THE WHISTLEBLOWER PERSPECTIVE:
WHY THEY DO IT, AND WHY WE NEED THEM

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The recent revitalization of the False Claims Act (FCA) is in large measure the product of improved incentives provided to whistleblowers and a narrowing of the restrictions that limit their ability to file suits. The federal government now relies on whistleblower-initiated lawsuits for the majority of its recoveries under the FCA. This is a reflection of the modern reality that fraud on the government is increasingly complex and difficult to detect and unravel without the specialized, usually insider, knowledge that whistleblowers often possess. A majority of state governments now have their own false claims acts as well. The successful expansion of the FCA has prompted the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC) to adopt similar whistleblower-reward programs, thus making whistleblowers the cornerstone of the federal government's efforts to combat fraud. In order for these new programs to succeed, and for the FCA to continue being an effective tool against fraud, the whistleblower's perspective must be carefully examined to ensure that whistleblower incentives remain appropriate.

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This paper discusses the unique and critical role that whistleblowers play in ferreting out fraud, and the social value they provide. This paper will also explore the financial and non-financial reasons that drive a whistleblower's decision about whether to play this crucial role and the cost/benefit analysis that all potential whistleblowers must make. If society is to continue to rely on whistleblowers as a tool to combat fraud, there needs to be a clearer understanding of their motivations. If we as a public want to provide the right mix of incentives to spawn private attorneys general, we need to know whether the current incentives work. And we must also know whether there is more that can be done to properly reward whistleblowers for the value they provide and the sacrifices they must make.

THE RISE AND FALL (AND RISE AGAIN) OF WHISTLEBLOWER INCENTIVES

The history of the federal False Claims Act (FCA) is notable for the tinkering with the *qui tam* incentives. When the law was first passed during the Civil War, the government had no right of intervention—the Department of Justice didn't even exist at the time—and relators received 50% of all recoveries.[2] Congress at that time was reacting to the outrageous fraudulent schemes of wartime profiteers who sold the government defective, substandard, or even non-existent goods. "The Lincoln Law," as the FCA was more commonly known, was an attempt to eradicate such overt acts of fraud by harnessing the power of whistleblowers, who would act as private attorneys general. Fraud, in that era, didn't need subtlety or complexity; it was usually pretty obvious. Yet the government—overwhelmed with the war effort—simply lacked the resources to detect the fraud, and even if it were detected, it was difficult if not impossible to find the culprit or obtain damages.

In the days following the attack on Pearl Harbor, Congress again revisited the FCA's incentives, this time worried about a different type of profiteering: the so-called "parasitic" suits that called into question the utility of the FCA. Although repeal of the FCA was considered, Congress eventually opted to heighten the bar for relators seeking to file suit and to reduce the incentives for relators. With the passage of the 1943 amendments, Congress granted the Department of Justice the power to intervene in cases and reduced the relator share where there was intervention to 10% of the recovery.[3] Even in cases where the government did not intervene, the relator share was halved to 25% of

[2] *See* An Act to Prevent and Punish Frauds Upon the Government of the U.S., ch. LXVII, § 1, 12 Stat. 696 (1863) (codified as amended as 31 U.S.C. § 3729 *et seq.* (2009)).

[3] *See* Public Law 78-213, 57 Stat. 608 (1943).

the recovery. A key rationale for these changes was the government's limited resources: while Congress felt the Department of Justice (DOJ) had the resources to fight fraud detected on its own, there was concern that it did not have the resources to pursue "parasitic" cases brought by others.[4] The consequences of these amendments were, not surprisingly, pretty dramatic: over the next four decades, the *qui tam* action filing rate dropped to only 6 per year.[5]

As the Cold War's intensity renewed in the 1980s, public attention was again focused on protecting federal coffers from military profiteers. Fraud had become harder to spot as weapons systems and procurement contracts became more complex. Whether purchasing a complex missile system, or the Navy's infamous "$600 toilet seat,"[6] the government recognized that it would be unable to effectively detect and root out fraud without the aid of whistleblowers and their specialized knowledge. Faced with increased defense spending and rising deficits, Congress sought to revitalize the FCA.

In 1986, Congress passed sweeping amendments to the FCA.[7] These amendments, among other things: (a) increased the size of relator shares to between 15% and 25% of the recovery in intervened cases, and 25% and 30% in non-intervened cases; (b) eased certain restrictions for filing an action; (c) increased fines from $2,000 per false claim to between $5,000 to $10,000 per false claim; (d) allowed for treble damages; (e) allowed prevailing relators to recover attorney's fees and costs from the defendants; and (f) provided a separate cause of action for relators who had been "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" as a result of their whistleblowing activities.

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[4] *See* Attorney General Francis Biddle to Chairman of the Senate Judiciary Committee, printed in S. Rept. No. 77-1708, at 2.

[5] Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 Vill. L. Rev. 273, 318 (1992) (noting that, from 1943 to 1986, *qui tam* actions averaged about six per year and actions by the Attorney General averaged about ten per year).

[6] The "$600 Toilet Seat" was a slight misnomer. The item in question was actually a corrosion-resistant plastic cover for toilets aboard the Navy's P-3C Orion antisubmarine plane. The controversy began when a contractor who lost the bid to Lockheed Martin learned that Lockheed was charging $34,560 for 54 such covers, or $640 apiece. While Lockheed denied any wrongdoing, it eventually agreed to lower the price to $100 per unit. *Adjusting the Bottom Line*, Time Magazine, February 18, 1985, available at http://www.time.com/time/magazine/article/0,9171,960748,00.html?iid=chix-sphere (last accessed February 24, 2011).

[7] False Claims Act Amendments, Pub. L. 99-562, 100 Stat. 3153 (1986), (codified as amended as 31 U.S.C. § 3729 *et seq.* (2009)).

WHY THE FALSE CLAIMS ACT NEEDS WHISTLEBLOWERS TO SURVIVE

As a result of the 1986 amendments, there has been a tremendous expansion in the statute's utility and a greater attention focused on the role of whistleblowers and the value of the information that they are able to uncover. Most impressively, the 1986 amendments have spawned two decades of escalating recoveries under the FCA.

As shown in Figure 1 below, within a decade of the 1986 amendments, whistleblower-initiated recoveries surpassed government-initiated recoveries:

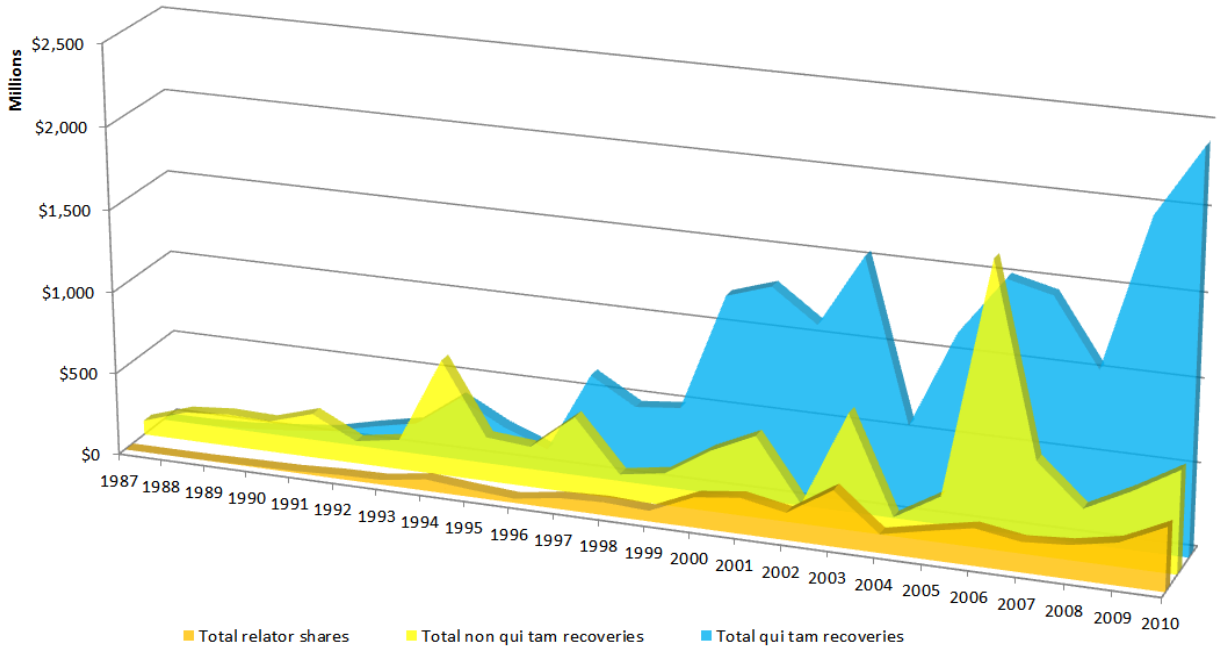

Figure 1: Aggregate FCA Recoveries[8]

In all but one fiscal year since 2000, total FCA recoveries from whistleblower-initiated suits have topped $1 billion. During that same time period, annual government-initiated recoveries have only surpassed the $1 billion mark once.

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[8] Source: U.S. Department of Justice, Civil Division. Fraud Statistics – Overview (October 1, 1987 [*sic*] - September 30, 2010), available at http://www.taf.org/FCA-stats-2010.pdf (last accessed February 23, 2011); U.S. Department of Justice, Civil Division. Fraud Statistics – Overview (October 1, 1987 [*sic*] - September 30, 2009), available at http://www.taf.org/FCAstats2009.pdf (last accessed February 23, 2011); U.S. Department of Justice, Civil Division. Fraud Statistics – Overview (October 1, 1986 - September 30, 2008), available at http://www.justice.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm (last accessed February 23, 2011).

The revival of the FCA has been most pronounced in the healthcare arena, and healthcare-related FCA cases now dominate the field. Since 1986, more than $18 billion of the $27 billion recovered under the FCA came from healthcare cases. This growth is largely attributable to the fact that an increasingly larger share of the federal budget goes toward healthcare costs. In fact, in the most recent proposed budget (see Table 1 below), spending for Medicare and Medicaid represent the largest single budget area, larger than social security, defense, or debt service.

Table 1: Healthcare & the 2012 Federal Budget[9]

Budget Area		**Spending**
Centers for Medicare and Medicaid Services (*mandatory*)		$1,100 billion
Social Security Administration (*mandatory*)		$808 billion
Defense-Military Programs		$678 billion
Operation and Maintenance (*discretionary*)	$295 billion	
Military Personnel (*discretionary*)	$154 billion	
Procurement (*discretionary*)	$128 billion	
R&D and Testing (*discretionary*)	$76 billion	
Other Spending (*discretionary*)	$25 billion	
Interest on Public Debt (*net interest*)		$474 billion

[9] Source: *Obama's 2012 Budget Proposal: How $3.7 Trillion is Spent*, New York Times, available at http://www.nytimes.com/packages/html/newsgraphics/2011/0119-budget/index.html?hp (last accessed February 23, 2011).

Given that more than a trillion dollars are spent on healthcare through Medicare and Medicaid annually, estimates of the cost of fraud borne by taxpayers can be staggering. Senator Grassley's office estimates that between 5% and 8% of the Medicare and Medicaid spending is fraudulent.[10] At current spending levels, that translates to a conservative estimate of between $50 and $80 billion wasted annually due to fraud.

Not surprisingly, healthcare-related recoveries have grown substantially since the late 1990s, even while recoveries outside of the healthcare arena have remained flat. $2.5 billion was recovered *last year alone* through healthcare-related cases brought under the FCA:

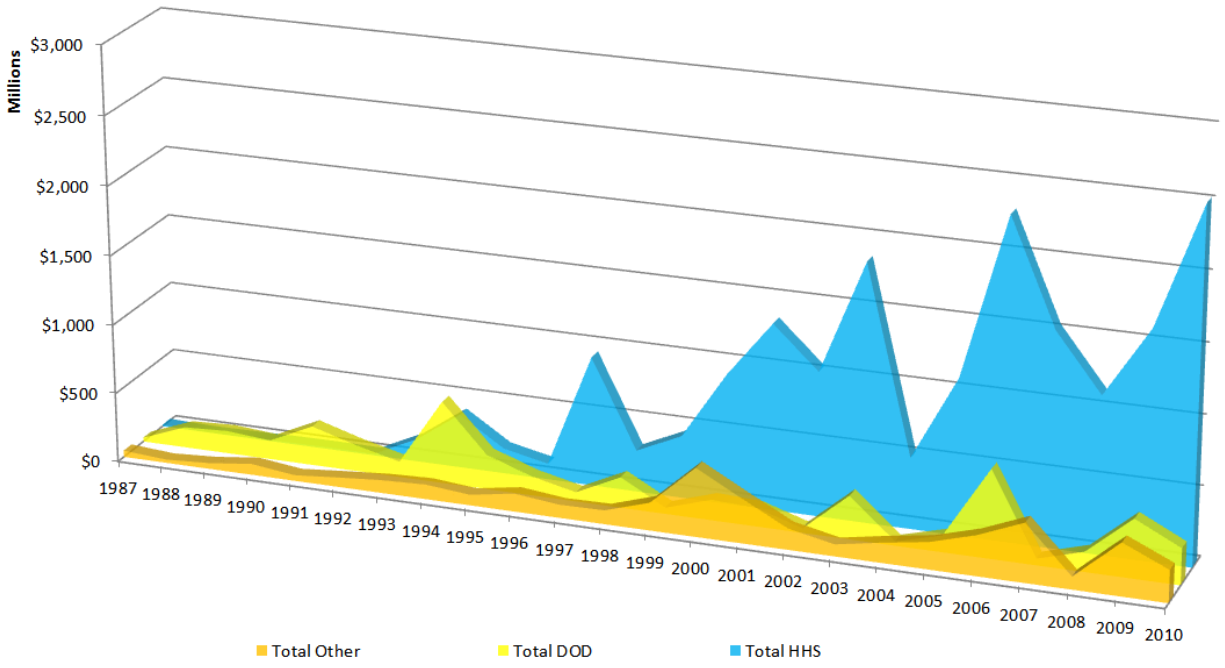

Figure 2: Total Recoveries Allocated by HHS, DOD, and "Other"[11]

Whistleblowers are the main cause of significant growth in FCA recoveries in the healthcare sector over the last two decades. Since the late 1990s, recoveries for

[10] Grassley on Health Card Fraud Recovery, Legislative Plans, available at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=30844 (last accessed February 23, 2011).

[11] *See* note 7, *supra*.

healthcare fraud uncovered by whistleblowers have greatly exceeded recoveries for healthcare fraud discovered by the government alone:

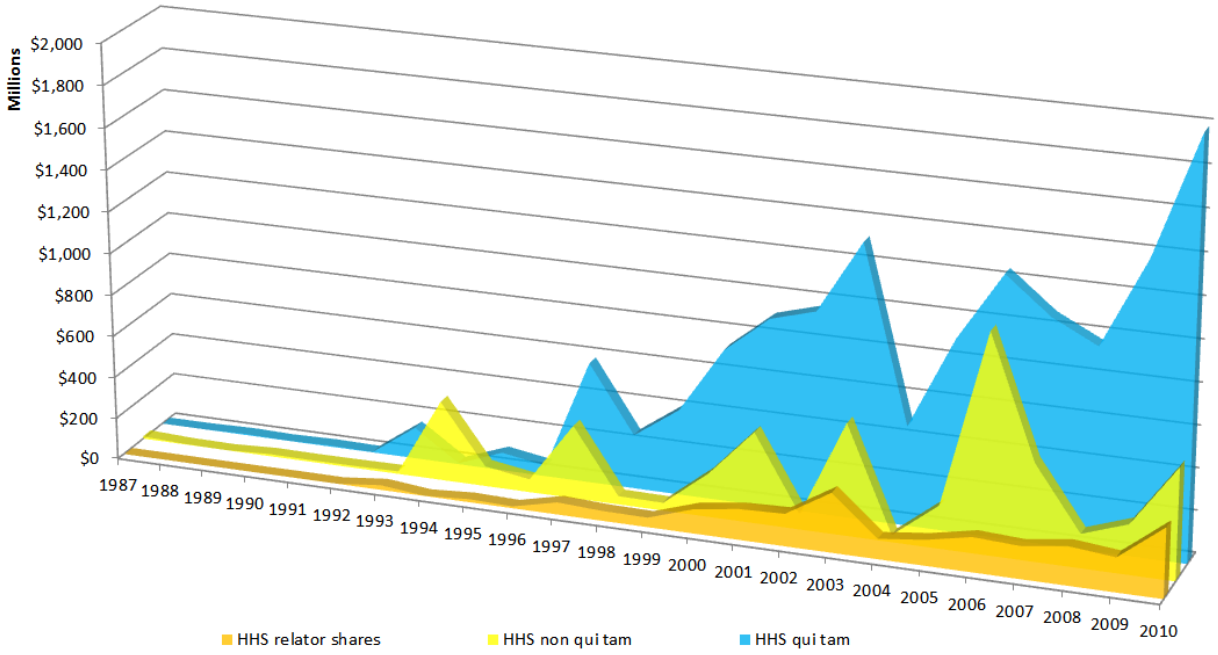

Figure 3: Healthcare Recoveries[12]

Because of the nature of healthcare expenditures, healthcare whistleblowers constitute the primary means for detecting fraud. In two important ways, the federal government's spending for healthcare in 21st century bears little resemblance to its purchases of munitions in the 19th century. First, in modern healthcare, the government functions essentially as a third party payor, meaning that it pays the bills, but does not itself receive the goods or services. Those go to the Medicare and Medicare beneficiaries, the patients who are receiving the healthcare. If a beneficiary receives substandard care or inflated billing, the government very likely will not find out.

Second, the goods and services delivered in healthcare are, for the most part, credence goods, making fraud difficult to detect. Credence goods are products whose utility can only be observed by customers after the products have been used (and expended), rather than before, as is typically the case with most products.[13] Since

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[12] *See* note 7, *supra*.

[13] *See* Dulleck, Kerschbamer and Sutter. *The Economics of Credence Goods: An Experiment on the Role of Liability, Verifiability, Reputation and Competition*, 44 J. Econ. Lit. 5-12 (2006), available at http://ibe.eller.arizona.edu/docs/2010/Dulleck/AER_20090648_Manuscript.pdf ("Repair services,

credence goods typically require consumption before a determination of quality can be made, it is almost always the case that fraud cannot be detected until after the product has already been consumed. There are, thus, few ways to protect against fraud in the delivery of credence goods. And because credence goods are typically sold by experts, whose dual role as salesman also includes diagnosing the customer's need for product in the first place, there is an inherent asymmetry in knowledge that can easily be exploited fraudulently. We rely on our doctors and car mechanics to tell *us* what we as consumers need, not the other way.

These two concepts combine to make the government unusually vulnerable to healthcare fraud. Short of having government bureaucrats patrolling doctors' offices or patients' medicine cabinets, the only way to combat this type of fraud is through the whistleblowers who are able to uncover the fraud through first-hand observation or knowledge. Federal and state governments simply lack the resources to scrutinize every transaction for fraud, and even if such resources existed, the government would have difficulty discerning the legitimate transactions from the fraudulent. The best, cheapest, and perhaps only way to reliably detect fraud in the healthcare arena is to harness the specialized knowledge that whistleblowers can bring.

Corporate insiders are usually the best source of information, as they are likely to be keenly aware of the nature of the fraud, as well as the location of the documents that prove its existence. Confidentiality agreements, document retention practices, and corporate control of the dissemination of information make it highly unlikely that the government will be able to detect fraud as a routine matter. For this reason, the most common type of whistleblower is a corporate insider who has access to the types of information that elude regulators. A classic example is whistleblower David Franklin, a pharmaceutical employee who was instructed by his superiors to engage in off-label marketing of the drug Neurontin. Perhaps the most powerful evidence of off-label marketing he obtained came in the form of recorded messages delivered to employees through their voice mailboxes—a communication system ironically used to avoid creating an incriminating paper trail.[14]

Not all whistleblowers of course are employees of the corporate fraudster. Observant and conscientious outsiders may be able to collect high-quality information as well. Some whistleblowers witness the fraud first-hand, as is the case in several recent

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medical treatments, the provision of software programs, or a taxi ride in an unknown city are prime examples of what is known as a credence good in the economics literature").

[14] *In re Neurontin Marketing and Sales Practices Litigation*, No. 04-cv-10739, 2010 WL 4325225, *24 (Nov. 3, 2010).

off-label marketing *qui tam*s where the whistleblowers were the physicians who were exposed to off-label marketing. A smaller but increasingly important group of whistleblowers has no direct interaction with the corporate fraudster. Instead, these whistleblowers possess expert knowledge in a particular field, which with some careful investigation and research, they use to piece together the existence of the fraudulent schemes. While the temptation is to dismiss these whistleblowers as "gadflies," they are the last line of defense when no corporate insider comes forward. Perhaps the best example of an outside whistleblower is Harry Markopolos, the whistleblower who made repeated attempts over several years to blow the lid off Bernie Madoff's multibillion dollar Ponzi scheme. As an expert in the field of derivatives, Markopolos was able to reverse engineer the massive swindle. He made careful observations of the numerous "red flags" and then utilized his trading expertise to recognize the impossibility that these red flags could have an innocent explanation. Sadly, his conclusion that "Madoff Securities is the world's largest Ponzi Scheme" was ignored, most likely because he was viewed as a "gadfly."[15]

WHAT MOTIVATES A WHISTLEBLOWER?

Public debate concerning the societal costs of fraud typically isolates all attention on the motivations of the government and potential corporate defendants. Governments want to deter fraud as much as possible, and recover all money defendants fraudulently obtained. Potential corporate defendants want to maximize the money earned from doing business with the government, while at the same time minimizing liability for fraud. In reality, of course, the government also spends significant sums of money to construct a regulatory environment which is designed to detect fraud, and potential corporate defendants, even if they are not engaged in fraud, must expend significant sums of money to comply with those regulations. These costs are clearly not "zero sum," and prove to be inefficient, as regulations alone cannot detect or prevent all frauds.

Lost in the discussion of how to combat fraud is an enlightened view of the motivations of the potential whistleblower. What makes one person decide to become a whistleblower, while someone else remains reticent, acquiescent, or even complicit in the face of fraud? The answer lies within a complex set of socioeconomic, moral, ethical, and interpersonal factors that are not fully understood and cannot be reliably predicted.

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[15] Letter from Markopolos to the SEC dated November 7, 2005, available at http://www.jdsupra.com/post/documentViewer.aspx?fid=54539da2-994e-43b5-b271-19fbb7e723e3 (last accessed February 24, 2011); *see also* Harry Markopolos, *No One Would Listen: A True Financial Thriller* (John Wiley & Sons 2010).

Nevertheless, it is clear that each potential whistleblower faces a quandary, which he or she resolves using a highly personalized cost-benefit analysis. The following table summarizes many of the factors that must be balanced:

Table 2: Whistleblower Motivational Factors

Factors Favoring Blowing the Whistle	Factors Disfavoring Blowing the Whistle
Financial Considerations	
• Substantial relator award • Book/movie rights • Other skills or sources of wealth	• Loss of income, benefits, stock options, and equity value • Loss of career (blacklisting) • Loss of seniority • Concern about retirement • Delays and uncertainty in collecting relator's share
Moral, Ethical & Fiduciary Principles	
• "Fraud is wrong"/reporting fraud is "the right thing to do" • Altruism (social benefits of exposing fraud) • Duty to fellow taxpayer • Religious values • Collecting fraud evidence ethically justified	• "Everyone does it" • Loyalty to corporation • Duty to corporation and shareholder to keep quiet • Collecting and exposing corporate documents is wrong
Interpersonal Issues	
• Antipathy towards superiors • No attachment to co-workers • Antipathy towards industry • "My complaints will be ignored by the company"	• Remain a "team player" • Friendships with co-workers • "My complaints will be taken seriously by the company" • Antipathy towards government
Personal Issues/Personality & Self Image	
• "Nothing to lose" by filing • Family/social support • Stamina • Curiosity, diligence • Courage, certainty • Craving attention • Concern about being the "fall guy"	• "Everything to lose" by filing • Lack of family/social support • Lack of stamina • Indifference, stress • Fear, doubt • Avoiding negative publicity • Concern about being blamed

While it seems self-evident that any person who learns of fraud will want to report it, especially when there are financial rewards for reporting such conduct, the above table shows a more complicated picture. For nearly every consideration that favors blowing the whistle, there are equal and opposite considerations that caution against it. While there is insufficient space to address all of these considerations, the paper will focus briefly on a few of the most important:

Financial Considerations

The financial motivations for being a successful *qui tam* relator are clear; a relator stands to earn somewhere between 15 and 30% of the government's FCA recovery, plus costs and reasonable attorney's fees. And because the focus of FCA cases is on multimillion dollar transactions, FCA recoveries can be quite large.

From October 1986 through September 2010, the Department of Justice reports that 1381 *qui tam* cases were resolved through settlement or judgment.[16] The cases in that span have resulted in total recoveries against defendants of $18.2 billion, or just over $13 million per case. Total payouts to relators in these cases have been $2.88 billion, or just over $2 million per case. While there is little or no data tracking unsuccessful relators—i.e., the relators who get *nothing*—there is ample data showing that relators can earn relator shares in the neighborhood between $10 million to $100 million. The highest recorded relator share appears to be from the $750 million GSK settlement in October 2010. Relator Cheryl Eckard, a former quality assurance manager, brought the action, alleging that manufacturing problems and GMP violations by GSK at its factory in Puerto Rico had caused drug shipments for various GSK products to be contaminated, have incorrect dosages or potency, or to contain the wrong product. Eckard, who was fired after bringing these problems to the company's attention, earned a relator share of $96,016,800.[17] Similar whistleblower recoveries have also been earned in multi-whistleblower actions in cases such as: the 2001 TAP settlement, the 2003 HCA settlement, the 2008 Merck settlement, and the 2009 Pfizer and Lilly settlements. While the manner in which multi-whistleblower recoveries are divided is not always made

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[16] *See* Appendix A: U.S. Department of Justice, Civil Division. Fraud Statistics – Overview (October 1, 1987 [*sic*] - September 30, 2010), available at http://www.taf.org/FCA-stats-2010.pdf (last accessed February 23, 2011).

[17] Peter Loftus, *Whistleblower's Long Journey*, Wall Street Journal, October 28, 2010, available at http://online.wsj.com/article/SB10001424052702303443904575578713255698500.html (last accessed February 24, 2011); Settlement Agreement, available at http://www.justice.gov/usao/ma/Press%20Office%20-%20Press%20Release%20Files/Oct2010/GSK%20Settlement%20Agreement10_26.pdf.

public, it is nevertheless estimated that the relators in those cases earned less than Ms. Eckard, although their awards were also substantial.

While we may think of relator shares as strictly proportional to the size of overall FCA recoveries, this is not the case. There are numerous factors, including number of whistleblowers, the respective value of their contributions, first-to-file and public disclosure issues, and the existence of criminal allegations that could result in large fines, that have an effect on the size of an in individual whistleblower's relator share. This is illustrated by the chart which begins on the following page, which shows reported relator shares from the top 20 reported FCA settlements:

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Table 3: Top 20 *Qui tam* Recoveries[18]

#	Defendant	Year	Total Amount	Relator(s)	Relator Share(s)[19]
1.	Pfizer *Off-label marketing, kickbacks & pricing*	2009	$1,000,000,000	John Kopchinski Dr. S. Kruszewski Ronald Rainero Glenn DeMott Dana Spencer Blair Collins	$51,500,999 $29,013,420 $9,321,369 $7,431,505 $2,743,637 $2,354,582
2.	Tenet Healthcare *Billing violations*	2006	$900,000,000		
3.	HCA *Billing violations*	2000	$731,400,000		

[18] Source: *Pfizer*—Settlement Agreement, available at http://www.justice.gov/usao/ma/Press%20Office%20-%20Press%20Release%20Files/Pfizer/Pfizer%20Settlement%20Agreement.pdf; *Tenet*— Department of Justice Press Release dated June 29, 2006, available at http://www.justice.gov/opa/pr/2006/June/06_civ_406.html; *Merck*—Department of Justice Press Release dated February 7, 2008, available at http://www.whistleblowerаction.com/sites/default/files/merck/DOJ-Press-Release.pdf; *HCA II*—Department of Justice Press Release dated June 26, 2003, available at http://www.justice.gov/opa/pr/2003/June/03_civ_386.htm; *GSK*—Settlement Agreement, available at http://www.justice.gov/usao/ma/Press%20Office%20-%20Press%20Release%20Files/Oct2010/GSK%20Settlement%20Agreement10_26.pdf; *Serono*—Settlement Agreement, available at http://www.corporatecrimereporter.com/documents/Serono-CivilSettlementAgreemnt.pdf; Department of Justice Press Release dated July 21, 2009, available at http://www.mbklawyers.com/News/09-709_DOJ_Press_Release.pdf; *AstraZeneca*—Settlement Agreement, available at http://www.justice.gov/usao/pae/News/Pr/2010/apr/astrazeneca_settlementagreement.pdf; *Lilly*—Settlement Agreement, available at http://www.justice.gov/usao/pae/News/Pr/2009/jan/lillysignedsettlementagreement.pdf; *Abbott Labs*—Settlement Agreement, available at http://www.michigan.gov/documents/ag/abott_labs2003051264_276180_7.pdf; *Fresenius*— Fresenius Medical Care Holdings Inc./NY · 8-K · For 1/18/2000, available at http://www.secinfo.com/dS997.546.htm; *Cephalon*—Settlement Agreement, available at http://www.justice.gov/usao/pae/Pharma-Device/cephalon_settlementagreement.pdf; *BMS*—Settlement Agreement, available at http://www.brandweeknrx.com/files/SettlementAgreement--FinalSignedVersion.pdf. (All above internet citations last accessed on or by February 24, 2011).

[19] Amounts shown in this table reflect reported relator recoveries, and do not take into side agreements.

Table 3: Top 20 *Qui tam* Recoveries[18]

#	Defendant	Year	Total Amount	Relator(s)	Relator Share(s)[19]
4.	Merck *Kickbacks & overcharging*	2008	$650,000,000	Dean Steinke Dr. W. LaCorte	$68,190,000 $23,000,000
5.	HCA *Kickbacks & overcharging*	2003	$631,000,000	James Alderson John Schilling	$100,000,000 (*shared*)
6.	GSK *Manufacturing*	2010	$600,000,000	Cheryl Eckard	$96,016,800
7.	Serono *Off-label marketing & kickbacks*	2005	$567,000,000	Christine Driscoll Sandra Boucher William Frye Kim Jackson	$16,940,000 $34,923,000 (*shared*)
8.	TAP *Pricing*	2001	$559,483,560	Douglas Durand Joseph Gerstein	$95,112,204 (*shared*)
9.	NY State and NY City *Billing violations*	2009	$540,000,000	Hedy Cirrincione	$10,000,000
10.	AstraZeneca *Off-label marketing*	2010	$520,000,000	James Wetta Dr. S. Kruszewski	$45,286,051 (*shared*)
11.	Lilly *Off-label marketing*	2009	$438,171,544 (*plus $361 mil. for participating states*)	Robert Rudolph Hector Rosado Robert Daywitt James Wetta William Lofing	$78,870,878 (*shared*)
12.	Abbott Labs	2003	$414,464,749		

Table 3: Top 20 *Qui tam* Recoveries[18]

#	Defendant	Year	Total Amount	Relator(s)	Relator Share(s)[19]
13.	Fresenius Medical Care *Billing violations*	2000	$385,147,334	Ven-A-Care Dana Austin Gregory Price Richard Bradford Jay Buford Russell Davis William Schoff	$40,347,463 $4,483,052 $2,736,762 $143,855 $18,089,423 (*shared*)
14.	Cephalon *Off-label marketing*	2008	$375,000,000	Lucia Paccione Dr. J. Piacentile Bruce Boise Mike Makulsky	$46,469,978 (*shared*)
15.	BMS *Off-label marketing, pricing & kickbacks*	2007	$317,436,081 (*plus $181 mil. for participating states*)	Ven-A-Care Dan Richardson Dr. J. Piacentile Kathy Cokus Carol Forden Phillip Barlow	$24,904,350 $12,301,611 $7,256,400 $3,876,200 $2,046,582 $235,992
16.	GSK *Billing violations*	1997	$325,000,000	Robert Merena	$26,075,267
16.	HealthSouth	2004	$325,000,000	James Devage	$8,139,498
16.	Northrop Grumman *Defective products*	2009	$325,000,000	Robert Ferro DeWayne Manning Brupbacher & Associates Michael Freeman	$48,800,000 $4,069,749 $150,000 (*shared*)
19.	National Medical Enterprises	1994	$324,200,000		

Table 3: Top 20 *Qui tam* Recoveries[18]

#	Defendant	Year	Total Amount	Relator(s)	Relator Share(s)[19]
20.	Gambro Healthcare *Kickbacks & billing violations*	2004	$310,000,000	Steven Bander	$56,000,000

The above table shows that the amount a relator recovers—again assuming that they recover anything—can vary wildly even in large settlements. Nevertheless, large potential recoveries are the single most important financial consideration favoring the decision to become a whistleblower. This is a difficult incentive to measure or quantify, however, because Relators cannot know the amount that they will recover until a final settlement is reached.

The speculative nature of whistleblowing is the reason that any attempt to cap recoveries will operate as a disincentive to relators. To begin with, to the extent that financial considerations are important to a whistleblower, such whistleblowers are lured by the significant upside of the maximum potential recovery based on publicized settlements, not average or median recoveries, which are not systematically recorded or made public. And even though the recoveries of successful whistleblowers appear to be quite large, many successful relators state the money is too little or comes too late to fully compensate them for the ordeal that they must go through. Most lose their job and benefits. Many are blacklisted and few remain in their industry as a result of their whistleblowing activities.[20]

Even record-setting relator Eckard stated it was "difficult to survive [her FCA case] financially." Eckard was fired in 2003 after she refused to participate in the cover-up of manufacturing problems, and after GSK rebuffed her recommendations that GSK suspend product shipments, suspend manufacturing for two weeks, and notify the FDA of the manufacturing problems.[21]

Other successful relators have reported similar financial strains or even financial devastation despite their recoveries. One relator reported:

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[20] *See* Kesselheim, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362:19 NEJM 1832, 1836-37 (2010).

[21] *See* Wall Street Journal, Whistleblower's Long Journey. October 28, 2010.

> I just wasn't able to get a job. It went longer and longer. Then I lost — I had a rental house that my kids were [using to go] to school. I had to sell the house. Then I had to sell the personal home that I was in. I had my cars repossessed. I just went — financially I went under. Then once you're financially under? Then no help. Then it really gets difficult. I lost my 401[k]. I lost everything. Absolutely everything.[22]

Compared to the potential financial upside, the financial downside for bringing an action happens much more quickly and with greater certainty.

A second consideration is the role that a whistleblower's counsel plays in not only bringing the case to the government's attention, but also conducting the investigation and discovery, and developing the case. Because nearly all whistleblower litigation is under contingent fee agreements, lawyers share their clients' financial interests in pursuing large, complicated, and time-consuming cases. Not only do the attorneys spend considerable time investigating *qui tam* matters, research shows that most successful relators also act as "active players" in their own investigations.[23] It is for this reason that as recently as April 2009, the Senate voted on fairly bipartisan lines to reject imposing even a generous cap on relator recoveries.[24]

Non-Financial Considerations

While the financial incentives to become a whistleblower are attractive, empirical evidence shows that they are not paramount. Many whistleblowers are, in fact, motivated by a host of non-financial reasons and many are even unaware of the potential for a whistleblower reward when they begin their whistleblowing activities.

This phenomenon is well documented in a recent study of pharmaceutical whistleblowers published in the New England Journal of Medicine in May 2010. The

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[22] An unidentified relator quoted in Kesselheim, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362:19 NEJM 1832, 1836 (2010).

[23] *See* Kesselheim, Whistle-*Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362:19 NEJM 1832, 1835-36 (2010).

[24] 155 Cong. Rec. S4617 (April 23, 2009).

author, Aaron Kesselheim,[25] conducted a study of 42 whistleblowers taken from 17 federal *qui tam* cases against pharmaceutical cases that settled between January 2001 and March 2009. Of the 42 whistleblowers contacted, 26 agreed to participate in a series of interviews. The results were striking. All 26 relators stated that their decision to file a *qui tam* action was not motivated by the potential for personal recovery, and only 6 of the 26 whistleblowers specifically contemplated filing a *qui tam* case when they decided to become a whistleblower.[26] The decisive factors, rather, were grouped into four main "themes":

(1) Integrity (11 of 26)
(2) Altruism/concern for public health (7 of 26)
(3) Duty to bring criminals to justice (7 of 26)
(4) Fear of being a scapegoat (5 of 26)[27]

Relator quotes compiled in Kesselheim's article are worth noting, not for the categories they fall in, but because of the window they open into the mind of each whistleblower:

- "…we were on the right side of justice… this was an illegal activity that needed to be reported."
- "They should be held accountable for their illegal and unethical behavior."
- "It's our duty. It's not an act of heroism. It's not an act of bravery. It's an act of responsibility."
- "This doesn't just hurt patients and physicians…This hurts everybody…"
- "It was just something I knew was wrong. I needed to correct it."
- "This is not right…I needed to stand up for my rights not only for every other person in this company but for my young daughters coming after me starting their careers."
- "I was angry they were trying to do something wrong."

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[25] Aaron S. Kesselheim, M.D., J.D., M.P.H., is an assistant professor of medicine at Harvard Medical School and a researcher at Brigham and Women's Hospital's division of pharmacoepidemiology and pharmacoeconomics. He also received a law degree from the University of Pennsylvania and is a member of the New York State Bar.

[26] Kesselheim, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362:19 NEJM 1832, 1834 (2010).

[27] *Id.* at 1834-35.

- "I've got autopsy reports…I've got the chief medical officer who sent me an email saying, 'Yes. [The side effect] is occurring'… I knew there was a problem."
- "…this drug kind of scared me."
- "The whole deal was being subsidized by programs for the poor." [28]

The Kesselheim study also documents the personal and psychological toll that relators experience. A majority of the whistleblowers experienced harassment, intimidation or other forms of pressure. Half suffered stress-related health problems. And several whistleblowers experienced marital or family problems.[29]

Cheryl Eckard described her personal ordeal:

> I think it's very, very difficult to survive this…It's difficult to survive this financially, emotionally, you lose all your friends, because all your friends are people you have at work…You really do have to understand that it's a very difficult process, but very well worth it…You have to believe in your heart that this is the right thing ... In my case, I was very, very concerned about patient safety.[30]

IS BEING A WHISTLEBLOWER WORTH IT?

Despite the psychological and financial toll that relators experience, Kesselheim's study demonstrated that an overwhelming majority feel that they have done the right thing for ethical, spiritual, or psychological reasons.[31] For some relators, a *qui tam* action provides the only vehicle to clear their conscience or to "correct" behavior that was

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[28] Kesselheim, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362:19 NEJM 1832, 1835 (2010).

[29] *Id.* at 1836.

[30] NECN, *Whistleblower wins 96 million in GlaxoSmithKline case*, October 26, 2010, available at http://www.necn.com/pages/landing?blockID=339520 (last accessed February 24, 2011).

[31] Kesselheim, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362:19 NEJM 1832, 1836 (2010).

illegal. This is illustrated in the following statement from Neurontin whistleblower David Franklin:

> Not only is [the off-label marketing of Neurontin] illegal, it's downright immoral. It doesn't just hurt the medical community, it has the potential of hurting patients….I knew that in the period of time that I had been there, my own personal behavior was illegal, that I had done things that were simply illegal…Either I needed to own up to this now and put it behind me, or at some point in the future, this could come back, and I'd find myself on the wrong side of this investigation… There hasn't been a day in six years that I haven't thought about this and wrestled with my involvement in it and the guilt I feel associated with it, and the sense that I need to correct it.[32]

And while Kesselheim's findings suggest that *qui tam* relators are not motivated primarily by the lure of lucrative rewards, it is a mistake to conclude that they are not influenced by the potential for large relator shares. Relators have recovered nearly $3 billion in awards, and the trend for recoveries is increasing. It should be noted that the median relator share in Kesselheim's study of successful whistleblowers was $3 million, and that the majority surveyed "perceived their net recovery to be small relative to the time they spent on the case and the disruption and damage to their careers." The phenomenon of "repeat" relators—relators who after resolution of their first *qui tam* file additional ones—suggests that at least for outside relators, the experience is justified.

Future research should focus on whether unsuccessful relators share similar views as successful relators, or whether they regret having become a whistleblower. Another trend worth monitoring is the use of whistleblowing "shell companies" that serve as the relator and shield the true whistleblower's identity.[33]

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[32] Transcript of interview with David Franklin (July 11, 2003), available at http://www.msnbc.msn.com/id/3079883/ns/dateline_nbc/.

[33] Ross Kerber and Tom Hals, ANALYSIS-Madoff whistleblower tries new shield tactic in bank-fraud suits, February 4, 2011, available at http://blogs.reuters.com/financial-regulatory-forum/2011/02/04/analysis-madoff-whistleblower-tries-new-shield-tactic-in-bank-fraud-suits/ (last accessed February 24, 2011).

POLICY IMPLICATIONS: DO WHISTLEBLOWER INCENTIVES UNDERCUT CORPORATE COMPLIANCE?

A common criticism of whistleblower rewards is that they harm corporate compliance efforts. The concern is that the lure of large rewards causes people who discover fraudulent business practices to bypass the internal corporate compliance procedures that could staunch the fraud immediately. Available evidence suggests these concerns are not well founded. First, an increasingly growing number of whistleblowers are outsiders who have no access to the compliance departments and no duty to share the information with the corporation.

Second, the evidence shows that most whistleblowers try to address the fraud internally and only file *qui tam* suits when those internal efforts fail. In Kesselheim's study, 18 of the 22 insiders "first tried to fix matters internally by talking to their superiors, filing an internal complaint, or both." [34] Most had their complaints dismissed, and some were told that the conduct in question was legal. Those who refused to participate in the fraud (11 of 26) saw their performance evaluations lag, and were subjected to unfair assignments, harassment, and threats. The problem is not that compliance departments are bypassed; the problem is that internal compliance programs are still not effective tools to stamp out company-sanctioned fraud.

CONCLUSIONS

The stunning success of the revamped FCA has caused the use of whistleblower-reward systems to be expanded to the areas of government. Success at the federal level has prompted a majority of states, the District of Columbia, and even some localities to enact their own versions of the false claims acts.[35] In the wake of the last decade's high-profile accounting scandals involving tax shelters, the IRS has added a whistleblower reward program, which mandates awards of up to 30% to whistleblowers whose information leads to the recovery of more than $2 million in uncollected taxes. [36] Now,

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[34] Kesselheim, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362:19 NEJM 1832, 1834 (2010).

[35] Kaiser Family Foundation, States that have Enacted a False Claims Act, 2009, available at http://www.statehealthfacts.org/comparetable.jsp?ind=260&cat=4 (last accessed February 23, 2010).

[36] *See* Internal Revenue Code, 26 U.S.C. § 7623.

with Wall Street still reeling from its decade of even higher-profile securities fraud scandals, the debate has shifted to how a whistleblower-reward program should be implemented. The Dodd-Frank Act, enacted in 2010, contains a whistleblower program similar to the IRS's, but with a slightly more relaxed requirement that whistleblowers tips need only result in a collection of greater than $1 million.[37] Now more than ever, the government relies on whistleblowers to fight fraud.

Empirical evidence shows that this reliance pays off only when whistleblower incentives are adequate. In order for these incentives to remain adequate, the financial and non-financial burdens on whistleblowers must be examined to ensure that whistleblowers are not dissuaded by the fear of financial or personal ruin. As fraud gets more complex and harder to detect, the time and energy that whistleblowers and their counsel invest in their investigations will continue to increase along with the risks of doing so. Only by ensuring adequate financial incentives to whistleblowers can the government continue its recent success at recovering the billions lost to fraud annually.

[37] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010), *codified as* 15 U.S.C. § 78u-6 & § 78u-7 (2011) (also known as Section 21F of the Securities Exchange Act of 1934, available at http://www.sec.gov/about/laws/sea34.pdf (last accessed February 24, 2011)).