F-17 action against defense contractor KBR, Inc.⁶² Like many corporations, KBR had a practice of performing internal investigations in which it interviewed company employees to determine compliance with federal securities laws.⁶³ As part of those interviews, KBR required all employees interviewed to sign a confidentiality agreement, which stated, among other things, that the employee was “prohibited from discussing any particulars regarding this interview and the subject matter [of] the interview, without the prior authorization of the [KBR] Law Department.”⁶⁴ The form agreement further warned that “unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.”⁶⁵

Although the agreement did not include language specifically prohibiting whistleblowing activity, and despite a lack of any evidence that KBR had ever enforced the confidentiality provision, the SEC nevertheless found that KBR violated Rule 21F-17.⁶⁶ The language of the provision, the SEC argued, had the *effect* of impeding communication between employees and the SEC and therefore “undermine[d] the purpose of Section 21F and Rule 21F-17(a), which is to ‘encourag[e] individuals to report to the Commission.’”⁶⁷ KBR agreed to change the language in its confidentiality agreements and to reach out to employees who had previously signed such agreements

Whistleblowers Exposed, Law360 (Sept. 19, 2016), <http://www.law360.com/articles/838091/confusion-over-dodd-frank-is-leaving-whistleblowers-exposed> [<https://perma.cc/WNL2-BUS7>].

60. 17 C.F.R. § 240.21F-17(a) (2017).

61. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,352 (June 13, 2011).

62. See KBR, Inc., Exchange Act Release No. 74,619, 2015 WL 1456619 (Apr. 1, 2015); Press Release, U.S. Sec. & Exch. Comm’n, SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements (Apr. 1, 2015), <https://www.sec.gov/news/pressrelease/2015-54.html> [<https://perma.cc/275X-AJMC>].

63. *KBR, Inc.*, 2015 WL 1456619, at *2.

64. *Id.*

65. *Id.*

66. *Id.* at *2–3.

67. *Id.* at *2 (citations omitted).

to inform them that the confidentiality provision did not apply to communications with the SEC.⁶⁸ The SEC also imposed sanctions on KBR in the amount of \$130,000.⁶⁹

The decision made waves in the legal community as law firms rushed to advise their clients to ensure their confidentiality agreements were 21F-17 compliant.⁷⁰ Lawyers also warned clients of the prospect of similar enforcement actions in the future.⁷¹ The SEC, for its part, doubled down on its position. Andrew J. Ceresney, then director of the SEC's Division of Enforcement, announced after the KBR settlement the SEC's position that 21F-17 could apply beyond confidentiality agreements to reach "employment, severance, or other types of agreements that may silence potential whistleblowers"⁷² and promised that the SEC would continue to "vigorously enforce this provision."⁷³

And vigorously enforce the provision it has. Since the KBR action, the SEC has brought a number of enforcement actions under 21F-17 against companies using similar provisions in internal investigations, severance agreements, and other documents.⁷⁴ Many of the violations involved confidentiality provisions similar to those in the KBR case;⁷⁵ others required would-be whistleblowers to disclaim a future interest in any SEC award.⁷⁶ In each case, the defendant corporation settled with the SEC without challenging the legitimacy of its application of the rule.⁷⁷

These enforcement practices have not been without their critics. Some in the legal community have characterized the SEC's enforcement of Rule

68. *Id.* at *2–3.

69. *Id.* at *3–4.

70. *See, e.g.,* GIBSON DUNN, SEC BRINGS FIRST ENFORCEMENT ACTION CHALLENGING EMPLOYEE CONFIDENTIALITY AGREEMENT ALLEGED TO IMPEDE WHISTLEBLOWERS (2015), <http://www.gibsondunn.com/publications/documents/SEC—First-Enforcement-Action-Challenging-Employee-Confidentiality-Agreement-Alleged-to-Impede-Whistleblowers.pdf> [<https://perma.cc/VL5Z-F5WE>]; SHEARMAN & STERLING LLP, SEC SAYS CONFIDENTIALITY AGREEMENTS MAY IMPEDE WHISTLEBLOWERS (2015), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/04/SEC-Says-Confidentiality-Agreements-May-Impede-Whistleblowers-LIT-04022015.pdf> [<https://perma.cc/Q9HQ-PVHA>].

71. *See, e.g.,* Aaron Katz & Alexandra Roth, *SEC Imposes Fine on KBR for Violating Dodd-Frank Whistleblower Protection*, ROPES & GRAY (Apr. 2, 2015), <https://www.ropesgray.com/newsroom/alerts/2015/April/SEC-Imposes-Fine-on-KBR-for-Violating-Dodd-Frank-Whistleblower-Protection-Rule.aspx> [<https://perma.cc/H6N2-65BB>]; William R. McLucas et al., *SEC Applies Whistleblower Interference Rule to Corporate Confidentiality Requirement*, WILMERHALE (Apr. 28, 2015), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179877088> [<https://perma.cc/5MFU-JNVW>].

72. *KBR, Inc.*, 2015 WL 1456619, at *2.

73. *Id.*

74. *E.g.,* BlueLinX Holdings, Inc., Exchange Act Release No. 34-78528, 2016 WL 4363864 (Aug. 10, 2016).

75. *E.g., id.*

76. *E.g.,* Health Net, Inc., Exchange Act Release No. 34-78590, 2016 WL 4474755 (Aug. 16, 2016).

77. *See id.*; *BlueLinX*, 2016 WL 4363864.

21F-17 as “aggressive and far-reaching,” asserting that it is “far from clear that the Commission’s position would ultimately be upheld if tested in a litigated case.”⁷⁸ But the SEC has shown no intention of slowing down. In October 2016, the SEC Office of Compliance Inspections and Examinations issued a “risk alert” that discussed its 21F-17 enforcement activity and affirmed its intent to continue to prosecute violations.⁷⁹ The risk alert encouraged entities to “evaluate whether their compliance manuals, codes of ethics, employment agreements, severance agreements, and other documents contain language that may be inconsistent with Rule 21F-17.”⁸⁰

II. PROTECTING WHISTLEBLOWERS: RETALIATION UNDER THE FALSE CLAIMS ACT

The FCA antiretaliation provisions—discussed briefly above⁸¹—allow a whistleblower to seek relief in federal court if she is retaliated against because of her whistleblowing activity.⁸² Whistleblowers are protected if they take some step to investigate wrongdoing that is actionable under the FCA, even if they ultimately do not file a lawsuit.⁸³ By including antiretaliation provisions in the Act, Congress has provided protection for whistleblowers who suffer adverse consequences after coming forward with knowledge of wrongdoing. These provisions are oriented toward protecting the *person* rather than the *claim*; they focus on the *whistleblower* rather than the *whistleblowing*. This Part examines the consequences and limitations of that

78. GIBSON DUNN, *supra* note 70, at 2.

79. OFFICE OF COMPLIANCE INSPECTIONS & EXAMINATIONS, U.S. SEC. & EXCH. COMM’N, NATIONAL EXAM PROGRAM RISK ALERT: EXAMINING WHISTLEBLOWER RULE COMPLIANCE (2016), <https://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-examining-whistleblower-rule-compliance.pdf> [<https://perma.cc/T4H5-WYWQ>].

80. *Id.* at 3. Other agencies have begun to follow suit. In November 2016, the director of Defense Procurement and Acquisition Policy for the Department of Defense announced a new prohibition that prevents federal dollars from going to any contractor that “requires employees or contractors of such entity seeking to report fraud . . . waste, or . . . abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse.” Memorandum from Claire M. Grady, Dir., Def. Procurement & Acquisition Policy, Office of the Under Sec’y of Def., to Commander, U.S. Special Operations Command et al. 1 (Nov. 14, 2016), <http://www.acq.osd.mil/dpap/policy/policyvault/USA004514-16-DPAP.pdf> [<https://perma.cc/BNL7-DJG4>]. The Department of Defense, along with the General Services Administration and the National Aeronautics and Space Administration, have also proposed codifying a similar rule in the Federal Acquisition Regulations. Federal Acquisition Regulation: Contractor Employee Internal Confidentiality Agreements, 81 Fed. Reg. 3763 (Jan. 22, 2016) (to be codified at 48 C.F.R. pts. 3, 4, 52). The rule would require each contractor to certify that it does not use restrictive confidentiality agreements, to modify existing contracts to comply with the new rule, and to notify employees subject to preexisting agreements that those clauses are no longer effective. *Id.*

81. See *supra* notes 31–33 and accompanying text.

82. 31 U.S.C. § 3730(h)(1) (2012).

83. See *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 739–40 (D.C. Cir. 1998) (“[T]he protected conduct . . . of such a [retaliation] claim does not require the plaintiff to have developed a winning *qui tam* action before he is retaliated against.”).

decision. There is a critical need to protect whistleblowers from discrimination. But focusing solely on whistleblower protection leaves room for some wrongdoers to undermine the effectiveness of the FCA.

A. *The Need to Protect Whistleblowers*

To be sure, there are legitimate and compelling reasons for the government to protect whistleblowers from personal and professional retaliation. There is a long and sordid history of individuals who have been targeted and persecuted for their whistleblowing activity.⁸⁴ Even when a whistleblower does not experience professional repercussions for her actions, the experience of reporting an employer is often a stressful and grueling one that can produce a range of adverse effects on the physical and mental health of the whistleblower and her family.⁸⁵ Individuals who have legitimate knowledge of fraudulent activity may hesitate to come forward with that activity if they fear personal or professional blowback from “snitching,” and data suggests that, despite legislative protections, retaliation remains a real concern for many employees. A 2011 survey by the Ethics Resource Center found that 22% of American workers who reported misconduct actually experienced retaliation.⁸⁶ The survey identified fear of retaliation as “[o]ne of the most common reasons that employees choose not to report misconduct”⁸⁷ and

84. This Note focuses on whistleblowing in the United States. For an example of retaliation against whistleblowers abroad, see Karthik Balasubramanian, *Ten Years After IIT Engineer Was Murdered for Exposing Corruption, Indian Bill Still Doesn't Protect Whistleblowers*, SCROLL.IN (Feb. 7, 2014), <https://scroll.in/article/655790/ten-years-after-iit-engineer-was-murdered-for-exposing-corruption-indian-bill-still-doesnt-protect-whistleblowers> [https://perma.cc/QS6W-UX6R]. One prominent example of a whistleblower experiencing retaliation in the United States is Jeffrey Wigand, the former director of research for Brown & Williamson, then the third largest tobacco manufacturer in the world. Cassi Feldman, *60 Minutes' Most Famous Whistleblower*, 60 MINUTES (Feb. 4, 2016), <http://www.cbsnews.com/news/60-minutes-most-famous-whistleblower/> [https://perma.cc/QBB4-WB7Q]. Wigand claimed Brown & Williamson terminated him after he got into a dispute with management about the company's knowledge of nicotine's addictive qualities. *Id.* Wigand ultimately decided to go public with the information despite the objections of his employer. *Id.* After coming forward, Wigand reported that he and his family received a number of death threats and that his former employer engaged in a large-scale smear campaign against him. Marie Brenner, *The Man Who Knew Too Much*, VANITY FAIR (May 1996), <http://www.vanityfair.com/magazine/1996/05/wigand199605> [https://perma.cc/U5R4-LXYP]. In another case, a Halliburton employee named Tony Menendez reported to the SEC claims that his employer had committed a variety of accounting violations. Jesse Eisinger, *The Whistleblower's Tale: How an Accountant Took on Halliburton*, PROPUBLICA (Apr. 21, 2015, 9:00 AM), <https://www.propublica.org/article/the-whistleblowers-tale-how-an-accountant-took-on-halliburton> [https://perma.cc/RX49-G7KF]. Once Halliburton learned that Menendez was the source of the allegations, Menendez experienced repercussions at work, including being excluded from meetings, losing job responsibilities, and being outcast by his colleagues. *Id.*

85. K. Jean Lennane, “Whistleblowing”: A Health Issue, 307 BRIT. MED. J. 667, 667–69 (1993).

86. ETHICS RES. CTR., RETALIATION: WHEN WHISTLEBLOWERS BECOME VICTIMS 3 (2012), http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150410/06_ERC_RetaliationWhenWhistleblowersBecomeVictims.pdf [https://perma.cc/A4CK-P6WZ].

87. *Id.* at 5.

noted that among employees who were aware of misconduct but chose not to report it, 46% cited fear of retaliation as the reason for their failure to report.⁸⁸ Indeed, in passing the 1986 amendments to the FCA, which included the antiretaliation provisions, Congress recognized that “few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation.”⁸⁹ By enacting the antiretaliation provisions of the FCA and subjecting employers to liability for retaliation, Congress hoped to blunt the fear of retaliation and thus pave the way for more individuals to come forward.

B. *The Goals of Antiretaliation Legislation*

Protecting whistleblowers from retaliation is in the public interest. But the act of whistleblowing involves a complex web of relationships between the individual whistleblower, the employer, the government, and the public—all of whom may have competing or overlapping interests. Whistleblower law necessarily involves navigating and regulating those relationships, and balancing the interests involved. This Section focuses on the public interest rationales underlying any whistleblower law regime.

Generally speaking, there are two separate, but overlapping, interests that animate most whistleblower law: an antifraud interest in encouraging future whistleblowing and an antiretaliation interest in protecting whistleblowers.⁹⁰ The first interest—the antifraud interest—is concerned with bringing fraudulent activity to light and stopping its perpetrators from committing further wrongs. Reporting fraud benefits the public good because it stops and deters wrongdoing. This, in turn, recoups wasted taxpayer money and prevents future waste and, in some cases, may address a threat to public health or safety.⁹¹ By prohibiting retaliation, legislators send a message to future whistleblowers that they should feel safe to report fraud (furthering the antifraud interest) without fear of repercussion.⁹² Less fraud is a good thing, and whistleblower-protection laws seek to minimize fraudulent activity by paving the way for whistleblowers to come forward.

88. *Id.* at 5 & n.4.

89. S. REP. NO. 99-345, at 34 (1986), reprinted in 1986 U.S.C.A.A.N. 5266, 5300.

90. Cf. Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 189 (2007) (highlighting two key “considerations” for whistleblowers: will their whistleblowing “fix the problem” and will the whistleblower “be protected from a destroyed career, financial ruin, and, perhaps, physical threat”).

91. E.g., Press Release, U.S. Dep’t of Justice, *supra* note 37 (announcing the False Claims Act settlement involving sale of misbranded drugs in interstate commerce and failure to report drug-safety data to FDA).

92. *But see* GOV’T ACCOUNTABILITY PROJECT, WHY WHISTLEBLOWERS WAIT: RECOMMENDATIONS TO IMPROVE THE DODD-FRANK LAW’S SEC WHISTLEBLOWER AWARDS PROGRAM 12 (2016) https://www.whistleblower.org/sites/default/files/GAP_Report_Why_Whistleblowers_Wait.pdf [<https://perma.cc/UM98-PMQS>] (“Fear of reprisal is a very realistic and very dangerous source of complaint inhibition that cannot be eliminated totally by [antiretaliation] provisions.”).

The second interest—the antiretaliation interest—focuses on protecting whistleblowers from enduring the hardships that can result from reporting wrongdoing. This interest relates to the antifraud interest in an obvious way: if a putative whistleblower knows that she is protected from retaliation, she will be more likely to report fraud. But there is more in play here than encouraging speculative future third-party conduct. In addition to promoting the reporting of fraud, there is also a public interest in simply ensuring that a present whistleblower is not punished for her whistleblowing. This assurance is not to incentivize or reward whistleblowing; rather, it is to merely prevent the normative wrong that occurs when a whistleblower suffers personal or professional harm for serving the public good.

The *qui tam* mechanism of the FCA recognizes this interest, at least implicitly. In enabling payment of an award to a whistleblower, the statute seeks in part to compensate that person for potential negative externalities she bears in the pursuit of her claim—a claim that principally benefits the government, which bears none of the costs but stands to reap the rewards in the event of a successful litigation. In determining the amount of the award a whistleblower should receive under the FCA, one factor that the Department of Justice considers is whether “[t]he filing of the complaint had a substantial adverse impact on the relator.”⁹³ If the whistleblower suffered an adverse impact, the DOJ guidelines recommend an increased award.⁹⁴ As Justice Kennedy has explained, the *qui tam* mechanism “is designed to benefit both the relator and the Government.”⁹⁵

The interests of an employer who is committing fraud and an employee who knows about it are fundamentally adverse to one another. The employer has an interest in not having its fraudulent activity revealed and in not being a defendant in a lawsuit. Conversely, the employee has an interest in revealing the fraud (to the extent that combatting fraud benefits the public) and in pursuing the portion of the award to which she is entitled as a whistleblower. But she also has a significant personal interest in keeping her job and avoiding repercussions relating to her whistleblowing activity.⁹⁶ In these situations, antiretaliation provisions are effective because they prevent employers from undertaking adverse employment actions against whistleblowers, which would undermine the *qui tam* incentive structure that Congress implemented in the Act. Indeed, Congress intended the antiretaliation provisions to “halt companies and individuals from using the threat of economic retaliation to silence ‘whistleblowers,’ as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.”⁹⁷

93. *DOJ Relator’s Share Guidelines*, 11 FALSE CLAIMS ACT & QUI TAM Q. REV. 17, 18 (1997).

94. *Id.* at 17–18.

95. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2016).

96. See Ramirez, *supra* note 90, at 189–90.

97. S. REP. NO. 99-345, at 34 (1986), reprinted in 1986 U.S.C.A.A.N. 5266, 5300.

But antiretaliation provisions do little good when the employer's action is not necessarily *adverse* to the interests of the employee, but rather is neutral—or even beneficial (for example, a severance agreement with a generous payout). In those cases, the interests of the employer and employee are not so divergent, and the likelihood that the employee will blow the whistle on the employer's wrongdoing is limited. There are two types of nonadverse employer activities that are of primary concern: activity that chills whistleblowing by discouraging employees from serving as whistleblowers (“chilling activity”), and activity that procedurally restricts the legal ability of an employee to actually bring a whistleblowing claim (“restrictive activity”). Both types of activity threaten to deter legitimate FCA litigation but do not necessarily run afoul of the existing antiretaliation provisions in the Act.

1. Chilling Activity

An employer engages in chilling activity when it takes some nonadverse action that has the probable effect (whether or not intended) of discouraging employees from pursuing legitimate whistleblower claims. The restrictive confidentiality clauses discussed above provide a useful example of this principle.

Consider a confidentiality clause similar to the one used by KBR that was the subject of an SEC enforcement action.⁹⁸ The mere presence of the confidentiality clause may well discourage individual employees from coming forward for a number of reasons: employees may fear they will suffer employment repercussions if they violate the agreement, or they may be uncertain that reporting fraud to the government is even legally permitted. The latter concern is not legally justified. Courts have generally held that these sorts of clauses are without legal teeth—whistleblowers are permitted to provide the government with confidential information in the course of an FCA action or rely on such information as the basis of their complaint.⁹⁹ But the problem with these clauses is about their bark, not their bite. The issue is not whether courts will enforce such an agreement if it is challenged in court. Rather, the issue is whether cases will never make it to court in the first place because the mere existence of the provision deters whistleblowers from reporting fraud. An employee who suspects her employer of engaging in illegal conduct may well hesitate to approach an attorney or government official out of fear that disclosing confidential information will result in retaliation by her employer—a well-founded fear given the language of many such agreements.¹⁰⁰

98. See *supra* notes 62–72 and accompanying text.

99. E.g., *United States ex rel. Cieszynski v. Lifewatch Servs., Inc.*, No. 13 CV 4052, 2016 WL 2771798 (N.D. Ill. May 13, 2016). For a more in-depth discussion of counterclaims against plaintiff-relators, see *Walsh v. Amerisource Bergen Corp.*, No. 11-7584, 2014 WL 2738215 (E.D. Pa. June 17, 2014).

100. The regulatory history of Rule 21F-17 reveals that the SEC was concerned about precisely this:

Employers wield an inherent authority over their employees, and the mere implication that certain conduct is prohibited (or even just frowned upon) can have real effects. Data suggests that the SEC's concern is not sheer speculation. Recall the statistics discussed above: 46% of employees declined to report misconduct out of fear of retaliation, while 22% of those who reported such misconduct claimed to have experienced retaliatory acts.¹⁰¹ Fear of retaliation chills whistleblowing activity, even when retaliation does not actually occur.¹⁰²

Yet it may be quite difficult to prove that a clause like the one used by KBR ran afoul of the FCA's antiretaliation provisions—that is, that the clause “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against” an employee.¹⁰³ The case becomes even more difficult if the clause is never actually enforced. And indeed, there is reason to believe that the attorneys who draft these clauses are aware of this chilling effect: attorneys have advocated for employers to use general releases in severance agreements regardless of their enforceability because, “[a]t the least, a well-drafted pre-filing release of qui tam claims may cause an employee to hesitate before bringing a qui tam action against his or her former employer.”¹⁰⁴ That is, the mere inclusion of such a clause may have the intended effect of discouraging whistleblower claims. Where the SEC has been able to target this sort of activity through Rule 21F-17, the antiretaliation provisions of the FCA come up short.

2. Restrictive Activity

Restrictive activity is employer activity that actually impairs the procedural ability of employees who might otherwise be inclined to file FCA lawsuits. Legal scholars have described a recent trend of judicial hostility towards certain kinds of individual actions—including skepticism of class-action litigation¹⁰⁵ and increased enforcement of waivers and arbitration

[A]n attempt to enforce a confidentiality agreement against an individual to prevent his or her communications with Commission staff about a possible securities law violation could inhibit those communications even when such an agreement would be legally unenforceable, and would undermine the effectiveness of the countervailing incentives that Congress established to encourage individuals to disclose possible violations to the Commission.

Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,352 (proposed June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) (footnote omitted).

101. ETHICS RES. CTR., *supra* note 86, at 3, 5 n.4.

102. See Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 62 (“[A]ny company’s blanket prohibition against witnesses discussing the substance of the interview has a potential chilling effect on whistleblowers’ willingness to report illegal conduct to the SEC.”).

103. 31 U.S.C. § 3730(h) (2012).

104. Todd P. Photopulos & Graham W. Askew, *Having Your Cake and Eating It Too—The (Un)Enforceability of Releases on Future Qui Tam Claims*, J. HEALTH & LIFE SCI. L., July 2008, at 145, 161.

105. See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

clauses¹⁰⁶—resulting in a diminished ability for individuals to pursue claims in court.¹⁰⁷ In the context of the FCA, this trend implicates unique concerns because of the public interest affected and the distinctive function of the qui tam mechanism.

An example of restrictive activity is the employee severance agreement, which often contains a broad, general release of all claims the employee might have against the employer.¹⁰⁸ When an employee has signed such a waiver, employers may claim that the employee has waived her right to proceed as a plaintiff-relator in a qui tam action against the employer. Courts have struggled to resolve this issue and have yet to reach a clear consensus. In *United States ex rel. Green v. Northrop Corp.*,¹⁰⁹ Michael Green brought an FCA lawsuit against his employer, Northrop, after learning that it had “double charged” the United States for certain equipment purchased by the Air Force for its B-2 bomber program.¹¹⁰ Before Green filed suit, Northrop terminated his employment.¹¹¹ Pursuant to his severance agreement, Green received \$190,000 in severance pay and, in exchange, signed an extremely broad agreement that included a clause in which he purportedly agreed to “release, acquit and forever discharge Northrop . . . from any and all claims . . . and causes of action of every nature, under any theory under the law . . . whether known or unknown.”¹¹²

The Ninth Circuit considered the text and legislative history of the statute, and after determining that Congress had not expressed intent one way or the other about whether such a waiver should be enforced,¹¹³ applied federal common law to determine that the waiver was unenforceable.¹¹⁴ The court noted that “qui tam actions exist *only* to vindicate the public interest”¹¹⁵ and that courts should not enforce a release that was entered into

106. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

107. See, e.g., Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317 (2012); Jed S. Rakoff, *Why You Won't Get Your Day in Court*, N.Y. REV. BOOKS (Nov. 24, 2016), <http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/> [https://perma.cc/5347-FCXE].

108. See, e.g., Susan Adams, *The Top Ten Reasons to Hire a Lawyer to Review Your Severance Agreement*, FORBES (Dec. 1, 2011, 10:57 AM), <https://www.forbes.com/sites/susanadams/2011/12/01/the-top-ten-reasons-to-hire-a-lawyer-to-review-your-severance-agreement/#2a705f9a419b> [https://perma.cc/B2G8-RPGS]; *Severance Pay: Release of Legal Claims*, LEGAL AID WORK, <https://las-elc.org/fact-sheets/severance-pay-release-legal-claims> [https://perma.cc/3P2Y-V42R] (noting that an employer may make severance pay contingent upon employee signing “[a] release of claims,” which is “generally legal and enforceable”).

109. 59 F.3d 953 (9th Cir. 1995).

110. *Green*, 59 F.3d at 956.

111. *Id.*

112. *Id.*

113. *Id.* at 960 (“[W]e have no basis for inferring that Congress intended the release at issue to be enforceable or unenforceable. . . . Therefore, we are faced with a ‘gap’ in the statutory scheme.”).

114. *Id.* at 963–68.

115. *Id.* at 968.

before the filing of a complaint and without the knowledge or consent of the United States.¹¹⁶ Enforcing such an agreement, the court reasoned, would “dilute significantly the incentives that Congress” had built into the FCA because a would-be whistleblower would be left with “no right or reason to file a *qui tam* claim.”¹¹⁷

The Ninth Circuit reached a different outcome in a later case where the plaintiff-relator executed the agreement *after* filing his FCA action, and after the government had already started to investigate the claim.¹¹⁸ Because the government was already aware of the fraud allegations at the time the employee entered into the agreement, the court enforced the waiver.¹¹⁹ It found enforcement was appropriate because “the public interest in having information brought forward that the government could not otherwise obtain [was] not implicated.”¹²⁰ The Fourth¹²¹ and Tenth¹²² Circuits have also looked to “government knowledge” to decide whether a claim is enforceable, holding that “when . . . the government was aware, prior to the filing of the *qui tam* action, of the fraudulent conduct represented by the relator’s allegations, the public interest has been served and the Release should be enforced.”¹²³

The “government knowledge” solution is rather unsatisfying. Congress elected to use the *qui tam* mechanism—which gives the whistleblower a fair degree of autonomy over the litigation—instead of a model more like the administrative whistleblower programs, which delegate total control to the agency over the decision of which claims to pursue. The fact that the FCA specifically allows plaintiff-relators to pursue a case even where the government has declined to intervene¹²⁴ suggests that Congress recognized the importance of allowing private enforcement to proceed even where the government might, for whatever reason, be disinclined to pursue the claim.¹²⁵ Congress did not specify exactly why the government may decline to intervene in a meritorious case, but there are several plausible reasons, including finite government resources, conflicting interests, and expertise

116. *Id.* at 965.

117. *Id.*

118. *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997).

119. *Id.* at 233.

120. *Id.*

121. *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319 (4th Cir. 2010).

122. *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161 (10th Cir. 2009).

123. *Radcliffe*, 600 F.3d at 332–33 (noting concurrence with the Tenth Circuit).

124. 31 U.S.C. § 3730(c)(3) (2012) (“If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.”).

125. Between 1987 and 2005, the Department of Justice intervened in approximately 27% of filed False Claims Act cases. GOV’T ACCOUNTABILITY OFFICE, GAO-06-320R, INFORMATION ON FALSE CLAIMS ACT LITIGATION 29 (2005), <http://www.gao.gov/new.items/d06320r.pdf> [<https://perma.cc/6WE4-ZLAE>].

that a whistleblower may have that a government lawyer may lack.¹²⁶ Whatever the precise reasoning, it is clear that Congress intended to permit more qui tam litigation, not less, and it intentionally decided to not have the Department of Justice serve as a gatekeeper, determining which cases would proceed and which should be dismissed. In this way, private qui tam enforcement is able to “push[] into regulatory gaps left by legislative and administrative inertia”¹²⁷ and areas “where political and democratic control may be less dependable.”¹²⁸ By looking to whether the government has already learned of the fraud allegations (and thus could potentially enforce against them), courts diminish the discretion the FCA bestows upon private citizens engaging in public enforcement. The risk, in turn, is a resulting decrease in whistleblowing activity.

In recent years, some courts have shown a willingness to honor arbitration agreements that force qui tam litigation into an arbitral forum instead of federal court.¹²⁹ These forums are often defendant friendly and may include a cap on damages, selection of one or more arbitrators by the defendant, and other features that can make the case exceedingly difficult for plaintiff-relators.¹³⁰ These arbitration agreements, then, also impose a potentially stifling effect on qui tam litigation by relocating the forum from the one designated by Congress to one where the claim may face diminished chances of success.¹³¹

Courts are not likely to consider chilling and restrictive activity as behavior that “discriminates” against the employee to be discrimination as contemplated by the FCA’s antiretaliation provisions. In most cases, the effect on the employee is either neutral (as in the case of an unenforced confidentiality clause) or even beneficial (as in the case of an employee who receives a severance package that offers a significant payment of money in exchange for the signing of a general release). But practices that chill or stifle whistleblowing are undesirable because they undercut the strong public interest in combatting fraud. When employers engage in these practices, they

126. See William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1823–24 (1996) (noting that the qui tam structure allows individuals to “second-guess internal government decisions not to prosecute where such decisions may be the result of capture or corruption”).

127. David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons From Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1923 (2014).

128. *Id.* at 1968–91.

129. *E.g.*, United States *ex rel.* Hicks v. Evercare Hosp., No. 1:12-cv-887, 2015 WL 4498744 (S.D. Ohio July 23, 2015); Deck v. Miami Jacobs Bus. Coll. Co., No. 3:12-cv-63, 2013 WL 394875 (S.D. Ohio Jan. 31, 2013).

130. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (on file with the *Michigan Law Review*).

131. See Mathew Andrews, *Whistling in the Silence: The Implications of Arbitration on Qui Tam Cases Under the False Claims Act*, 15 PEPP. DISP. RESOL. L.J. 203, 251–66 (2015) (discussing concerns that qui tam arbitration could “blunt the effectiveness of the FCA and tip the scales in defendants’ favor”).

realign the interests of the wrongdoer and the would-be whistleblower, to the detriment of the government and the public.

This sort of activity contravenes the history and purpose of the FCA and undermines the robust fraud-fighting mechanism Congress created. It also circumvents the incentive structure Congress intentionally crafted through its implementation of the *qui tam* procedure. Where the FCA—including its antiretaliation provisions—is designed to give employees incentives to come forward and blow the whistle, chilling and restrictive employer activity threatens to take those incentives away. And the existing antiretaliation provisions are unable to reach this activity. Current FCA measures target actions that punish whistleblowers for making a claim, rather than actions that discourage whistleblowers from bringing claims in the first place.

III. PROTECTING WHISTLEBLOWING: RULE 21F-17 AS A MODEL FOR REFORM

Although courts and legislatures have primarily focused on laws protecting individual whistleblowers, it is time for a shift in the way that we think about whistleblower-retaliation law. Whether working within a statutory *qui tam* regime like the FCA, or a modern administrative program like the SEC Office of the Whistleblower, courts and lawmakers should expand and reorient their focus to ensure that these laws protect not only whistleblowers but also whistleblowing. Doing so will afford more robust protection of fraud-fighting activity, while honoring the purpose and intent that undergird these programs. This reform could come about in several ways.

First, courts can and should recognize the importance of deterring antiwhistleblowing activity: such conduct runs counter to the purpose of the FCA and frustrates congressional intent.¹³² When courts review documents like severance or arbitration agreements, which purport to restrict the ability of an employee to bring a whistleblowing claim, courts should refuse to enforce their terms as against public policy.¹³³ The antifraud policy underlying whistleblower law provides support for such a finding. Where an employer committing fraud is able to manufacture procedural impediments to the prosecution of a whistleblower claim, those agreements undermine congressional intent and should not be enforced.

The power of the courts, however, is necessarily limited. By its terms, the FCA only focuses on preventing reactive retaliation. The FCA does not empower courts to reach forward-looking activity designed to chill or restrict future whistleblowing. When a company uses a confidentiality clause

132. See, e.g., *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005) (explaining that the purpose of *qui tam* provision is to “encourage whistleblowers to act as private attorneys-general in bringing suits for the common good”).

133. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (noting that courts may refuse to enforce unconscionable contracts); see also *Winston v. Academi Training Ctr., Inc.*, No. 1:12-cv-767, 2013 WL 989999 (E.D. Va. Mar. 13, 2013) (holding agreement to arbitrate FCA complaint procedurally unconscionable and invalid).

that discourages whistleblowing, for example, courts will generally not enforce it.¹³⁴ The damage, however, is already done since the entire point of chilling activity is that the claims do not reach courts in the first instance. Because the FCA is currently silent about proactive antiwhistleblowing activity, courts are simply not equipped to address this sort of behavior.

Rule 21F-17 offers a model for how Congress could bolster protection of the FCA through legislation that counters not only harm targeted toward whistleblowers, but also harm to whistleblowing activity. Congress could implement a provision like Rule 21F-17 and create a new cause of action under the FCA establishing liability for employers that engage in antiwhistleblowing conduct. The cause of action could authorize the attorney general and the Department of Justice to enforce violations, rather than private individuals. Entrusting the Department of Justice rather than individuals to prosecute these violations has logical appeal since, unlike retaliation actions, the injury inflicted by antiwhistleblowing activity is closer to a public harm—it injures the government and the public by discouraging whistleblowing activity while its harm to any particular employee is more speculative.¹³⁵

Such a provision would serve the public interest in prosecuting whistleblowing claims and also preserve the congressional intent underlying the FCA. Congress implemented the *qui tam* model to create a specific incentive structure: “setting a rogue to catch a rogue” by inducing those with knowledge of fraud to come forward through the promise of a bounty.¹³⁶ Congress implemented an incentive structure that better aligned the interests of the whistleblower with those of the government and the public, thereby encouraging whistleblowing claims. When the very employers engaging in fraud can realign those incentive structures—through, for example, lucrative severance packages that incorporate general releases or confidentiality clauses that confuse employees about their rights—the purpose of the statute is frustrated.

To be sure, enabling the Department of Justice to prosecute companies that engage in proactive antiwhistleblowing activity could enable a wide swath of enforcement activity.¹³⁷ But that administrative cost is worth the benefit to the weighty public interests at play. By enacting a whistleblowing-protecting provision, Congress would ensure that that the private citizens it authorizes to pursue claims of fraud on its behalf would be free to do so untainted by external interference or influence. And although Rule 21F-17 enables the SEC to prosecute these violations, many of the largest FCA violations have come from entities and industries where the relevant conduct is

134. See *supra* note 99.

135. See generally Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

136. See *supra* text accompanying note 20.

137. The United States government routinely awards over \$500 billion in contracts each year. See *Overview of Awards by Fiscal Year*, USASPENDING, <https://www.usaspending.gov/transparency/Pages/OverviewOfAwards.aspx> [<https://perma.cc/D4K7-5PZM>].

not within the ambit of SEC regulation and is thus beyond the reach of the SEC program and its rules.¹³⁸ Additionally, with the future of the Dodd-Frank Act and the SEC whistleblower program uncertain,¹³⁹ adding an independent basis for whistleblowing protection within the FCA would ensure that employers would continue to be accountable for antiwhistleblowing activity.

Apart from Congress, antiwhistleblowing behavior could be proscribed at the state level. Many states have passed statutes analogous to the FCA—including *qui tam* provisions—that enable lawsuits against individuals or entities that have submitted false claims for payment to a state government.¹⁴⁰ Legislation that reins in antiwhistleblowing activity would promote state interests for the same reasons that federal legislation would bolster similar federal interests implicated under the FCA. Moreover, if such protection gained traction in enough states—or in states with large enough populations—companies that operate across the country may implement the more restrictive policies nationwide to ensure compliance and uniformity.¹⁴¹

Certainly, there would be pushback to this sort of legislation. Corporations that use waivers, arbitration agreements, restrictive confidentiality clauses, and the like will object to new limitations on their efforts to avoid liability for these claims. But it is hardly a novel idea that public interest

138. Many of the top FCA settlements, for example, have involved off-label marketing of prescription medication. See *Top 100 FCA Cases*, TAXPAYERS AGAINST FRAUD EDUC. FUND, <http://www.taf.org/general-resources/top-100-fca-cases> [<https://perma.cc/5NPY-AVC2>].

139. There is some uncertainty about what SEC whistleblower enforcement will look like going forward. Following the election of Donald Trump, SEC is under new leadership. See Press Release, U.S. Sec. & Exch. Comm'n, SEC Chair Mary Jo White Announces Departure Plans (Nov. 14, 2016), <https://www.sec.gov/news/pressrelease/2016-238.html> [<https://perma.cc/EM2W-W78S>]; Leslie Picker, *Donald Trump Nominates Wall Street Lawyer to Head S.E.C.*, N.Y. TIMES (Jan. 4, 2017), <https://www.nytimes.com/2017/01/04/business/dealbook/donald-trump-sec-jay-clayton.html> (on file with the *Michigan Law Review*). President Trump has called the Dodd-Frank Act a “disaster” and promised to “do a big number” on it—presumably not one that will expand its regulatory reach. Matt Egan, *Trump Pledges to “Do a Big Number” on Dodd-Frank Wall Street Reform*, CNNMONEY (Jan. 30, 2017, 4:53 PM), <http://money.cnn.com/2017/01/30/investing/dodd-frank-trump-regulation-banks/> [<https://perma.cc/WJ98-MAG3>] (calling the Act a “disaster”). While experts speculate that any change to the Dodd-Frank Act would not result in the wholesale dismantling of the SEC whistleblower program, its future is unclear. See Carmen Germaine, *Big SEC Whistleblower Bounties Won't Change with Trump*, LAW360 (Nov. 14, 2016, 9:02 PM), <https://www.law360.com/articles/862235/big-sec-whistleblower-bounties-won-t-change-with-trump> [<https://perma.cc/2QP3-ANST>]; Samuel Rubinfeld, *Dodd-Frank Rollback to Spare SEC Whistleblower Program, Experts Say*, WALL STREET J. (Nov. 15, 2016, 6:38 PM), <http://blogs.wsj.com/riskandcompliance/2016/11/15/dodd-frank-rollback-to-spare-sec-whistleblower-program-experts-say/> (on file with the *Michigan Law Review*).

140. See, e.g., New York False Claims Act, N.Y. STATE FIN. LAW §§ 187–194 (McKinney 2014); see also *States with False Claims Acts*, *supra* note 42.

141. See, e.g., Steven Overly, *Even in Trump's America, California Could Decide How Cleanly Your Car Runs*, WASH. POST (Feb. 23, 2017), <https://www.washingtonpost.com/news/innovations/wp/2017/02/23/even-in-trumps-america-california-could-decide-how-clean-your-car-runs/> [<https://perma.cc/6KUC-WJAW>] (noting the “magnifying power” of California regulations).

considerations may justify restricting employee-employer communications. Many states, for example, limit the duration of noncompete clauses in employment or severance agreements on public interest grounds.¹⁴² State and federal regulations require employers to make certain disclosures to their employees.¹⁴³ And government agencies have promulgated rules prohibiting arbitration agreements in certain contexts.¹⁴⁴ Here, the compelling public interest in protecting whistleblowing claims overwhelms the relatively minor obligations that the proposed provision would impose.¹⁴⁵ The public interest in identifying and stopping fraud, waste, and abuse is well recognized. Adding this provision would simply sharpen the FCA as the “most effective civil tool”¹⁴⁶ to prevent fraud and protect government programs.

CONCLUSION

The FCA continues to be a critical mechanism for the government to identify and combat fraud. While current antiretaliation protocols serve the important function of protecting those who come forward to report wrongdoing, they ultimately come up short. Current law does little to prevent employers from engaging in chilling or restrictive activity that may have a detrimental effect on the robust antifraud regime Congress intended to create. Judges and lawmakers should reorient their understanding of antiretaliation to prohibit not only behavior that affects the individual whistleblower after the fact, but also preemptive behavior that deters whistleblowing before it can occur. Administrative whistleblowing programs like the SEC Office of the Whistleblower, and in particular SEC Rule 21F-17, provide a useful model. Focusing on protecting both whistleblowers and whistleblowing would vindicate the original intent and purpose of the FCA and encourage whistleblowers to come forward and put an end to corporate wrongdoing. Protecting whistleblowing benefits the government, taxpayers,

142. *E.g.*, MICH. COMP. LAWS SERV. § 445.774a (LexisNexis 2013) (“An employer may obtain from an employee an agreement or covenant which protects an employer’s reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business.”).

143. *E.g.*, CAL. LAB. CODE § 3550 (West 2011) (requiring employers to post in “conspicuous location frequented by employees” notice identifying insurance carrier responsible for compensation insurance and claims adjustment); 29 C.F.R. § 825.300 (2016) (requiring every employer covered by FMLA to post “in a conspicuous place where employees are employed” notice explaining provisions of FMLA and procedures for filing complaints under FMLA).

144. *E.g.*, 81 Fed. Reg. 68,688, 68,867 (Oct. 4, 2016) (to be codified at 42 C.F.R. pt. 483) (prohibiting arbitration clauses in certain nursing home contracts). *But see* Am. Health Care Ass’n v. Burwell, No. 3:16-CV-00233, 2016 WL 658295 (N.D. Miss. Nov. 7, 2016) (enjoining enforcement of this rule).

145. *See generally* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016).

146. Press Release, U.S. Dep’t of Justice, *supra* note 3 (quoting Principal Deputy Assistant Attorney General Benjamin C. Mizer).

and whistleblowers—and ensures that the FCA remains an effective instrument in the fight against fraud.