



U.S. CHAMBER

Institute for Legal Reform

The Great Myths of State False Claims Acts

*Alternatives to State
Qui Tam Statutes*

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U.S. CHAMBER
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Introduction

In the early 2000s, as government lawyers turned their attention to combatting fraud and abuse in the federally-funded state Medicaid programs, the whistleblowers bar saw an opportunity. The U.S. Department of Justice and its state partners had begun to collect increasing large civil False Claims Act (FCA) settlements largely from pharmaceutical manufacturers. Collections from these companies were premised on allegations that their conduct in particular states rippled through Medicaid programs nationwide.



Because states supplied roughly half the funding for these programs, state treasuries were the beneficiaries of roughly half the growing recoveries.¹ And because only a handful of the states sharing in those growing recoveries had whistleblower or *qui tam*² statutes authorizing the payment of any rewards, whistleblowers viewed the vast majority of states as collecting windfalls without paying any bounty.³ Indignant at the perceived slight, the whistleblowers bar organized around a cause of their own—finding a way to convince states to pay the bounty, and thereby to double the rewards, paid to whistleblowers in Medicaid cases.

In 2005, Congress granted the whistleblowers bar its wish. Through a provision that slipped, practically unnoticed, into the Deficit Reduction Act of 2005 (DRA),⁴ Congress offered states a financial incentive to pass laws modeled on the federal FCA and its signature *qui tam* provisions. Upon passage, proponents professed that the DRA would “usher in a new era for the FCA.”⁵ Enticed by the prospect of increased Medicaid funding, 29 states and the District of Columbia have since adopted measures to add *qui tam*

provisions—and the percentage-based rewards they offer whistleblowers—to the existing arsenals available to law enforcement and regulatory officials working to combat Medicaid fraud.

Yet if a proliferation of *qui tam* laws and relator-driven lawsuits heralds the start of a “new era,” its impact on state Medicaid fraud recovery efforts remains decidedly mixed. Newly minted *qui tam* provisions have exacted a price few states appear to have anticipated. Most entitle whistleblowers to increased shares of state recoveries for doing little more than they do now under the federal statute. A concomitant rise of multi-jurisdictional litigation—under state and federal law, largely in federal courts—has complicated the resolution of those FCA lawsuits governments actually pursue. More significantly, that increase in complexity comes at a time when the number of cases litigated by whistleblowers alone, after federal and/or state governments have declined to adopt their allegations, is also on the rise. The cost and burden of those cases is consuming ever-greater amounts of resources—government resources as well as defense resources. Too often,

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these laws have prioritized the interests of whistleblowers and their attorneys over those of the state. In recent years, these complications have been exacerbated by directives from the Office of the Inspector General, Department of Health and Human Services (OIG) that states loosen key safeguards against opportunistic litigation.

State FCA proponents tend to equate the statutes' laudable *purpose*—to enhance state fraud detection and recoveries—with *efficacy*. This paper seeks to separate the wheat from the chaff. First, it outlines the fundamentals of the DRA and the incentives that have prompted states to enact their own *qui tam* laws. Second, it examines common misconceptions about the impact of these laws on state efforts to recoup the proceeds of Medicaid fraud, and the challenges they have presented to states and defendants alike. Finally, the paper considers existing alternatives to the prevailing state *qui tam* model that may empower states to combat Medicaid fraud while mitigating the risks of lawsuit abuse.

Background

Drafted as an amendment to the Medicaid statute, the DRA provides that states enacting a *qui tam* law modeled after the federal FCA shall receive an additional 10% of federal Medicaid fraud recoveries. Its sponsors theorized that by encouraging states to pass their own FCAs, the DRA would invigorate local efforts to tackle Medicaid fraud.⁶



As amended, the Medicaid statute now provides that “the Federal medical assistance percentage” (FMAP) of any amounts recovered in an action brought under a qualifying state FCA will be “decreased by 10 percentage points.” Thus, instead of the federal government receiving 60%, its recovery percentage drops to 50%. Put another way, in a state where the federal government covers 60% of the state Medicaid expenses, the qualifying state would receive 50% of Medicaid fraud settlements rather than 40%.

A state’s receipt of this bonus is by no means automatic; it rests on a determination by OIG, in “consultation with the Attorney General..that the State has in effect a law that meets [certain] requirements.” Those requirements are that the state’s law:

- (1) establishes liability to the State for false or fraudulent claims to Medicaid consistent with the liability provisions of the federal FCA;
- (2) is at least as effective as the federal FCA at rewarding and facilitating *qui tam* actions;
- (3) provides for filing an action under seal for 60 days with review by the State Attorney General; and

- (4) contains a civil penalty that is not less than that authorized by the federal FCA.⁷

Nor does OIG’s determination that a statute satisfies these prerequisites guarantee that a state will remain eligible for the DRA bonus. Recent history demonstrates that to retain provisions “as effective” as those in the federal FCA, and thus maintain its bonus, a state must continually amend its statute to keep pace with new federal legislation and the changing views of OIG, or face funding whistleblower rewards without federal support.

In 2011, for example, OIG issued over twenty new state FCA reviews—the first since Congress amended the federal FCA in 2009 and 2010. OIG concluded that none of the then-existing state FCAs were DRA-compliant because they were “not at least as effective” as the amended federal FCA “in rewarding and facilitating *qui tam* actions.” States with FCAs previously deemed DRA-compliant were provided two years to bring their statutes in line, during which time they would continue to receive a 10% bump in their Medicaid fraud recoveries. Importantly, several provisions previously deemed compliant by OIG were held to be non-compliant in their subsequent review, even where the federal amendments did not relate to those

provisions.⁸ Thus, compliance is not only affected by amendments made to the federal FCA by Congress, but also by the changing interpretations of OIG. This lack of clarity over whether a state FCA will be held DRA-compliant—and how long it will remain compliant—raises the risk states take when enacting their own *qui tam* provisions. Their costs are certain to increase, but states may never see the benefits promised in the DRA.

Recent state experience exemplifies this reality. Currently, 29 states and the District of Columbia have *qui tam* statutes. However, despite the proliferation of these laws, only nine⁹ state statutes have been certified by the OIG as DRA-compliant. Five additional states, previously deemed compliant, missed OIG imposed deadlines in 2013¹⁰ to amend their statutes and retain their eligibility for the DRA bonus. In other words, a majority of states with FCAs are today ineligible for the incentives provided by the federal government, but remain liable for providing bounties to relators and taking on the administrative burdens of dealing with litigation filed by third-parties that invokes the law they are charged with enforcing.



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Prevailing Myths About State *Qui Tam* FCAs

MYTH #1: STATE *QUI TAM* FCA STATUTES ARE NECESSARY TO DETECT STATE-SPECIFIC FRAUD AND HAVE THE EFFECT OF INCREASING DETECTION OF STATE-SPECIFIC FRAUD

Though many proponents of state *qui tam* statutes—and perhaps Congress itself—assume that a state’s enactment of an FCA statute would improve law enforcement and promote state-specific fraud detection,¹¹ there is little evidence to support that claim. States presumably adopt false claims laws to empower their Attorneys General to prosecute fraud committed against their states and to recover monies lost on account of that fraud.¹² And, while relators have taken advantage of this proliferation to file complaints under every possible legal mechanism,¹³ states have been slower to avail themselves of these options. In fact, early statistics indicate that state Attorneys General have filed few, if any, actions under the new statutes. Six states, post-DRA, have adopted an FCA that requires them to report the number of cases filed and money recovered under the statute: Colorado, Connecticut, Delaware, Maryland, New Jersey, and North Carolina. The results are instructive. In each state, reported cases filed under the state FCA were nearly (if not literally) non-existent. For example, Colorado, Connecticut, and New Jersey all reported the same number of actions filed by their Attorney General under their

respective state FCA statute: zero.¹⁴ In fact, Delaware was the only state to have indicated that any cases were filed by the state Attorney General, and even in that instance, only two cases were reported.¹⁵

A closer review of these recovery statistics also belies the notion that state *qui tam* statutes uncover “local” fraud that would otherwise be overlooked in the wake of large multi-district actions filed under the federal FCA. Though proponents of state FCAs often contend that such laws incentivize whistleblowers to bring state-specific fraud to the attention of state authorities, so far it has not happened. In state reports, cases filed under a state statute, in a court located in the “victim” state, proved nearly nonexistent. Almost all reported cases—in Colorado, Connecticut, Delaware, Maryland, New Jersey, and North Carolina—were filed elsewhere, in federal courts, pursuant to claims under the federal FCA, and pertained to nationwide fraud allegations. In fact, relators filed 94% of all reported out-of-state cases in federal courts.¹⁶ As an enforcement matter, because the federal FCA claims at issue required federal prosecutors to work with state law enforcement to investigate claims to and payments from state Medicaid programs, these cases and the states’ roles in them did not depend on the existence of state *qui tam* statutes.

For example, in 2010-2011, Colorado reported that 90 cases were filed in out-of-state federal courts, and none were filed by the state Attorney General in state court or in in-state federal courts.¹⁷ In the most recent report from 2012, Colorado reported that 52 cases were filed in out-of-state federal courts, and none were filed by the state Attorney General in state court or in in-state federal courts.¹⁸ In 2010 in Connecticut, 79 *qui tam* cases were filed in out-of-state federal courts, while only two cases were filed in state court or in an in-state federal courts.¹⁹ None were filed by the state Attorney General. Similarly, in 2010 in New Jersey, though 120 cases were filed in out-of-state federal courts, none were filed in state court or by the state Attorney General, while 18 were filed in an in-state federal court.²⁰ Likewise, Delaware's 2010 report indicated that its Attorney General filed only two cases, while the rest of the state's FCA cases (49) were filed in out-of-state federal courts.²¹ Delaware's 2012 report showed an increase in out-of-state federal court actions (81) and a decrease in cases filed by the Attorney General (zero).²² The only reporting state to show any increase in in-state actions was North Carolina, which in 2012 reported that it was involved in 18 state FCA claims, a relatively small figure when compared to the 196 *qui tam* cases it reported were pending in out-of-state courts.²³ In all, these reports demonstrate that states are not taking advantage of their own FCAs to litigate fraud claims.

MYTH #2: STATE *QUI TAM* FCA STATUTES ARE NECESSARY FOR STATES TO PROTECT THEIR INTERESTS IN MULTI-STATE INVESTIGATIONS AND RECOVERIES

States without their own *qui tam* statutes

are not prohibited from recovering from fraud allegations brought to their attention by an action filed only under the federal FCA.²⁴ In truth, the overwhelming majority of state recoveries stem from multi-district actions filed under the federal FCA. Each of the state reports illustrates this reality. For instance, Connecticut reported recoveries in over a dozen cases in 2010, totaling nearly \$18 million. These cases were all filed under the federal FCA, named multiple states as plaintiffs, and importantly, did not require a state FCA for participation. The fact is that Connecticut, or any other state, need not have adopted an FCA nor shouldered the costs associated to have been named in the case or to recover a share of the proceeds.

Moreover, the absence of a state *qui tam* statute does not preclude a state's recovery for state-specific fraud claims in single or multi-state investigations. In addition to whatever state statutory and common law authorities exist, fraud actions can—and are—brought under the federal FCA in order to punish and deter state-specific fraud. For example, although Idaho has no state *qui tam* statute, relators were able to bring an FCA action against an Idaho medical facility in an in-state federal court under the federal FCA.²⁵ In other words, the federal FCA functions in a manner such that state-specific fraud is effectively litigated without adding costs to the states that it benefits.

Furthermore, even without state *qui tam* statutes, states have established mechanisms for coordinating with federal authorities in fraud litigation. The fact of the matter is that state Attorneys General do obtain information to enable prosecution of state crimes. In fact, "working protocols have developed through which state and federal prosecutors share evidence as

necessary, and at an appropriate time, in investigating each federal Medicaid *qui tam* filed.”²⁶ Federal prosecutors work with state employees to determine whether and how the alleged conduct implicates the particular state reimbursement scheme at issue. In cases involving a single state’s Medicaid program, federal prosecutors work with state’s Medicaid Fraud Control Unit (MFCU)—lawyers and investigators working in a state prosecutor’s office funded by a federal appropriation.

In national cases, MFCUs across the country have developed a mechanism for coordinating the interactions of multiple states with the federal investigation. Working through the National Association of MFCUs (NAMFCU), teams of MFCU lawyers serve as liaisons to state Medicaid program officials, MFCUs, and state prosecutors to facilitate a coordinated investigation and negotiation of either a “global” resolution if settlement is achievable or coordinated litigation if it is not. As a result, a relator’s share of the “proceeds” in such cases has been measured as a percentage of, and is paid from, the federal recovery only, not the state recovery. These coordinated efforts ensure that states’ interests are considered during federal FCA actions and that states receive necessary information regarding fraud within their state. They do *not* require state *qui tam* statutes to function.²⁷

MYTH #3: STATE *QUI TAM* STATUTES ARE NECESSARY TO INCREASE STATE’S SHARES IN MULTI-STATE SETTLEMENTS

Another common misconception is that the DRA incentives necessarily provide a tangible financial benefit to the states that qualify.²⁸ While states that pass a FCA may expect a 10% bump in their recovery share, they must also pay a bounty of up to 30% to

whistleblowers who file suit under that statute. The result, for many, will be no net increase in recovery. In fact, in many scenarios, states may actually lose money.

By way of example, presume a settlement of an alleged national Medicaid fraud with a total recovery of \$160 million and with the state and federal governments each procuring 50% (\$80 million each) of the total reward. Absent a *qui tam* provision, the state’s recovery remains at \$80 million, while the federal government alone bears the burden of paying out the relator’s percentage from its \$80 million recovery.

Now, consider a similar scenario involving a state with a *qui tam* statute. Instead of recovering 50%, or \$80 million, of the \$160 million award, the state would recover 60%, or \$96 million. However, the state would now be required to pay the relators a share of that recovery—an obligation the state would not shoulder if the action is filed only under the federal statute. Assuming an average relator’s share of 20%, the hypothetical state must now subtract \$19.2 million (20% of the \$96 million) from its recovery and retain only \$76.2 million for its Medicaid program losses.²⁹ In other words, the state loses \$3.2 million because it had a state *qui tam* statute. By design, the only financial “winner” in this scenario is the relator, who receives double the recovery—from \$16 million to \$32 million—he or she would have received in the pre-DRA era. The result is a direct transfer of recovered monies from the state, subsidized in part by the federal government’s DRA incentive, to relators (and their attorneys through contingency fees).

The numbers suggest that the “break-even” point for states is at the 60% FMAP mark. That is, states with an FMAP of less than 60% “stand to lose, and can be worse off, than if they had no *qui tam* provision.”³⁰ Yet even this “break-even” point does not account for the additional costs that a state faces when it enacts an FCA. Many state legislatures fail to account for the new costs—most drastically the share paid out to relators, but also administrative expenditures—in their cost-benefit analysis.³¹

Several states, including West Virginia, Vermont, Kentucky, Kansas, Oregon, and Maine, have taken this cost-benefit analysis into consideration when determining whether or not a state FCA statute would increase recoveries.³² Vermont’s observations were prescient: “We have to do a cost-benefit analysis. When we participate in the national cases, the relator’s share does not come out of our share. We do not receive the 10% bump, but we do not have to pay as much in the relator’s share.”³³ West Virginia, too, notes that “it does not make fiscal sense for West Virginia to have a *qui tam* provision.”³⁴ In other words, the windfall to relators makes a state *qui tam* statute fiscally detrimental to the state. It is relevant to note that the reason that state *qui tam* statutes are potentially fiscally detrimental has little to do with state FCA provision generally, but rather with the requirement of *qui tam* provisions and the associated relator’s award.



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Additional Costs

The text of the DRA suggests that its authors expected states to recover Medicaid damages consisting of a state and a federal share in one state action brought under one state FCA. But the practice under existing state *qui tam* statutes demonstrates that relators do not see filing a state *qui tam* action as an alternative to filing under the federal FCA. Instead, relators seek to maximize their own recovery under *qui tam* statutes by invoking the federal FCA to obtain a share of the federal recoveries for Medicaid and other programs, and *all available state FCAs*, to obtain a share of each state's Medicaid recoveries.³⁵

Nothing in the federal statute or any state statute precludes the same relator from bringing the same claims under state and federal statutes. Nor do the DRA incentives address the procedural and practical complexity of investigating, defending, or litigating Medicaid fraud allegations under multiple state and federal *qui tam* provisions.

While most often these duplicative claims are filed as pendant claims in one action in federal court, the potential for facing multiple duplicative actions in multiple courts and jurisdictions poses obvious heightened risks and costs for defendants. Such actions also threaten the rights of individuals, witnesses, or defendants in the civil action who may also be subject to parallel criminal investigation. Furthermore, filings under multiple state statutes often

impede the progress and coordination of investigations of alleged multi-state schemes. Thus, while state *qui tam* laws promise large rewards—mainly to relators—they do so at the peril of government, judicial, and defense interests alike. The examples below illustrate the complications such laws beget.

LIMITATIONS TO PUBLIC DISCLOSURE BAR

As discussed above, OIG has interpreted the DRA to require that states emulate changes to the federal statute if they are to remain DRA-complaint. OIG has recently taken this emulation threshold to new extremes. OIG has mandated that states enable relators to litigate a category of claims otherwise barred under a recently amended version of the federal *qui tam* provisions.

In 2010, Congress amended provisions of the federal FCA that, until then, had divested federal courts of subject matter jurisdiction in cases where relator's allegations were based on publically disclosed information. Since its inception in 1986, the public disclosure bar has served to enhance statutory incentives for "those with knowledge of fraud against the government to bring that information to the fore" while "avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of fraud."³⁶ The 2010 amendments narrowed the bar's scope, eliminated its status as a jurisdictional defense, and notably excluded "state" hearings and litigation from the list of proceedings that qualify as "public disclosures" for purposes of triggering the bar. Thus, while its predecessor included no such qualification, the current federal FCA specifies that:

The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a Federal criminal, civil or administrative hearing... or other Federal report, hearing, audit, or investigation ..unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.³⁷

Under the auspices of requiring states to maintain provisions "at least as effective" at incentivizing whistleblowing as those in the federal FCA, OIG issued new guidance in March 2013 advising states to impose

additional restrictions on the public disclosure bars of their false claims statutes. It directed that states follow the format of the federal statute by limiting their bar to state "criminal, civil, or administrative hearing...report,...audit, or investigation[s]." In other words, states were directed to exclude from the list of "public disclosures" triggering the bar those that are made in federal criminal, civil, or administrative hearings or in federal reports, hearings, or investigations notwithstanding the fact that Congress and OIG itself frequently convene federal hearings and issue federal reports describing fraud schemes involving specific state Medicaid programs. Regardless of this incongruity, if states fail to adhere to OIG's latest directive, they forgo their eligibility for an increased share of Medicaid fraud recoveries.

OIG's decree seems likely to yield a string of "parasitic"³⁸ lawsuits of the exact type the original public disclosure bar was designed to prevent. As noted, state Medicaid programs are often subject to federal review, audits, and legislation. Thus, narrowing state bars to cover only disclosures in state proceedings would have the perverse effect of allowing relators to sue and to recover proceeds from states based on information already publically disclosed to the states in federal forums, even if those disclosures would preclude the same relators from suing under the federal FCA.

For example, under these rules, a whistleblower could track down allegations disclosed to the state Medicaid agency by federal investigators and auditors in reports or federal court proceedings and copy them into a lawsuit under a state false claims statute. Then, when the state finishes its

prosecution, the plaintiff could demand a bounty from the state's share of the recovery, which in the absence of a federal lawsuit could very well include the recovery of all dollars paid out of the state program, triggering a remittance of the federal share of that recovery from the state to the federal government.³⁹ Moreover, the statute would force the state to pay out at least 15% of its recovery, even when the plaintiff had not helped the state at all or would have been barred altogether under the federal public disclosure bar.

Adding insult to injury, if collected under a DRA-compliant statute, the federal government will not only lose a share of its recovery from the state, but also subsidize the state's payment of a bounty to the very whistleblower Congress barred from pursuing claims on behalf of (or for a bounty against) the United States. OIG's dictate on the public disclosure bar may be the most revealing piece of evidence that the DRA-incentive really operates to serve one primary purpose, which is to maximize payments to relators (and their contingency fee attorneys).

FAIRNESS AND DUE PROCESS

A proliferation of whistleblower suits based on identical allegations, under state and federal statutes, likewise raises fairness and due process concerns. For one, the federal FCA and each state *qui tam* statute permit the government to seek a stay of relator discovery pending completion of the government's investigation or prosecution of a civil or criminal matter arising out of the same facts as those alleged in a *qui tam* complaint. Yet no state statute authorizes a court to stay discovery in deference to the investigation by another state and where a statute limits the granting of a stay to certain circumstances. Invoking the court's general supervisory powers to issue a stay outside those circumstances will likely prove difficult. Thus, the normal remedy available to avoid one of the primary perils of parallel proceedings is simply unavailable in the context of multi-state *qui tam* litigation where some states investigate diligently and others have no reason or resources to do so.⁴⁰

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GAMESMANSHIP

Too often, multi-jurisdictional complaints breed gamesmanship as whistleblowers seek multiple state recoveries for identical claims. In one classic example, the United States brokered a settlement for \$124 million, \$50.6 million of which was to be paid to 22 states—only to watch a relator launch a post-settlement campaign for more money.⁴¹ The relator's thrice-amended complaint invoked the federal FCA and several state *qui tam* provisions. Prior to the announcement of the settlement, the relator did not serve any state with his complaint or disclosure of material evidence. Once the settlement went public, however, he served the *qui tam* states, asserted a right to share in the proceeds, and took discovery to challenge the fairness and adequacy of the settlement and to obtain a share of the estimated value of the Corporate Integrity Agreement the defendant had signed with the United States.

The District Court dismissed all of the relator's claims to share in the state recoveries. Yet notwithstanding the relator's sweeping loss, at least four months passed between the execution of the settlement and actual resolution of the matter, all because the various state *qui tam* statutes provided the relator with opportunities to delay resolution and demand a greater reward than he expected when he first filed his *qui tam* action.⁴²

As implemented, the DRA incentives and the state *qui tam* statutes they inspire pose latent risks to the government and defendants alike. The challenge is to recognize those risks while supporting the pursuit of true fraud, not bounties.⁴³



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Alternatives to State *Qui Tam*

In enacting the DRA provision, Congress offered state legislatures an opportunity and a challenge. The opportunity to increase the Medicaid revenues flowing back to the state from each FCA investigation is abated by the challenges posed by state *qui tam* statutes. To meet this challenge, states must take the steps Congress overlooked in order to account for the lessons learned in investigations and litigation under existing state *qui tam* statutes.

State legislatures need to determine whether a state *qui tam* statute makes sense, and if so, they must draft their statutes in a way that targets categories of schemes that still evade detection in circumstances where the current federal incentive alone is not sufficient to induce whistleblowers to come forward. At the same time, state legislatures must guard against exacerbating the complexity of multi-state investigations and litigation and providing windfalls to existing relators.

Some states have met this challenge by providing alternatives to existing state *qui tam* provisions:

DECLINED *QUI TAM*S DISMISSED

The Maryland FCA specifies that a relator cannot pursue a *qui tam* action that the state declined to take over. Md. Code, Health-Gen. § 2-604(a)(7) ("If the State does not elect to intervene and proceed with the action...before unsealing the complaint, the court shall dismiss the action.").

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NON-QUI TAM WHISTLEBLOWER REWARD OR BOUNTY

Arkansas’s Medicaid fraud statute does not include a *qui tam* provision. Instead, it provides successful whistleblowers a financial reward without corresponding rights to litigate on the state’s behalf. Ark. Code Ann. § 20-77-911(a) (The court “is authorized to pay a person sums, not exceeding ten percent (10%) of the aggregate penalty recovered, as it may deem just, for information the person may have provided which led to the detecting and bringing to trial and punishment persons guilty of violating the Medicaid fraud laws.”). Both the Attorney General and the whistleblower can petition the Court to provide this reward. Only the former can prosecute the case itself.

NO QUI TAM FOR CLAIMS WITHIN GOVERNMENT’S KNOWLEDGE

Prior to implementation of the DRA, Massachusetts’s original FCA barred courts from exercising jurisdiction over *qui tam* actions if relators knew or had reason to know that the government already had knowledge of the claim. Mass. Gen. Laws Ann. ch. 12, § 5G (2000) (“No court shall have jurisdiction over an action...brought by a person who knew or had reason to know that

the attorney general, the state auditor or the inspector general already had knowledge of the situation.”).⁴⁴

NO QUI TAM OR REWARD

The Kansas FCA does not include a *qui tam* provision or whistleblower reward. Instead, it authorizes the state Attorney General to bring civil actions under the state FCA, and collect treble damages and civil penalties for any violations. Kan. Stat. Ann. § 75-7503.

These statutes reflect awareness by states that, DRA incentives aside, state FCAs carry their own risks and *qui tam* provisions may not be the optimal way to boost state fraud recoveries. The models above provide incentives and/or mechanisms for reporting fraud yet avert, or at least limit, the potential for private interests to usurp those of the state.⁴⁵

Notably, the Maryland legislature limited the burden of declined *qui tam* litigation knowing that a provision mandating dismissal of declined claims would cost them the federal incentive payment by rendering them DRA non-compliant. Other states adopted limitations in hopes that OIG would recognize that literal emulation of the federal statute was not the only way to balance the dictates of the DRA with the

need of the state to curtail abusive litigation. For example, Oklahoma, Colorado, and Delaware initially adopted provisions designed to prevent existing relators, whose whistles had already been blown, from piling on parasitic claims in a single action or in a series of actions filed in other courts.⁴⁶ The so-called “first-to-file anywhere” provision was intended to adapt a provision of the federal statute to the construct of Medicaid-style actions where the same false claims could be subject to both federal and state jurisdiction, the same scheme is frequently alleged to victimize more than one state in the same way, and law enforcement partners are alerted in the normal course to the fraud by the first whistleblower filing, regardless of jurisdiction. The emphasis below shows how Oklahoma modified the federal “first-to-file” provision to address these multi-jurisdictional concerns:

When a person brings an action under this section, under the federal False Claims Act, or under any similar provision of the law of any other state, no person other than the state may intervene or bring a related action based on the facts underlying the pending action.⁴⁷

Despite being tied for consistency purposes to the federal provision, OIG rejected the provision, forcing each of the states to assess whether the DRA-incentive was worth the cost and risk of duplicitous *qui tam* litigation. For Colorado and Delaware, the answer was yes; the incentive was more important.⁴⁸ For Oklahoma, the answer was no; the federal incentive was not worth changing their first-to-file provision.

State FCA proponents often opine that

states need private litigants to carry out the cases they decline or are otherwise unable to pursue. But the facts tell another story. Year after year, statistics indicate that the overwhelming majority of declined *qui tams* are dismissed. In fact, as noted above, 87% of cases that are declined by the government are ultimately dismissed in court,⁴⁹ thus suggesting that the government already litigates a large majority of meritorious actions. The truth is that state and federal recovery data expose the fundamental flaws of the arguments advanced in support of state *qui tam* laws. As states come to realize those flaws, an increasing number will reject the DRA incentive and consider alternatives to the *qui tam* model. Those alternatives must provide mechanisms to encourage fraud reporting, but discourage self-interested parties from gaining a windfall and undermining the states’ interests.⁵⁰

Conclusion

State legislatures deciding whether to add or keep *qui tam* statutes on the books should consider costs they exact. Ultimately, while *qui tam* provisions are certain to escalate a state’s costs, there is little evidence that they have led to greater fraud detection. Worse, the incentives provided by the DRA fail to provide states adequate funding to cover those costs and often subsidize little more than increased relator rewards. Though well-intentioned, the DRA has not functioned as its drafters envisioned. Thus for many states, the endless pursuit of DRA-compliance—and the often illusory benefits it promises—is simply not worth the price. Those states would be wise to consider alternative laws that serve to improve local fraud detection without the high costs *qui tam* provisions entail.

Endnotes

- 1 For example, in *U.S. ex rel. Bogart v. King Pharm.*, Civ. A. No. 03-1538 (E.D. Pa.), the Department of Justice announced the settlement of claims against King Pharmaceuticals for a total of \$124.1 million, DEP'T OF JUSTICE, KING PHARMACEUTICALS TO PAY U.S. \$124 MILLION FOR MEDICAID REBATE AND UNDERPAYMENTS & OVERCHARGES FOR DRUG PRODUCTS, (2005), *available at* http://www.justice.gov/opa/pr/2005/November/05_civ_581.html (last visited September 19, 2013), from which states recovered \$50.6 million. *See U.S. ex rel. Bogart v. King Pharm.*, 493 F.3d 323, 325-26 (3d Cir. 2007 (summarizing state share of district court settlement)). Relator Bogart received "relator fees in excess of \$9 million," in addition to counsel fees and expenses of \$800,000. *Id.* at 325.
- 2 "*Qui tam*" statutes, as used in this paper, refer to false claims laws that permit private individuals, known as "relators," to litigate claims on behalf of the government and collect a percentage of the recovery if successful. The term "whistleblower" is often synonymous with "relator," and refers to a person who brings alleged fraud to the government's attention.
- 3 In *Bogart*, after months of litigation, the District Court held that it lacked jurisdiction to invoke common law theories like the "common fund doctrine" to order a state to pay whistleblowers and their attorneys any bounty on their share of such recoveries in the absence of a statute, like a *qui tam* statute, that explicitly authorized the payment. *U.S. ex rel. Bogart v. King Pharm.*, 410 F. Supp. 2d 404, 410 (E.D. Pa. 2006) *aff'd*, 493 F.3d 323 (3d Cir. 2007).
- 4 Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031, 120 Stat. 4, 72-73 (2006).
- 5 Letter from Sen. Charles E. Grassley, to Daniel R. Levinson, Dep't of Health and Human Services Inspector General, and Alberto R. Gonzales, United States Attorney General, at 2 (Mar. 17, 2006), *available at* <http://finance.senate.gov/press/Gpress/2005/prg032106.pdf> (last visited Oct. 29, 2009) (hereinafter "Grassley Letter").
- 6 Senator Charles E. Grassley, the Senate sponsor of the DRA provision, explained that "[it] was included in an effort to contain the escalation of fraud and waste and abuse in the Medicaid program, as outlined in a two-day Medicaid fraud hearing the Committee held" in June 2005. Grassley Letter, at 2. Senator Grassley stressed that the heart of the DRA provisions was the requirement that qualifying states reward and facilitate whistleblower actions via the *qui tam* mechanism. *See id.* at 3. The DRA reflects the view that greater Medicaid programs to the attention of law enforcement, while deterring potential fraudfeasors from hatching those schemes in the first place.
- 7 42 U.S.C.A. § 1396h (West).
- 8 For example, in March of 2011, OIG sent a letter to the Nevada Attorney General stating that due to the amendments to the FCA made by the Fraud Enforcement and Recovery Act of 2009 (FERA), the Patient Protection and Affordable Care Act (ACA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), the Nevada statute could no longer be deemed "at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act." Letter from the Office of Inspector General, Daniel R. Levinson, to Nevada Attorney General, Catherine Cortez Masto (Mar. 21, 2011), *available at* <http://oig.hhs.gov/fraud/docs/falseclaimsact/Nevada.pdf>. OIG provided Nevada, along with other states in non-compliance, two years to modify its laws in

concordance with the 2009 and 2010 amendments to the federal FCA. Interestingly, however, OIG labeled provisions in the Nevada statute non-compliant when those provisions remained unaffected by the amendments. Later in 2011, OIG issued another letter to Nevada (among other states) pointing out yet another provision of the Nevada FCA they suddenly realized had never been DRA-compliant.

- 9 These are: California, Connecticut, Hawaii, Illinois, Iowa, Massachusetts, Tennessee, Texas, and Washington. OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, STATE FALSE CLAIMS ACT REVIEWS, <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp> (last visited Sept. 11, 2013).
- 10 Indiana, Michigan, New York, Virginia and Wisconsin. OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, STATE FALSE CLAIMS ACT REVIEWS, <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp> (last visited Sept. 11, 2013). Nevada and Rhode Island passed amendments to their state *qui tam* statutes prior to the 2013 deadline but OIG had not posted a decision on either statute's eligibility as of this paper's publication.
- 11 For example, in its 2010 Senate Bill Report, the State of Washington states that "[w]hile a government entity can, in theory, recover undeserved payments under tort or contract law, false claims for payment may go undiscovered." S. B. Rep. No. 95-797, at 1 (Wa. 2010), *available at* <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/Senate/5144%20SBA%20JUD%2010.pdf>. This statement fails to recognize that states and relators are able to identify and bring state-specific fraud claims under the federal FCA, in an in-state federal court. *See* discussion *infra* Part III.B. The report additionally comments that "[a] private citizen is unable to initiate an action, on behalf of an injured state governmental entity, against another party submitting a false claim for payment," and that a private citizen can only do so "on behalf of the federal government under the federal False Claims Act." *Id.* While factually accurate (technically a case brought under the federal FCA is on behalf of the federal government), this statement falsely implies that states are unable to recover under the federal FCA. This is not the case. *See* discussion *infra* Part III.B. As this paper illustrates, a majority of state recoveries stem from multi-district actions filed under the federal FCA.
- 12 *See, e.g.*, Marc S. Raspanti & Pamela C. Brecht, *The Minnesota False Claims Act: Is It Minnesota Nice?*, 67 Bench & B. Minn. 20, 22 (April 2010) (Minnesota's False Claim Act "will provide the Minnesota Attorney General's Office, as well as private attorneys general, also known as "whistleblowers," a powerful potential tool in ferreting out fraud committed against the state and its many agencies."). The Raspanti article includes the litany of arguments whistleblower lobbyists presented to convince legislators that state *qui tam* was the answer to their fiscal woes: "Presumably, members of the Minnesota legislature were interested in passing such a statute to avail Minnesota of the 10 percent incentive for having a DRA-compliant statute", *id.* at 20; "Due to the remarkable success of the federal FCA over the last 24 years, numerous state governments have enacted similar laws to protect the public fisc and recover funds obtained fraudulently," *id.* *See also* Attorney General Martha Coakley's Fiscal Year 2009 Annual Report, at 29 ("The AGO has used the False Claims Act aggressively to help prevent fraud and recover monies wrongfully procured from public sources."); ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, THE FALSE CLAIMS ACT, <http://www.ag.ny.gov/whistle-blowers/false-claims-act> (last visited September 9, 2013) ("The False Claims Act is an important new tool for people to help the state or local governments recover funds or property lost through fraud or corruption.").
- 13 Practice under existing state *qui tam* statutes demonstrates that relators do not utilize state FCA statutes to address a gap in fraud detection, but rather as an additional mechanism for increased recoveries. *See infra* Part IV and note 35.

- 14 See *infra* notes 17, 18, 19, and 20.
- 15 See *infra* notes 22 and 22.
- 16 This percentage was calculated from the figures reported by states. See *infra* notes 17, 18, 19, 20, 21, 22, and 23.
- 17 Letter from Attorney General John Suthers to The Honorable Mary Hodge, Chairperson of the Joint Budget Committee, The Honorable Betty Boyd, Chairperson of the Senate Health and Human Services Committee, and The Honorable Ken Summers, Chairperson of the House Health and Environment Committee (Jan. 6, 2012) (on file with author).
- 18 *Id.*
- 19 Letter from Attorney General Richard Blumenthal to Thomas P. Sherida, Clerk of the Senate and Garey E. Coleman, Clerk of the House of Representatives, at (Nov. 4, 2010) (on file with author).
- 20 Attorney General's Report To The Legislature Pursuant to N.J.S.A. 2A:32C-18 Concerning The New Jersey False Claims Act (2010) (on file with author).
- 21 Letter from Attorney General Joseph R. Biden, III to The Honorable Anthony J. DeLuca, President Pro Tempore, Delaware General Assembly and The Honorable Robert F. Gilligan, Speaker of the House, Delaware General Assembly (Dec. 3, 2010) (on file with author).
- 22 Letter from Attorney General Joseph R. Biden, III to The Honorable Anthony J. DeLuca, President Pro Tempore, Delaware General Assembly and The Honorable Robert F. Gilligan, Speaker of the House, Delaware General Assembly (Feb. 13, 2012) (on file with author).
- 23 Letter from Attorney General Roy Cooper to Sen. Stan Bingham, Sen. Thom Goolsby, Sen. Buck Newton, Rep. James Boles, Jr., Rep. Leo Daughtry, Rep. John Faircloth, and Rep. Pat Hurly, Co-Chairs, Appropriations Subcommittees on justice and Public Safety (Feb. 1, 2013) (on file with author).
- 24 In fact, many states have recovered, and continue to recover, in multi-state actions filed

under the federal FCA without their own FCA statute and without incurring the burden of paying relators. For example, Ohio has successfully recovered millions in Medicaid fraud actions without a state false claims act and its associated costs. DEPARTMENT OF JUSTICE, OHIO-BASED MANAGED CARE PLAN CONTRACTOR CARESOURCE & ENTITIES TO PAY \$26 MILLION TO RESOLVE FALSE CLAIMS ALLEGATIONS, (Feb. 1, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-civ-138.html> (last visited Sept. 10, 2013); *see also* Editorial: Short Takes, THE COLUMBUS DISPATCH (Feb. 25, 2011), *available at* <http://www.dispatch.com/content/stories/editorials/2011/02/25/short-takes.html> (last visited Sept. 9, 2013). Kentucky also has no state *qui tam* statute, but the Attorney General of that state announced in 2011 that "his Office of Medicaid Fraud and Abuse Control has recovered or been awarded more than \$210 million for the state and federal Medicaid programs." OFFICE OF THE KENTUCKY ATTORNEY GENERAL, LAWRENCE COUNTY DOCTOR, FORMER PAIN CLINIC OWNER, INDICTED FOLLOWING ATTORNEY GENERAL'S Investigation (October 14, 2011), *available at* <http://migration.kentucky.gov/Newsroom/ag/balaklawindicted.htm> (last visited Sept. 10, 2013). Furthermore, Kentucky received that money without having to pay a single penny of its recovery to the whistleblowers as a "bounty" for blowing the whistle. Arkansas, too, has successfully obtained awards under the federal FCA. The Associated Press, Settlement to Boost State Medicaid Funding (Dec. 16, 2010), *available at* <http://www.arkansasonline.com/news/2010/dec/16/settlement-boost-state-medicaid-funding/?sports> (last visited Sept. 20, 2013). Maine, another state without an FCA statute, has also received awards as a result of federal FCA actions. OFFICE OF THE MAINE ATTORNEY GENERAL, PHARMACEUTICAL COMPANY UCB INC. SETTLES HEALTH CARE FRAUD ALLEGATIONS (June 10, 2011), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Press&id=261653&v=article10 (last visited Sept. 9, 2013) (noting that Maine received a

- \$43,000 award from the federal FCA settlement).
- 25 See, e.g., *U.S. ex rel. Putnam v. E. Idaho Reg'l Med. Ctr.*, 696 F. Supp. 2d 1190 (D. Idaho 2010).
 - 26 Pamela Bucy, Jonathan Diesenhaus, Marc S. Raspanti, Holly Chestnut, Katherine Merrell, & Chad Vacarella, *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 CARDOZO L. REV. 1523, 1546 [hereinafter "*States, Statutes, and Fraud*"].
 - 27 Anecdotal evidence suggests that the proliferation of *qui tam* statutes in recent years has actually frayed some of these connections as representatives of states with *qui tam* statutes have begun to exclude representatives of states without them from accessing some aspects of their investigations, acting under the guise of new interpretations of the statutes' seal provisions. In the past, during the investigative stage of a *qui tam*, the fact of a *qui tam* filing and a witness's status as a relator were distinguished from the evidentiary product of the investigation itself and withheld from non-*qui tam* state officials participating in the investigation. Today, separate deliberations by groups whose states pay whistleblowers and those states that do not have given rise to the impression that valuable evidence is not being shared equally among law enforcement partners. Far from the populist notion of disclosure said to underlie the *qui tam* statutes, the DRA incentive seems to have given rise to a bureaucratic, pay-to-play mentality among some state Medicaid law enforcement personnel, with the payment ensuring to benefit already well-compensated whistleblowers and their attorneys.
 - 28 Many states attribute financial benefits to their support of state *qui tam* provisions. For example, 17 states answered "yes" when asked whether their state's anticipated greater recoveries following the enactment of their state *qui tam* statutes. *States, Statutes, and Fraud*, at 1601-02.
 - 29 *States, Statutes, and Fraud*, at 1547. Under the federal FCA, when the government declines to intervene, a relator in a successful *qui tam* suit is entitled to 25-30 percent, even higher than the average recovery percentage. *Id.* These percentages are somewhat illusory, however, due to the fact that, as of September of 2010, 86% of all *qui tam* cases that were declined by the government were ultimately dismissed. CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE, FRAUD STATISTICS – OVERVIEW, at 9 (2010). Furthermore, excluding active cases (some of which may yet be dismissed), that number jumps to 94%. *Id.*
 - 30 *Id.*
 - 31 Proponents of state *qui tam* statutes argue that states stand to recover more if they enact their own *qui tam* provisions, but they frequently fail to calculate these additional costs. For example, in 2011, following a \$26 million settlement under the federal FCA, Ohio State Attorney General Mike DeWine encouraged Ohio to enact a state *qui tam* provision, arguing that Ohio's "share of the recovery would have been greater." 12-5 Briefing Papers 1, 5. In reality, an Ohio FCA would *not* have increased the state's share of any actual recoveries to the Medicaid program. Without a state FCA, Ohio recovered 10.24 million – 39% of the total recovery. With a state *qui tam* statute, they would have recovered 10% more – or \$12.74 million – but would also have had to pay relator's share. Using the average percentage for relators' recovery, 20%, Ohio would have recovered \$10.19 million, or \$50,000 less than without a state *qui tam* provision. In fact, the figures from this real-world example indicate that even those states whose FMAP is greater than 60%, still stand to lose. Thus, taking into account both the relators fees and administrative costs, even states with greater than 60% FMAP should be wary of the claimed benefits of enacting a state *qui tam* statute.
 - 32 *States, Statutes, and Fraud*, at 1621.
 - 33 *Id.* at 1622.
 - 34 *Id.*
 - 35 See, e.g., *United States ex rel. Bogart v. King Pharms.*, 414 F. Supp. 2d 540, 541 (E.D. Pa. 2006) (dismissing relator's claims against

- several *qui tam* and non-*qui tam* states for a share of the state portion of a Medicaid false claims settlement).
- 36 *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992). See also *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885 (2011) (“As we have observed, ‘[r]ather than simply repeal the Government knowledge bar,’ the public disclosure bar was ‘an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits.’” *Id.* at 1894 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294, 130 S. Ct. 1396, 1407, 176 L. Ed. 2d 225 (2010))).
 - 37 31 U.S.C.A. § 3730 (West) (emphasis added).
 - 38 See, e.g., *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885 (2011) (“As we have observed, ‘[r]ather than simply repeal the Government knowledge bar,’ the public disclosure bar was ‘an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits.’” *Id.* at 1894 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294, 130 S. Ct. 1396, 1407, 176 L. Ed. 2d 225 (2010))).
 - 39 Letter from Herb B. Kuhn, Acting Director, Center for Medicaid and State Operations, Dep’t of Health and Human Services to State Health Officials, at 1-2 (Oct. 28, 2008), available at <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO08004.pdf> (last visited Sept. 19, 2013) (requiring states to return to CMS the FMAP proportion of recoveries collected for Medicaid fraud, less any federal recovery already received).
 - 40 For instance, where one state declines to intervene and take over a relator’s civil action, while other states and the federal government continue to conduct a criminal investigation in connection with the same alleged underlying conduct, the first state’s declination could entitle, or obligate, the relator to commence civil discovery against that defendant in the midst of the parallel criminal investigation.
 - 41 See *Bogart*, 414 F. Supp. 2d at 544-45
 - (disposing of whistleblower’s demands for share of proceeds recovered by various states).
 - 42 Among the more extreme of the relator’s allegations was the charge that the proposed transfer of the state settlement amount into an escrow account maintained by the New York Attorney General was an attempt to undermine the jurisdiction of the Court and deprive the relator of his rightful share of the settlement funds. See Relator’s Response in Opposition to the United States’ Motion to Dismiss with Prejudice Count I of the Third Amended Complaint at 3, *Bogart*, 414 F. Supp. 2d 540 (E.D. Pa. 2006) (No. Civ. A. 03-1538).
 - 43 Indeed, with state budgets already under strain, this distinction is key. A recent case sounds a word of caution: when Relators place their interests above those of the government, it can prove costly. In *U.S. ex rel. Piacentile v. Amgen Inc.*, 2013 WL 5460640 (E.D.N.Y. Sept. 30, 2013), Relators sued Amgen, Inc., under the federal FCA for alleged off-label promotion and kickback violations. The United States and ten others reached a settlement for \$780 million, and offered relators \$1.8 million of that amount. Relators rejected that offer. The Government then moved to dismiss because it believed that the Relators “failed to actually bring light to any FCA violations committed by Amgen that were recoverable under the law.” *Id.* at *1. The court agreed, and dismissed, but not before highlighting the costs, and incongruity, of litigating what the Government had *already* “determined were not viable claims”: “In this age of austerity, the coffers from which the government drew in order to investigate Amgen for eight years are no more. Therefore, even if the government’s right to dismiss ought to be conditioned on a demonstrable nexus to a valid government purpose, this Court finds that nexus to be present.” *Id.* at 4.
 - 44 OIG initially deemed the statute DRA-compliant, only to later reverse course and direct Massachusetts to remove this provision. See John T. Boese, 2 Civil False Claims and Qui Tam Actions 6-57 n.326 (4th ed. & Supp. 2012-2). Massachu-

setts did so in 2012, evidencing again that states seeking to retain their DRA bonuses must continually amend their statute to keep pace with the changing views of OIG.

- 45 Recent conflicts between relators and the government over their “piece of the pie” make this danger abundantly clear. For example, in *U.S. ex rel. Schweizer v. Oce N.V.*, the government and relator disagreed to the terms of settlement. The D.C. Circuit Court held that the government could not settle without relator’s consent unless the court approved the settlement agreement. 677 F.3d 1228, 1233-34 (D.C. Cir. 2012). Thus, not only is conflict between the government and relators a reality, it

is a barrier to the government reaching a result it sees as meeting its interests.

- 46 See Okla. Stat. Ann. tit. 63, § 5053.2 (2007); Colo. Rev. Stat. § 25.5-4-306(2)(e) (2010); Del. Code tit. 6, § 1203(b)(5) (2000).
- 47 Okla. Stat. Ann. tit. 63, § 5053.2 (2007).
- 48 Both states amended their statute in 2013; neither has yet to be deemed DRA-compliant.
- 49 See FRAUD STATISTICS – OVERVIEW, *supra* note 29, at 9.
- 50 Others have proposed additional amendments to the federal statute



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