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New False Claims Law Incentives Pose Risks To Contractors And States

by
John T. Boese and Beth C. McClain
Fried, Frank, Harris, Shriver & Jacobson LLP

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INTRODUCTION

Three little-known provisions in the Deficit Reduction Act of 2005 (the "DRA")[1] are set to enrich whistleblowers and their lawyers, and to redraw the fraud and compliance landscape that industries and institutions must navigate. These provisions, sponsored by U.S. Senator Charles Grassley, use economic incentives to encourage state legislatures to enact state false claims laws with strong pro-plaintiff provisions, including private *qui tam* enforcement.[2] Additionally, the DRA requires certain entities to educate their employees regarding federal and state false claims statutes, including how to commence actions against their employers.

These provisions, passed without discussion or debate, not only create new bases for false claims liability, they will also politicize fraud enforcement and

[1]*See* Deficit Reduction Act of 2005, Pub. L. 109-171, §§ 6031-6033, 120 Stat. 4, 72-74 (2006) (to be codified at 42 U.S.C. §§ 1396a(a), 1396b(i), 1396h(a). The DRA is being challenged because the President allegedly signed the Senate version of the bill, which differed from the version approved by the House. *See, e.g.,* Jonathan Weisman, *Spending Measure Not a Law, Suit Says*, WASH. POST, Mar. 22, 2006 at A4.

[2]Press Release, Senator Charles Grassley, Chairman, U.S. Senate Comm. on Finance, *Grassley's New State False Claims Act Tools Head to President* (Feb. 2, 2006), *available at* http://finance.senate.gov/press/Gpress/2005/prg020206a.pdf.

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negatively impact traditional internal, self-correcting mechanisms of corporate and institutional compliance programs. And while enforcement of the federal False Claims Act is overseen by the United States Department of Justice, the corresponding state statutes would entrust enforcement of those provisions to more politicized state officials, raising the potential for the use of state provisions as political weapons. Every state attorney general will now be handed a punitive law to fatten state coffers and heighten his or her political profile.

I. A SKETCH OF THE FEDERAL FALSE CLAIMS ACT

The federal False Claims Act[3] ("FCA") was first enacted in 1863 as the Informer's Act (also known as the Lincoln Law) in response to fraudulent practices by defense contractors during the Civil War.[4] The law was designed to prevent entities from presenting false claims or statements to the government. The Informer's Act and its enforcement differed in many ways, however, from the text of and circumstances surrounding the current version of the FCA. When the law was first enacted, the use of *qui tam* enforcement was deemed necessary because the Attorney General lacked the means to enforce the law, since the Department of Justice ("DOJ") had not yet been established. Although the Informer's Act contained *qui tam* provisions allowing a private party to bring an action and to recover up to 50% of the recovery, *qui tam* enforcement was relatively infrequent until the FCA underwent a massive reworking

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[3] 31 U.S.C. §§ 3729-3733 (2000).

[4] *See* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.01[A] (3d ed. 2006). The original FCA was codified as the Act of March 2, 1863, ch. 67, 12 Stat. 696-98 and was later reenacted by Rev. Stat. §§ 3490-3494, 5438 (1878).

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more than a century after its creation.[5] Moreover, today's world of complex regulations was many decades in the future, so the law was applied only to cases of obvious fraud.

In the past two decades, FCA litigation has produced a rising tide of monetary recoveries. Amendments to the FCA in 1986 increased damages and penalties, while lowering both the standards for intent and burden of proof. These amendments, which turned the FCA from a fraud statute into a "recklessness" statute, made it easier for both whistleblowers and the government to recover, dramatically increasing *qui tam* litigation and the amount of recoveries.[6] The increasingly complex regulatory environment also provides far greater opportunities for both *qui tam* relators and the government to claim that a regulated party did not comply with a government requirement. Today, those liable under the FCA (which includes municipal governments, colleges and universities, virtually every small and large business, and individuals) face triple damages, plus a civil penalty of between $5,000 and $11,000 for each false claim. But the collateral consequences may be worse: possible exclusion from participation in any federal contracts, grants, or the receipt of other federal funds, including Medicaid and Medicare funds. Since 1986, the federal government has recovered more than $15 billion dollars under the re-vamped FCA.[7]

Eleven states and the District of Columbia have enacted their own general false

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[5]In 1943, President Roosevelt signed into law amendments to the FCA, including a reduction of the whistleblower's share from a maximum of 50% to 25%, that resulted in a further reduction of the use of the FCA's *qui tam* provision. *See* BOESE, *supra* note 4, at § 1.02.

[6]*See* BOESE, *supra* note 4, ch. 1.

[7]CIVIL DIVISION, DOJ, FRAUD STATISTICS – OVERVIEW (as of FY 2005), *available at* http://www.ffhsj.com/quitam/cfc.htm.

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claims laws that are modeled on the federal FCA and contain a *qui tam* enforcement mechanism: California, Florida, Illinois, the District of Columbia, Nevada, Hawaii, Delaware, Massachusetts, Tennessee, Virginia, Montana, and Indiana.[8] Another seven states have more narrow false claims laws with whistleblower enforcement mechanisms that apply only to healthcare fraud: Louisiana, Texas, Tennessee, New Mexico, New Hampshire, and Michigan.[9] Most state false claims laws follow the federal FCA closely, but some diverge on a few key issues.[10]

II. THE DEFICIT REDUCTION ACT OF 2005

The Deficit Reduction Act of 2005 contains a provision that strongly encourages all states to enact false claims laws with *qui tam* rights of action. Under the DRA, the federal government provides a significant financial reward to states that have enacted a law patterned after the federal FCA. The DRA also *requires* certain

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[8]CAL. GOV'T CODE §§ 12650-12656 (West 2002); FLA. STAT. ANN. §§ 68.081-68.092 (West 2002); 740 ILL. COMP. STAT. 175/1-8 (West 1996); D.C. CODE ANN. §§ 2-308.13-20 (2001); NEV. REV. STAT. ANN. §§ 357.010-357.250 (West 2001); HAW. REV. STAT. ANN. §§ 661-21 TO 661-29 (Matthew Bender 2001); DEL. CODE ANN. TIT. 6 §§ 1201-1209 (2001); MASS. GEN. LAWS ANN. CH. 12, §§ 5A-5O (West 2002); TENN. CODE ANN. §§ 4-18-101 TO 4-18-108 (2002); VA. CODE ANN. §§ 8.01-216.1 TO 8.01-216.19 (2000 & Supp. II 2005); 2005 MONT. CODE, CH. 465, HB 146, 59TH MONT. REG. SESS. (2005); IND. CODE § 5-11-5.5 (2005).

[9]LA. REV. STAT. ANN. §§ 437.1-440.3 (West 1998); TEX. HUM. RES. CODE ANN. §§ 36.001-36.117 (West 1998); TENN. CODE ANN. §§ 71-5-181 to 71-5-185 (2002); 2004 N.M. ADV. LEGIS. SERV. 49; 2004 N.H. ADV. LEGIS. SERV. 167; 2005 MICH. PUB. ACTS 337 (approved by the governor on January 3, 2006).

[10]For example, the Massachusetts statute authorizes both triple damages and compensatory damages, raising significant constitutional issues regarding Eighth Amendment limits on excessive fines. MASS GEN. LAWS ANN. ch. 12 § 5B(9). Massachusetts also creates liability for knowingly entering into a false understanding or agreement, *id.* § 5B(7), and holds a corporation liable for actions taken by an employee that are not for the benefit of the corporation, *id.* § 5B(11). *See generally* BOESE, *supra* note 4, § 6.01[H] (discussing the Massachusetts law). Unlike the federal FCA, which applies regardless of a finding of damages, the California statute does not apply to cases involving less than $500. CAL. GOV'T CODE § 12651(d). The California statute also provides for liability when an entity discovers a false claim or statement but then fails to disclose that claim or statement, *id.* § 12651(a)(8), and for greater judicial discretion, *id.* § 12651(a) (providing for no minimum amount recoverable for each penalty) and 12651(b) (allowing the court to reduce damages from triple to double those actually caused). *See generally* BOESE, *supra* note 4, § 6.01[A] (discussing the California law).

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entities that participate in state Medicaid programs to design and implement an education program instructing employees about the federal and state false claims statutes. These entities must also educate their employees on how to commence actions under those statutes. Both of these provisions become effective on January 1, 2007. According to Senator Grassley, the advocate of these provisions, this recently enacted law "marks a new day for the False Claims Act."[11] As discussed more fully below, the DRA does signify a new era of the FCA – an era that those dealing with state governments will find increasingly oppressive and frightening.

A. The 10% "Bonus" Incentive

Under the DRA, the federal government will provide any state that has enacted a qualifying false claims statute with 10% of the federal government's share of any recovery of Medicaid funds obtained under that state's qualifying false claims statute. For example, if the state provides 40% of the funding to its Medicaid plan, that state will be entitled to recover 50% of the recovery obtained under that state's qualifying false claims statute. The statute must include the following four elements to qualify for the bonus:

1. liability provisions patterned after those found in the federal FCA;
2. provisions that "are at least as effective in rewarding and facilitating *qui tam* actions";
3. a requirement that the complaint be sealed for 60 days with review by the state Attorney General; and

[11]Press Release, Senator Charles Grassley, *supra* note 2.

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4. a provision for a civil penalty not less than that authorized by the federal FCA.[12]

Under the DRA, both the Attorney General and the Inspector General for the Department of Health and Human Services ("DHHS") must determine whether a state's false claims statute qualifies for the 10% bonus.

B. The Employee Education Requirement

The DRA imposes a new fraud and compliance requirement on many entities receiving Medicaid funds – regardless of whether any of the states enact false claims statutes. Every entity receiving or making annual payments of at least $5 million from or to a state Medicaid plan must instruct employees about the federal and state false claims statutes.[13] Such entities must instruct employees on how to institute an action under those statutes against their employers. They must provide written policies for all employees, management, contractors, or agents of the entity that include "detailed information" regarding:

- the federal FCA;
- the administrative remedies provided by the Program Fraud Civil Remedies Act;
- any state laws imposing civil or criminal penalties for false claims or statements;
- any whistleblower protections provided by the above-mentioned laws;
- the role of such laws in preventing and detecting fraud, waste, and abuse in federal healthcare programs; and

[12]Pub. L. 109-171, § 6031, 120 Stat. 4, 73 (2006) (to be codified at 42 U.S.C. § 1396h).

[13]*See id.* § 6032 (to be codified at 42 U.S.C. § 1396a(a)).

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- the entities' existing policies and procedures for detecting and preventing fraud.

Entities must also include a specific discussion of the topics listed above in their employee handbooks.

III. WHAT LIES AHEAD IN THE STATES

While final action on the DRA was still pending, Michigan enacted a false claims law with *qui tam* provisions on January 3, 2006. State *qui tam* bills are already pending or have been recently introduced in Colorado, Kansas, Missouri, New York, Connecticut, Mississippi, Minnesota, Alabama, New Jersey, Nebraska, Pennsylvania, and Oklahoma.[14] The DRA will result in most states passing – or at least considering – some type of false claims act in the next few years. However, other questions that should be considered by states considering enacting false claims laws include the following:

A. Will States Be Liable to the United States For Money They Never Recovered?

The Social Security Act requires states to report any Medicaid overpayments within 60 days from the date of "discovery," "whether or not recovery was made."[15]

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[14]H.B. 1359, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006); H.B. 2729, 81st Leg., 2005-06 Sess. (Kan. 2006); S.B. 1210, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006); A.B. 2027 228th Ann. Legis. Sess. (N.Y. 2005); S.B. 938, Gen. Assem., Jan. Sess. (Conn. 2005); H.B. 317, 2005 Reg. Sess. (Miss. 2005) (Medicaid false claims); H.B. 278, 2005 Reg. Sess. (Miss. 2005) (health care false claims); S.B. 1428, 84th Legis. Sess (Minn. 2005); H.B. 2254, 84th Legis. Sess. (Minn. 2005); H.B. 348, 2005 Reg. Sess. (Ala. 2005); S.B. 64, 2001 Reg. Sess. (Ala. 2001); S.B. 2427, 210 Leg., 2d Reg. Sess. (N.J. 2003); A.B. 2102, 211 Leg. (N.J. 2004); A.B. 293, 210 Leg. (N.J. 2001); L.B. 1084, 98th Leg., 2d Sess. (Neb. 2004) (a Medicaid false claims law without *qui tam* enforcement was ultimately adopted in Nebraska and approved by the governor on Apr. 13, 2006, L.B. 1248); H.B. 898, 187th Gen. Assem., 2003-04 Reg. Sess. (Pa. 2003); S.B. 1585, 49th Leg., 2d Sess. (Okla. 2004); H.B. 2237, 48th Leg., 2d Sess. (Okla. 2001).

[15]Social Security Act § 1903(d)(2)(C) (codified at 42 U.S.C. § 1396b).

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Once a state has discovered a Medicaid overpayment, it must report the overpayment to CMS on a form that is filed with CMS on a quarterly basis.[16] CMS reduces its future federal share payments to the Medicaid program to offset that overpayment, even if the state never recovers a penny of that money.[17]

The unfortunate reality is that some Medicaid providers (especially the truly criminal enterprises) are simply judgment-proof – they flee jurisdictions when hints of trouble appear or they funnel money to offshore accounts.[18] In other cases, the Medicaid program must accept something less than a full recovery from the defendant or risk driving a provider of essential services out of business. Moreover, FCA plaintiffs will likely argue that a state exposes *itself* to federal False Claim Act liability if its quarterly filings with CMS do not accurately identify known overpayments.[19] States that are lured into enacting false claims laws because of the DRA's ten percent bonus may well find that they have made a Faustian bargain with the government.

B. Must State Laws Be Draconian to Qualify for the Bonus?

Some provisions of the DRA are vague regarding the exact nature of the legislation that must be adopted by states in order to qualify for the 10% bonus. For example, the DRA does not appear to require states to enact a law containing the

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[16]CMS Form 64.

[17]Social Security Act § 1903(d)(3)(A).

[18]If a state can demonstrate that it was unable to recover an overpayment because the provider filed for bankruptcy or the amount is otherwise uncollectible, the federal government will not force repayment of the federal share under these circumstances. *Id.* at 1903(d)(2)(D).

[19]The Supreme Court held in *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 529 U.S. 765, 789 (2000) that states are immune from liability in FCA suits initiated by *qui tam* relators, but DOJ has continued to extract FCA settlements from state entities because that decision does not resolve whether states are immune from such suits by the Justice Department.

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federal FCA's triple damages provision; rather, the legislation simply states that the state law must contain "a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31, United States Code." Under the federal FCA, damages and penalties are typically treated as two independent remedies.[20]

C. Must States Lavish Compensation on Whistleblowers?

Also unclear is whether the state law must reward whistleblowers as richly as the federal law does in order to qualify for the federal bonus. The federal FCA provides for bounties ranging from 0 to 30%, and when the amount of a settlement is high, whistleblower recoveries can be staggering. For example, a 2001 settlement involving TAP Pharmaceuticals yielded a *$95 million* bounty to the relators, which represented 17% of the total recovery. If a whistleblower would have been just as "effectively" incentivized by a $20 million bounty, may states enact a false claims law that caps bounties at a particular level? It is important to note that every dollar paid to whistleblowers is taken from the total recovery to the government, so excessive bounties come from funds that would otherwise have benefited the state's citizens, rather than the whistleblowers and their lawyers.[21] While the federal government is fond of reporting amounts recovered under the federal FCA since 1986, it seldom points out that it has also paid out over $1.6 billion to whistleblowers and their lawyers

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[20] *See, e.g., Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003) (referring to the FCA penalty as "separate" from damages); *U.S. ex rel. Taylor v. Gabelli*, 2005 WL 2978921, at *3 (S.D.N.Y. Nov. 4, 2005) ("Section 3729(a) provides for two forms of liability under the FCA: 'civil penalt[ies]' and 'damages.'"). The government always argues that an FCA can proceed even in the absence of damages because penalties may be recovered in such cases, and a number of courts have agreed.

[21] 31 U.S.C. § 3730(d).

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during that time.[22]

D. Can States Tailor Their Laws To Reduce Inefficiencies and Still Qualify for the Bonus?

In addition to the obvious costs imposed by meritless suits, *qui tam* enforcement of false claims laws imposes many hidden costs and economic inefficiencies. They can include:

- reductions in the number of contractors willing to do business with the government;
- higher costs of doing business;
- the need for states to hire more personnel to screen and monitor suits filed by whistleblowers;
- interference with legitimate management choices by disgruntled employees;
- impaired collaboration between contractors and subcontractors because of concerns that one party will become a whistleblower against the other;
- delays in the identification and correction of problems as would-be whistleblowers build cases against their employers rather than working internally to correct a problem;
- erosion of internal compliance programs because of increasingly common suits by compliance officers; and
- distortions of the flow of information within an organization because of fears that the information will be misconstrued by potential whistleblowers.[23]

[22]For the latest Justice Department Statistics, *see* http://www.ffhsj.com/quitam/cfc.htm.

[23]For a very interesting analysis of the costs of *qui tam* enforcement, *see* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY.L.A. L. REV. 1799, 1825-41 (1996). Professor Kovacic suggests a number of possible methods for reducing the negative effects of *qui tam* enforcement.

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- *The Grassley Letters*

Although principles of federalism ought to permit states to tailor their false claims laws to better reflect their particular needs and values, it is unlikely, as a practical matter, that most legislatures will risk experimenting in this area. Senator Grassley, the author of the DRA provisions, has already distributed two letters that are clearly intended to pressure states to adopt only laws that mirror or exceed federal FCA provisions. The letters, addressed to the Inspector General for the DHHS and the Attorney General, stress that the DRA requires that state false claims provisions be "at least as effective in rewarding and facilitating qui tam actions" as the federal *qui tam* provisions.[24]

While Senator Grassley's first letter refrains from specifying what *qui tam* provisions in a state's law would be necessary to qualify under the DRA, it does make clear that he believes that the *qui tam* provision is the heart of the FCA, and a state law must facilitate and encourage *qui tam* suits by replicating the federal FCA closely.[25]

The second Grassley letter to the Attorney General and Inspector General, distributed on April 26, 2006, was more direct in its criticism of some of the bills pending in state legislatures.[26] In particular, Senator Grassley criticized bills that

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[24]Letter from Senator Charles Grassley, Chairman, U.S. Senate Comm. On Fin., to Daniel R. Levinson, Inspector General, Department of Health and Human Services, and Alberto Gonzales, Attorney General, Department of Justice (Mar. 17, 2006) (quoting the DRA), *available at*: http://www.ffhsj.com/quitam/cfc.htm.

[25]*Id.* ("[T]he FCA works to detect and prevent fraud and abuse because of the *qui tam* provisions.").

[26]Letter from Senator Charles Grassley, Chairman, U.S. Senate Comm. On Fin., to Daniel R. Levinson, Inspector General, Department of Health and Human Services, and Alberto Gonzales, Attorney General, Department of Justice (Apr. 26, 2003), *available at*: http://www.ffhsj.com/quitam/guidance.htm.

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provide for the automatic dismissal of declined cases. He noted that the DRA requires qualifying state laws to contain provisions that are at least "as effective in rewarding and facilitating *qui tam* actions as those in Sections 3730 to 3732 of" the federal FCA, and asserted that:

> Congress expressly included Section 3730(c), which permits qui tam actions to proceed absent participation by the Government. Accordingly, any state FCA law that does not permit qui tam actions to proceed if the State Attorney General declines to intervene is exactly the opposite of what is required under Section 3730(c)(3) of the federal FCA.[27]

The federal FCA provisions referenced by Senator Grassley provide that "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action."[28]

However, Senator Grassley appears to conflate the requirements of the federal FCA with those of the DRA. The DRA does not say that states must enact *qui tam* provisions that are exactly like those found in the federal FCA. Rather, the DRA says the state *qui tam* provisions must be "*at least as effective*" as the federal FCA "in rewarding and facilitating" *qui tam* false claims actions.

The determination of whether a state law is "at least as effective" as the federal FCA is a very subjective analysis, but strong arguments can be made that automatic dismissal provisions are actually more effective – not less – "in rewarding and facilitating qui tam actions." Declined *qui tam* cases commonly generate negative precedent, especially when a court seeks to clear its docket of clearly frivolous claims (just the types of claims that governments tend to decline). This precedent binds not

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[27] *Id.*

[28] 31 U.S.C. § 3730(c)(3).

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only other relators with perhaps more meritorious claims, but also the government. Although an automatic dismissal provision does not facilitate individual declined cases, it may well facilitate many subsequent *qui tam* suits more effectively than a state law that requires an attorney general's office to go through the affirmative steps of getting meritless cases dismissed.

Additionally, courts have held that under the federal FCA and the U.S. Constitution, the government has a virtually unfettered right to dismiss declined cases. Automatic dismissal provisions simply allow states to avoid the unnecessary expense of engaging in motion practice to achieve the same result – the dismissal of a case that the government does not wish to have litigated "on its behalf" and in its name. It is important to remember that *qui tam* relators have not suffered any injury-in-fact under false claims statutes, and have standing to sue only under a partial assignment of the *government's* right to sue.

Finally, it is worth noting that some of the most "effective" enforcement of a state Medicaid false claims law has occurred in Texas. The Texas Medicaid Fraud Control Unit has recovered $75 million since 1999 under a state law that contains exactly the kind of automatic dismissal provision that has been criticized by Senator Grassley.[29] Moreover, the Texas statute provides for less generous bounties to whistleblowers than are allowed under the federal statute. According to Senator Grassley, the automatic dismissal provision disqualifies Texas from receiving the

[29]Kit Wagar, *Legislators Hear Ideas to Cut Medicaid Fraud*, KANSAS CITY STAR, Feb. 9, 2006, at B3.

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DRA's federal "bonus," even though the state is involved in very vigorous and productive enforcement efforts.

E. Will States Limit Their Laws to Medicaid Claims?

Although the DRA provides a 10% federal bonus only for Medicaid recoveries, many state legislatures are likely to consider and enact more general false claims statutes. Indeed, the federal legislation recognizes this and specifically provides that broader state false claims acts would also meet the DRA's requirements.[30] Taxpayers Against Fraud ("TAF"), a whistleblower lobbying group, is distributing a "model" state FCA for states to enact in order to qualify for the incentive.[31] This so-called model, however, contains provisions that far exceed the four requirements of the DRA.

Not only does the TAF bill heavily favor relators both procedurally and substantively, it also provides for an additional liability provision not required for states to obtain the 10% bonus and not found in the federal FCA. The legislation advocated by TAF would have states impose liability for the inadvertent receipt of payments resulting from a false claim if the recipient later discovers the claim's falsity but fails to disclose it. This extraordinary provision arguably can lead to treble damages and stiff penalties for the mere failure to act in the face of a potential overpayment. Moreover, the bill being pushed by plaintiffs' lawyers applies to *all* industries and institutions dealing with state governments – not just those dealing with state Medicaid programs.

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[30]Pub. L. 109-171, § 6031(c), 120 Stat. 73.

[31]Joseph E. B. White, *Model State False Claims Act* (Feb. 2006); *at* http://www.taf.org/modelstatefca.pdf.

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The DRA raises additional concerns for entities dealing with state governments. State prosecutions are more directly influenced by political changes than the federal system, so there is greater potential for inconsistency in a new proliferation of state enforcement actions. This effect might only be compounded by the different municipal false claims ordinances currently in effect.[32] One can only imagine what politically-motivated state attorneys general (*e.g.,* Elliot Spitzer), not to mention city attorneys hoping for higher office, will do with a law in which liability is based on "recklessness," not fraud, and which also provides crippling damages and penalties, devastating collateral consequences, and an army of plaintiffs' lawyers more than willing to bring any case, whatever its merits.

The DRA's other FCA provision, requiring entities to educate their employees to bring FCA cases, is also rife with problems. Because the education requirement is characterized as a "condition of payment," relators likely will argue that non-compliance with the mandatory education requirement, alone, gives rise to FCA liability. Instead of supporting the institutional interest in training employees to respond to accounting, billing, and other problems by notifying superiors within the company in order to correct them, the rule supports a competing purpose, which is to give employees the details about enriching themselves by becoming *qui tam* relators. This is inconsistent with the goal of corporate "hot lines" and conflicts indirectly with internal compliance programs. Indeed, the DRA is remarkably silent about

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[32]Currently, both New York City, N.Y.C. Admin. Code §§ 7-801 *et seq.* (2005), and Chicago, Chicago, ILL. MUN. CODE §§ 1-21-010 *et seq.* (2005), have false claims ordinances. San Francisco's false claims ordinance recently was held invalid under California's Constitution. *See City and County of San Francisco v. Tutor-Saliba Corp.*, No. C-02-5286 CW (N.D. Cal. May 19, 2004) (unpublished slip op.).

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encouraging employees to resolve issues within the compliance networks of entities before blowing the whistle.[33]

CONCLUSION

According to Senator Grassley, "[t]he passage of the DRA ushered in a new era for the FCA."[34] States will enact qualifying statutes instead of foregoing 10% of recoveries of false claims cases regarding Medicaid, but the shape of those statutes, and consequently, the picture of that "new era," remains to be seen. If considering false claims legislation, states are likely to pattern their statutes as closely as possible after the federal FCA. Anything else will lead to confusion, undue hardship, and poor public policy. Although sound public policy would allow states more freedom to tailor laws to meet their own objectives, incorporating provisions dramatically different from those in federal FCA may prevent a state from qualifying for the DRA bonus. While the path ahead may be unclear, one may be certain that, with additional FCA-related legislation that encourages *qui tam* actions pouring through the federal and state legislatures,[35] *qui tam* suits will remain a strong presence in the coming years.

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[33]For example, California requires government employees to exhaust internal compliance procedures and wait a reasonable time for a response before commencing a false claims suit. *See* Cal. GOV'T CODE § 12652(d)(4). California may need to amend this provision to comply with the DRA.

[34]Letter from Senator Charles Grassley, *supra* note 24.

[35]*See, e.g.,* H.R. 4887, 109th Cong. (2006) (bill excluding *qui tam* recoveries from gross income for tax purposes).

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