WHISTLE WHILE YOU WORK: HOW THE FALSE CLAIMS ACT AMENDMENTS PROTECT INTERNAL WHISTLEBLOWERS

John T. Nicolaou*

* J.D. Candidate 2012, Columbia University School of Law; M.A. Northwestern University School of Communication; B.A. Vanderbilt University College of Arts and Sciences. The author would like to thank Professor Mark Barenberg, Professor Peter Strauss, Mallory Jensen, Amy Ma, C.B. Buente, Jennifer Albecht, Julie Baine, Walton Dumas, Gregory Howling, Chris Lacovara, Jonathan Marcus, Elise Minter, Alessandro Presti, and Arvind Ravichandran for their comments on earlier drafts of this Note.

I. INTRODUCTION

Fraud on the federal Medicare and Medicaid programs is pervasive.[1] Due to the complexity of federal billing protocols

[1] Since January 2009, the Justice Department has recovered a record $4.6 billion for healthcare fraud under the False Claims Act (FCA). *See* Mike Scarcella, *False Claims Act Recoveries Hit Record-Breaking $5 Billion*, NAT'L L. J. (Nov. 23, 2010), http://www.law.com/jsp/article.jsp?id=1202475238236.

in the healthcare context,[2] evidence of fraud is frequently hidden within an organization, "buried in mountains of paper or digital documents."[3] Because law enforcement officials will always be outsiders to organizations in which fraud is occurring, insiders who are willing to blow the whistle provide the most effective way for outsiders to learn that wrongdoing has occurred.[4] For instance, without the cooperation of inside whistleblowers, how could government investigators discover that an orthopedic center regularly claims reimbursements for the most expensive form of pre-operation visit, when in reality, the visits at issue took only five minutes or less?[5] Likewise, how could investigators learn that a hospital fraudulently billed for hospitalization services for heart transplant patients who had no objective medical need for such treatments?[6] These types of healthcare fraud require inside knowledge not only of the relevant paper trail, but also of the true medical condition of

[2] The *Medicare Claims Processing Manual* alone contains thirty-eight chapters worth of billing rules and requirements. *See* Centers for Medicare and Medicaid Services ("CMS"), *Medicare Claims Processing Manual*, https://www.cms.gov/Manuals/IOM/itemdetail.asp?itemID=CMS018912 (last updated Apr. 14, 2011). To bill Medicare, physicians must, among other things, match the billed treatment with the proper diagnostic code from a list of thousands of codes. *See* 42 C.F.R. §§ 424.3, 424.32 (2008) (defining diagnostic code and requiring physicians to provide the appropriate code to receive reimbursements); DEP'T HEALTH & HUMAN SERVS., *Version 28 Full and Abbreviated Code Titles* (Oct. 1, 2010), https://www.cms.gov/ICD9ProviderDiagnosticCodes/06_codes.asp. Each state has its own comprehensive set of rules and regulations for Medicaid billing, some of which impose extremely detailed requirements upon healthcare providers for each category of health service. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, §§ 485.17, 505.21 (2011) (discussing prerequisites for billing New York State Medicaid for Long Term Home Health Care).

[3] The False Claims Correction Act of 2008, S. REP. NO. 110-507, at 5 (2008).

[4] *Id.*

[5] *See* United States *ex rel.* Sharp v. E. Okla. Orthopedic Ctr., No. 05-CV-572-TCK-TLW, 2009 WL 499375, at *11–14 (N.D. Okla. Feb. 27, 2009).

[6] *See* United States *ex rel.* Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370, 376–77 (5th Cir. 2004).

the patients or the actual services rendered that only an inside witness could have.

Given these challenges, the civil False Claims Act (hereafter referred to as "the False Claims Act," "the Act," or "the FCA")[7] is structured to prevent and detect fraud on federal healthcare programs and on the federal government generally.[8] The False Claims Act forbids any person from knowingly making false or fraudulent claims on the public fisc.[9] Actions under the sections forbidding fraud are often referred to as "FCA fraud claims."[10] Unlike other anti-fraud statutes, the FCA contains unique procedural devices that actively enlist private citizens with inside information in the fight against fraud.[11] Under the current version of the Act,

---

[7] *See* False Claims Act, 31 U.S.C. §§ 3729–3733 (Supp. 2010).

[8] Over the past twenty years, "FCA cases have touched virtually every area of the healthcare community, including hospitals, doctors, pharmaceutical companies, nursing homes, durable medical equipment retailers and manufacturers, and renal care facilities, among others." False Claims Correction Act of 2008, S. REP. NO. 110-507, at 7 (2008). Since 1986, more than half of the FCA cases filed by private plaintiffs have focused on fraud against government health care programs. *See id.* at 8. Between 1986 and 2008, FCA cases against hospitals and pharmaceutical manufacturers produced over $8 billion in damages for the government, or more than 40% of the total recovery for violations of the FCA. *See id.* at 7. Standing alone, healthcare cases brought by private plaintiffs under the FCA have netted over $9 billion within the same time frame, or nearly 72% of all FCA recoveries by private plaintiffs. *See id.* at 8.

[9] Under the FCA, a "claim" includes "any request or demand, whether under a contract or otherwise, for money or property" under the control of the Federal Government or its agencies or grantees. 31 U.S.C. § 3729(b)(2). Section 3729(a) lists the forms of forbidden false claims that give rise to liability. The FCA also prohibits so-called "reverse false claims," which include attempts to conceal or failures to disclose monetary obligations, § 3729(a)(1)(G), and the submission of materially false statements or records, § 3729(a)(1)(B).

[10] *See, e.g.*, United States *ex rel.* Elms v. Accenture LLP, 341 Fed. App'x 869, 873 (4th Cir. 2009) (referring to actions under § 3730 as "FCA fraud claims"); United States *ex rel.* Roop v. Hypoguard USA, Inc., 559 F.3d 818, 823 (8th Cir. 2009) (same).

[11] *See* False Claims Amendments Act of 1986, S. REP. NO. 99-345, at 1–2, 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5271 (discussing private enforcement and assistance as Congress's chosen solution to the

both private citizens, also known as "qui tam relators,"[12] and the Attorney General of the United States may file civil actions on behalf of the federal government.[13] If any case originally filed by a qui tam relator succeeds, the relator and the government split any recovery, which can include treble damages and civil penalties for each false claim.[14]

But even with the monetary incentive of a contingent share of any recovery, potential whistleblowers often face a difficult choice between reporting their concerns to federal attorneys or keeping quiet. Most whistleblowers with inside information are also employees of the defendant, such that they often risk termination whenever they expose their employer to FCA fraud liability or otherwise undermine

problem of asymmetry of resources between the government and private defendants in the fight against fraud); False Claims Correction Act of 2009, H.R. REP. NO. 111-97, at 2 (2009) ("The central purpose of the False Claims Act is to enlist private citizens in combating fraud against the United States.").

[12] *See* False Claims Correction Act of 2008, S. REP. NO. 110-507, at 2 (2008). The phrase "qui tam" derives from the Latin saying "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who as well for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY (9th ed. 2009).

[13] *See* False Claims Act, 31 U.S.C. § 3730(a)–(b) (2006). A private plaintiff must first serve his complaint upon the local United States Attorney, who determines if the government will intervene to take over the case. *See* § 3730(b)(1)–(4). If the government declines to intervene, the relator continues the action as a private civil suit on behalf of the government. *See* § 3730(b)(4)(B).

[14] In cases taken over by the government, the relator receives 15–25%, unless the court finds that the suit is based primarily upon a public disclosure, in which case the plaintiff may receive as little as 10%. *See* False Claims Act, 31 U.S.C. § 3730(d)(1) (2006). In cases brought and completed by a private plaintiff, the plaintiff receives 25–30%. *See* § 3730(d)(2). Except when a defendant cooperates with the government to remedy the false claim prior to the initiation of an FCA suit against it, see 31 U.S.C. § 3729(a)(2) (Supp. 2010), defendants are "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person." § 3729(a).

their employer's efforts to defraud the government.[15] To counteract these obstacles to whistleblowing, Congress added a retaliation provision when it revised the FCA in 1986.[16] This provision holds defendant employers liable for any retaliation against a plaintiff employee "because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under" the FCA fraud provisions, including "investigation for, initiation of, testimony for, or assistance in an action filed or to be filed."[17] Courts frequently refer to the statutory prohibition of such forms of retaliation and actions thereunder as "the FCA retaliation provision" and "FCA retaliation claims," respectively.[18] This Note focuses on recent amendments to the retaliation provision.

While the 1986 retaliation provision improved the lot of many employees, it has largely failed to protect the employees most likely to possess relevant inside knowledge of fraudulent activity, namely, the internal compliance employees who monitor the propriety of company billing practices as part of their primary job duties.[19] Despite judicial willingness to include internal reports and investigations of fraud within the scope of protected activity under the broad language of the 1986 retaliation provision's "in furtherance" clause,[20] courts have relied on the provision's legislative history to infer a rigorous employer notice requirement never mentioned in the statutory text.[21]

---

[15] False Claims Amendments Act of 1986, S. REP. NO. 99-345, at 34, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299 (recognizing that "few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation").

[16] *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 4, 100 Stat. 3153 (1986).

[17] False Claims Act, 31 U.S.C. § 3730(h) (2006), *amended by* 31 U.S.C. § 3730(h) (Supp. 2010) and 31 U.S.C. § 3730(h) (Supp. 2011).

[18] *See, e.g.*, Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 69, 71 (D.C. Cir. 2008).

[19] *See infra* Part II.B.2–3.

[20] *See infra* Part II.A.

[21] *See infra* Part II.B.

To prove their employer had notice of their protected activity under the 1986 provision, corporate compliance employees must show that they engaged in extraordinarily adversarial conduct that would have affirmatively rebutted the employer's presumption that they were performing their regular job duties.[22] Under this onerous notice standard, some courts have denied corporate compliance employees protection under the statute, even when the defendant employers clearly retaliated against these employees because they reported concerns regarding potentially fraudulent and illegal billing practices.[23]

In response to these and other limiting judicial interpretations, the authors of the 1986 FCA amendments introduced legislation in 2007 to better carry out the legislative intentions behind the 1986 FCA amendments.[24]

---

[22] *See infra* Part II.B.2.

[23] *See infra* note 92 and accompanying text.

[24] *See* 155 CONG. REC. E1295–1300 (daily ed. June 3, 2009) (attributing co-authorship of the 1986 amendments to Representative Howard Berman and Senator Charles Grassley, among others); 153 CONG. REC. S11,506 (daily ed. Sept. 12, 2007) (statement of Sen. Grassley) (introducing the "False Claims Correction Act of 2007" and noting that the bill was meant to address "[r]ecent decisions by Federal courts [that] have limited the False Claims Act in a way that was not envisioned when I authored the 1986 amendments"); 153 CONG. REC. E2658 (daily ed. Dec. 19, 2007) (statement of Rep. Berman) (introducing the "False Claims Corrections Act of 2007" and noting an intent to "correct the effect of unduly restrictive judicial opinions by clarifying that Congress intends the law to reach all types of fraud on the Federal fisc, regardless of the form of the transaction"). *See also* H.R. REP. NO. 111-97, at 2 (2009) ("H.R. 1788 amends title 31, United States Code, to remove judicially-created limitations and qualifications which have undermined the effectiveness of the False Claims Act."). The Senate and House bills introduced during the 110th Congress contained substantially similar amendments, including measures to expand the government's control over actions in which it intervenes, loosen restrictions on the use of civil investigative demands, prohibit false claims on grantees of federal funds, weaken the public disclosure bar, and further protect potential whistleblowers from retaliation. *See* False Claims Corrections Act of 2007, H.R. 4854, 110th Cong. (2007) (as reported by H. Comm. on the Judiciary, July 16, 2008); False Claims Act Correction Act of 2008, S. 2041, 110th Cong. (2008) (as

Amidst growing concerns regarding fraud on new government programs, such as the Troubled Asset Relief Program and President Obama's healthcare reform initiative, the 111th Congress proved quite receptive to the proposed amendments.[25] After seriously considering the proposed amendments as one cohesive legislative act,[26] Congress eventually enacted most of the proposed amendments piecemeal as components of three omnibus acts: the Fraud Enforcement and Recovery Act of 2009 (FERA),[27] the Patient Protection and Affordable Care Act of

reported by the S. Comm. on the Judiciary, Sept. 25, 2008); S. REP. NO. 110-507 (2008).

[25] The FCA amendments only successfully passed Congress as efforts to protect new spending programs from fraud. *See* S. REP. NO. 111-10, at 3 (2009) ("This legislation provides the resources and new tools needed for law enforcement . . . to detect and prevent fraud related to the Government's ongoing efforts to bail out banks and stimulate the economy."); 155 CONG. REC. S13,692–93 (daily ed. Dec. 21, 2009) (statement of Sen. Leahy) ("I am also pleased Senator Reid's amendment includes a key reform to the False Claims Act that Senator Sanders, Senator Grassley, and I have proposed . . . . We all agree that reducing the cost of health care for American citizens is a critical goal of health care reform. We in Congress must do our part by ensuring that, when we pass a health care reform bill, it includes all the tools and resources needed to crack down on the scourge of health care fraud. This provision is an important part of that effort.").

[26] In 2009, the House reported the "False Claims Act Correction Act of 2009," which included substantially the same amendments as the FCA legislation that stalled in the 110th Congress. *See* False Claims Correction Act of 2009, H.R. 1788, 111th Cong. (as reported by the H. Comm. on the Judiciary, Mar. 30, 2009); H.R. REP. NO. 111-97 (2009).

[27] First, the original version of the Fraud Enforcement and Recovery Act ("FERA"), which Senator Grassley co-sponsored, included a series of amendments imposing liability for false claims made on federal grantees and clarifying the scope of liability for fraudulently concealing one's obligation to pay the government (also known as "reverse false claims"). *See* Fraud Enforcement and Recovery Act, S. 386, 111th Cong. § 4 (as introduced in the Senate, Feb. 5, 2009). After passing the Senate, FERA was amended by the House to include the earlier proposed FCA amendments regarding civil investigative demands, government control over qui tam actions in which it intervenes, and whistleblower retaliation. *See* Fraud Enforcement and Recovery Act, S. 386, 111th Cong. (as passed by the House, May 6, 2009). The Senate approved these changes and the

2010 (PPACA),[28] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[29] This series of bills amended the FCA retaliation provision in two ways. First, FERA altered the retaliation provision to protect "[a]ny employee, contractor, or agent" against retaliation "because of lawful acts . . . on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations" of the FCA.[30] Next, the Dodd-Frank Act further altered the text to protect employees, contractors, or agents against retaliation "because of lawful acts done by the employee, contractor, agent or associated

bill was enacted into law. *See* Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009).

[28] The Patient Protection and Affordable Care Act ("PPACA") contained a new version of the earlier public disclosure and original source amendments, see *supra* note 24 and accompanying text, as well as a provision attaching liability for a range of treble to sextuple damages for false claims made upon the new healthcare exchanges. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1313(a)(6), 1303(j)(2), 124 Stat. 119, 185, 901 (2010). The language of the PPACA public disclosure and original source amendments is identical to analogous provisions in the contemporaneous "Strengthening Program Integrity and Accountability in Health Care Act" bill, which Senator Grassley proposed. *See* Strengthening Program Integrity and Accountability in Health Care Act, S. 2964, 111th Cong. § 303 (2010) (as introduced in the Senate). Ironically, Senator Grassley voted against the PPACA, despite the inclusion of his public disclosure and original source amendments. *See* Patient Protection and Affordable Care Act, H.R. 3590: Roll Vote No. 396, 155 CONG. REC. S13,891 (daily ed. Dec. 24, 2009) (cataloguing results of the roll call vote).

[29] Further FCA amendments to the retaliation provision were anonymously added to the Dodd-Frank bill during the Conference Committee. *See* H.R. REP. NO. 111-517, at 376 (2010); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 748(h), 124 Stat. 1376, 1743–44 (2010). These additions were made after earlier attempts to add them to the Dodd-Frank Act and to pass them as part of Senator Grassley's Strengthening Program Integrity and Accountability in Health Care Act bill had failed. *See* 156 CONG. REC. S3990 (daily ed. May 19, 2010) (ordering amendment 4117 to lie on the table); 156 CONG. REC. S3105 (daily ed. May 4, 2010) (ordering amendment 3794 to lie on the table).

[30] Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624–25 (2009).

others in furtherance of an action under this section or other efforts to stop 1 or more violations" of the FCA.[31]

While the text of the 2010 retaliation provision and accompanying legislative history clearly indicate an intent to broaden coverage in some respects,[32] it is less clear whether the expansion of protected activity to include "acts . . . in furtherance of . . . other efforts to stop 1 or more violations"[33] of the FCA will actually protect the internal compliance employees whom the 1986 provision frequently excluded, because the statutory text still fails to address the employer notice requirement that frequently barred their retaliation claims in the past.[34] If read to effect no change in the knowledge requirement, the 2010 provision will hardly change the law,[35] despite evidence of its drafters' intent to extend protection to internal compliance employees.[36] At the same time, an unduly broad interpretation of protected activity could empower corporate compliance employees to flout reasonable reporting channels and procedures implemented by well-meaning employers.[37] Bypassing such channels and procedures may actually undermine the FCA's goal of preventing fraud by injecting poisonous

[31] False Claims Act, 31 U.S.C. § 3730(h) (Supp. 2011). The Dodd-Frank Act also established that a three year statute of limitations applies to all retaliation actions under the FCA, superseding *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005) (holding that the statute of limitations for the most closely analogous state cause of action applies).

[32] For instance, the amended text clearly covers all hired parties, not just common law employees. *See* S. REP. NO. 110-507, at 26–27 (2008); H.R. REP. NO. 111-97, at 14 (2009).

[33] False Claims Act, 31 U.S.C. § 3730(h) (Supp. 2011).

[34] *See infra* Part III.B.

[35] *See infra* Part III.B.1.

[36] *See* 155 CONG. REC. 1295, 1299 (daily ed. June 3, 2009) (statement of Rep. Berman) (The FERA retaliation provision "protects not only steps taken in furtherance of a potential or actual qui tam action, *but also steps taken to remedy the misconduct through methods such as internal reporting . . . and refusals to participate in the misconduct that leads to the false claims*, whether or not such steps are clearly in furtherance of a potential or actual qui tam action.") (emphasis added).

[37] *See infra* Part III.B.2.

adversarialism where good faith cooperation would better cure a company's improper billing practices.[38]

Given the delicate balance at stake, courts must carefully construct a standard of employer knowledge that incorporates congressional intent to expand the scope of the retaliation provision to protect inside whistleblowers' internal investigations of, and refusals to participate in, fraudulent activity.[39] An ideal interpretation of the knowledge requirement would direct companies that assume relatively high risks of FCA fraud liability to adopt compliance procedures requiring cooperation with whistleblowing employees while also encouraging employees to report and resolve their concerns internally before they resort to costly litigation or otherwise undermine the legitimate objectives of well-meaning employers. Part II of this Note criticizes the judicial interpretations of the 1986 retaliation provision to which the 2010 retaliation provision responded. Part III analyzes the potential readings of the protected activity and knowledge requirements of the 2010 retaliation provision. Ultimately, Part III conceptualizes proof of organizational knowledge under the 2010 retaliation provision by giving defendant employers the affirmative defense of proving that they implemented reasonable reporting procedures which the plaintiff unreasonably failed to use. If the defendant carries its burden in this regard, it will defeat the allegation that it knew the plaintiff had engaged in protected activity. If the defendant fails to carry its burden, however, the plaintiff need only show that the defendant had knowledge of the allegedly protected conduct, not of its protected nature or nexus with FCA litigation. This standard best accommodates the legitimate concerns of all interested parties while still effectuating the greater statutory purpose of detecting and preventing fraud.

[38] *See infra* Part III.B.2.

[39] *See supra* note 36.

II. LIABILITY UNDER THE 1986 PROVISION

To comprehend the significance of the recent amendments to the FCA retaliation provision, one must first understand the judicial interpretation of its ancestor provision. Since the basic framework of retaliation liability under the FCA and the primary purpose of the statutory prohibition against retaliation remain unchanged,[40] courts applying the new retaliation provision will likely look to interpretations of the 1986 provision for insight. Courts will also likely look to the 1986 provision to give legal significance to changes in the statutory text.[41]

The 1986 retaliation provision reads,

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.[42]

Like most retaliation laws, the 1986 provision prohibits employers from terminating or otherwise adversely altering the terms and conditions of the employment of any employee because of that employee's engagement in activity protected by the statute.[43] Courts have interpreted the 1986 provision

---

[40] *See supra* note 11 and accompanying text; *see also infra* Part III.B.

[41] Generally, courts assume that "[t]he deliberate selection of language . . . differing from that used in the earlier Acts indicates that a change of law was intended." Brewster v. Gage, 280 U.S. 327, 337 (1930). *See also* Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 263 (1992); Hiivala v. Wood, 195 F.3d 1098, 1103 (9th Cir. 1999). Analyses of changes in language entail analyses of the altered text and the judicial interpretations thereof.

[42] *See* False Claims Act, 31 U.S.C. § 3730(h) (2006), *amended by* 31 U.S.C. § 3730(h) (Supp. 2009) and 31 U.S.C. § 3730(h) (Supp. 2011).

[43] *Compare* False Claims Act, 31 U.S.C. § 3730(h) (Supp. 2011), *with* Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a) (2006), *and* Clean

to have three elements: the plaintiff must demonstrate that (1) the plaintiff engaged in protected activity, (2) the defendant knew of the plaintiff's protected activity, and (3) the defendant took an adverse employment action[44] against the plaintiff because of her engagement in protected activity.[45] Because the third prong generally involves an analysis of causation under the *McDonnell Douglas* burden-shifting scheme that courts frequently use in other types of employment law disputes,[46] the first and second prongs comprise the unique features of the FCA retaliation provision. As such, this Note discusses only the requirements of protected activity and employer knowledge in the FCA retaliation context under the 1986 provision and the possible interpretations of those requirements under the 2010 provision.

Air Act, 42 U.S.C. § 7622 (2006), *and* Atomic Energy Act, 42 U.S.C. § 5851 (2006).

[44] The Supreme Court has defined "adverse employment action," the prohibited conduct for a retaliation claim, as an action that "could well dissuade a reasonable worker" from engaging in the activity protected by the retaliation statute. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

[45] *See* False Claims Amendments Act of 1986, S. REP. NO. 99-345, at 35 (1986); United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 235 (1st Cir. 2004); Fanslow v. Chi. Mfg. Ctr., Inc., 384 F.3d 469, 479 (7th Cir. 2004); Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 186 (3d Cir. 2001); McKenzie v. BellSouth Telecomms., Inc., 219 F.3d 508, 514 (6th Cir. 2000); United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 736 (D.C. Cir. 1998); Zahodnick v. Int'l Bus. Mach. Corp., 135 F.3d 911, 914 (4th Cir. 1997); United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996); Robertson v. Bell Helicopter Textron Inc., 32 F.3d 948, 951 (5th Cir. 1994); Mikes v. Strauss, 889 F. Supp. 746, 752 (S.D.N.Y. 1995). *But see* Wilkins v. St. Louis Hous. Auth., 314 F.3d 927, 932–33 (8th Cir. 2002) (dividing the same showing into four elements).

[46] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Scott v. Metro. Health Corp., 234 Fed. App'x 341, 346 (6th Cir. 2007).

A. Protected Activity Under the 1986 Provision

1. The 1986 Provision Only Protects Good Faith Acts That Are Reasonably Likely to Further FCA Fraud Litigation

As the text of the statute plainly indicates, the 1986 provision protects only "lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section."[47] An "action under this section" includes actions brought by the government or private plaintiffs.[48] The statute lists enumerated examples of protected activity that furthers such FCA actions, including "investigation for, initiation of, testimony for, or assistance in an action to be filed" under the FCA."[49] These examples are not exhaustive, however, because courts have held that the provision also protects some forms of internal reporting and internal investigation, neither of which is expressly mentioned in the statutory text.[50] The relevant inquiry is whether the alleged protected activity relates to a good faith effort at "exposing fraud" that is reasonably likely to violate the FCA.[51] Under this standard, protected actions need not have resulted in any party securing a judgment or settlement against the defendant for FCA fraud or even in any party filing an actual FCA fraud claim, because the statute's "to be filed" clause links protection to events as they were understood at the

[47] False Claims Act, 31 U.S.C. § 3730(h) (2006), *amended by* 31 U.S.C. § 3730(h) (Supp. 2010) and 31 U.S.C. § 3730(h) (Supp. 2011).

[48] *See* S. REP. NO. 99-345, at 34 (1986) ("[P]rotection should extend not only to actual qui tam litigants, but those who assist or testify for the litigant, as well as those who assist the Government in bringing a false claims action.") (italics omitted).

[49] 31 U.S.C. § 3730(h) (2006).

[50] *See, e.g.*, *Yesudian*, 153 F.3d at 743–45 (holding that internal reporting can constitute protected activity).

[51] McKenzie v. BellSouth Telecomms., Inc., 219 F.3d 508, 516 (6th Cir. 2000) (citing *Yesudian*, 153 F.3d at 740).

time of the investigation or report,[52] not to the understanding of events when the plaintiff decides whether to commence FCA fraud litigation.[53]

Although the protected activity need not lead to the filing of an FCA fraud claim, the plaintiff must still allege and later prove at trial that she had some plausible reason to suspect fraud or false claims on the government. Exactly what threshold plausibility the plaintiff must show is far from clear. Different circuits have developed a variety of names for the plausibility requirement,[54] which suggests

---

[52] *See* Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409, 416 (2005) ("A retaliation plaintiff . . . need prove only that the defendant retaliated against him for engaging in 'lawful acts done . . . in furtherance of' an FCA 'action filed or to be filed,' § 3730(h), language that protects an employee's conduct even if the target of an investigation or action to be filed was innocent."); *Yesudian*, 153 F.3d at 739; Childree v. UAP/GA AG Chem, Inc., 92 F.3d 1140, 1144–45 (11th Cir. 1996); United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1522 (10th Cir. 1996); Neal v. Honeywell, Inc., 33 F.3d 860, 864–65 (7th Cir. 1994); Robertson v. Bell Helicopter Textron Inc., 32 F.3d 948, 951 (5th Cir. 1994).

[53] In this sense, an FCA retaliation action is a separate cause of action from an FCA fraud action. The fact that only the plaintiff employee recovers for harm caused by a violation of the FCA retaliation provision, see False Claims Act, 31 U.S.C. § 3730(h)(2) (Supp. 2011), whereas the government and qui tam relator share recovery for a violation of an FCA fraud provisions, see False Claims Act, 31 U.S.C. § 3730(d) (2006), further demonstrates the separate nature of the two causes of action. Significantly, the disjunction of the two actions allows private plaintiffs to avoid the heightened pleading standards of Federal Rule of Civil Procedure 9(b), which applies to FCA fraud actions. *See* United States *ex rel.* Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1259 (D.C. Cir. 2004).

[54] Some courts interpret the statute as protecting activity that "reasonably could lead to a viable FCA action." United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996). *See also* Dookeran v. Mercy Hosp. of Pittsburgh, 281 F.3d 105, 108 (3d Cir. 2002); *McKenzie*, 219 F.3d at 515; *Yesudian*, 153 F.3d at 740. Other courts read the statute as protecting activity that raises the likelihood of FCA litigation to the level of "distinct possibility." *See Childree*, 92 F.3d at 1146; *Neal*, 33 F.3d at 864. Still other courts claim the statute only protects activity that raises the likelihood of FCA litigation to the realm of "reasonable

some inconsistency in the level of scrutiny that courts apply.[55] However, despite the nominal differences between the standards, plaintiffs in any circuit must establish at least some rational basis for suspecting that the defendant committed fraud in violation of the FCA fraud provisions.[56] Generally, the plaintiff must show that she had both an actual subjective suspicion and an objectively reasonable basis for suspicion of fraud.[57] This framework is often called the "good faith, reasonable belief" standard.[58]

To satisfy the subjective good faith belief prong, the plaintiff need not have known of the existence of the FCA at

possibility." Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 869 (4th Cir. 1999).

[55] *Compare Neal*, 33 F.3d at 864 (holding, under the seemingly narrow "distinct possibility" standard, that protected activity includes only "situations in which litigation could be filed legitimately—that is, consistently with Fed. R. Civ. P. 11") *with Hopper*, 91 F.3d at 1269 (holding, under the seemingly broad "could reasonably lead to a viable FCA action" standard, that the plaintiff's activity was not protected where the allegations of FCA fraud "were not sufficient to pass summary judgment muster"). *Hopper* is inconsistent with *Neal* insofar as a claim can satisfy Federal Rule of Civil Procedure 11, yet still fail to survive summary judgment. *See* FED. R. CIV. P. 11(b) (requiring only that claim have some legal basis and evidentiary support, and not be made for purposes of harassment, to avoid judicial sanctions). Under *Neal*, the *Hopper* plaintiff likely engaged in protected activity.

[56] *See, e.g.*, Lang v. Nw. Univ., 472 F.3d 493, 495 (7th Cir. 2006) (holding that an employee who alleges fraud with no reasonable basis for believing there was fraud is not protected from retaliation).

[57] *See* Fanslow v. Chi. Mfg. Ctr., Inc., 384 F.3d 469, 480 (7th Cir. 2004) ("[T]he relevant inquiry to determine whether an employee's actions are protected under § 3730(h) is whether: (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government" (quoting Moore v. Cal. Inst. of Tech. Jet Propulsion Lab., 275 F.3d 838, 845 (9th Cir. 2002))); *accord* Wilkins v. St. Louis Housing Auth., 314 F.3d 927, 933 (8th Cir. 2002). *See also* Shekoyan v. Sibley Int'l., 409 F.3d 414, 423 (D.C. Cir. 2005) (holding that although plaintiff "alleged several acts that could constitute fraud" he subjectively "never concluded there was corruption" and thus "did not engage in protected activity").

[58] *See* Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 74 (D.C. Cir. 2008).

the time of her alleged protected activity.[59] Rather, she must only prove that she intended to take action in furtherance of uncovering fraud on the federal government.[60] In this sense, the subjective belief prong recognizes the presumption that lay employees are ignorant of the technical requirements of the FCA.[61] This forgiving standard implements Congress's "intent to protect employees while they are collecting information about a possible fraud, *before* they have put all the pieces of the puzzle together."[62] However, some courts have required a clear nexus between the allegedly protected employee activity and the defendant's suspected fraud on the government. These courts deny protection to actions meant to expose general fraud on a pool of consumers that happens to include the government.[63] But even with this caveat, the subjective belief prong is fairly easy to satisfy.

The objectively reasonable belief prong, however, frequently proves a more significant hurdle. Although circuits differ regarding the criteria for satisfying the

---

[59] *See* Childree v. UAP/GA AG Chem, Inc., 92 F.3d 1140, 1146 (11th Cir. 1996) (noting that "there will be cases . . . in which the employee was apparently unaware of the existence of the False Claim Act in general, and § 3730(h) in particular . . . . However . . . [t]he provision contains no knowledge requirement, and we will not read one into it.").

[60] *See Fanslow*, 384 F.3d at 479–80 (holding that the relevant inquiry is whether the plaintiff "in good faith believes . . . that the employer is committing fraud against the government" when taking allegedly protected actions in furtherance of FCA litigation).

[61] *See* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 741 (D.C. Cir. 1998) (noting that if plaintiffs were required to have specific awareness of the FCA, the retaliation provision would only protect "those well-versed in the law . . . as only they would know from the outset that what they were investigating could lead to a False Claims Act prosecution").

[62] *Id.* at 740 (emphasis in original).

[63] *See* McKenzie v. BellSouth Telecomms., Inc., 219 F.3d 508, 517 (6th Cir. 2000) (denying that plaintiff engaged in protected activity when she "refus[ed] to falsify repair records" used to calculate customer refunds, some of which she knew included refunds for government customers, because "her numerous complaints on the matter were directed at the stress from and pressure to falsify records, not toward an investigation into fraud on the federal government").

objectively reasonable belief requirement, courts have agreed on certain minimum prerequisites. At the very least, the employee's investigation or complaint must concern a "claim" on the government, meaning "a request or demand . . . for money or property."[64] Moreover, in cases of allegedly protected investigation, usually by internal compliance employees, the plaintiff must be investigating actual fraud on the government, rather than mere regulatory noncompliance or mischarging, which are not covered by the FCA fraud provisions.[65] By excluding investigations involving mere regulatory noncompliance or mischarging from protected activity, the reasonable belief prong of the 1986 retaliation provision often left plaintiffs unprotected. In effect, the reasonable belief prong denies relief when plaintiffs investigated conduct that probably violated a regulation or overcharged the government without first confirming that the defendant's suspicious conduct fell outside the prohibitions of the False Claims Act.[66]

---

[64] *See* Green v. City of St. Louis, 507 F.3d 662, 668 (8th Cir. 2007) (noting that plaintiff "was unable to point to any case in which he even suspected that the City's practice had led to a false statement. If [plaintiff] had no reason to believe there was a false or fraudulent claim, he is not protected from retaliation under the False Claims Act."); Dookeran v. Mercy Hosp. of Pittsburgh, 281 F.3d 105, 108 (3d Cir. 2002) (holding that "there was no possibility that [plaintiff] could have filed a viable FCA action because . . . no 'claim' had, or could have, been made upon the government").

[65] *See, e.g.*, United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996) (holding that "[c]orrecting regulatory problems" is "not actionable under the FCA in the absence of actual fraudulent conduct"). *See also Yesudian*, 153 F.3d at 740–41 (stating in dicta that "an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations" is not protected activity); Zahodnick v. Int'l Bus. Mach. Corp., 135 F.3d 911, 914 (4th Cir. 1997) (holding that "simply reporting his concern of a mischarging to the government to his supervisor does not suffice to establish that [plaintiff] was acting 'in furtherance of' a *qui tam* action").

[66] *See, e.g.*, Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 63 (D.C. Cir. 2008) (holding plaintiff's reports regarding non-compliance with a consent decree did not constitute protected activity); *Hopper*, 91 F.3d at 1269 (9th Cir. 1996) (holding that plaintiff's reports concerning regulatory violations did not constitute protected activity).

2. Courts Have Applied the Reasonable Belief Requirement with Unnecessary and Inconsistent Strictness

The failure of the 1986 retaliation provision to protect good faith investigations into regulatory noncompliance or mischarging the government places potential whistleblowers in a precarious position, because the line separating suspicious conduct from fraudulent activity that actually violates the FCA is often unclear. For example, in cases involving reverse false claims liability, which attaches when a defendant "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,"[67] there is frequently legitimate ambiguity as to whether concealing regulatory violations to avoid regulatory fines constitutes a prohibited attempt to avoid a commercial obligation.[68] Moreover, regulatory noncompliance, which generally does not constitute fraud prohibited by the FCA,[69] is easily confused with "false certification" liability, which attaches when defendants (sometimes implicitly) file false certifications in violation of government payment or reimbursement regulations.[70] Such confusion is particularly

[67] False Claims Act, 31 U.S.C. § 3729(a)(1)(G) (Supp. 2010).

[68] *See* United States *ex rel.* Lamers v. City of Green Bay, 998 F. Supp. 971, 997 (E.D. Wis. 1998) ("Litigation in district courts under § 3729(a)(7) [*amended by* 31 U.S.C. § 3729(a)(1)(G)] has become more frequent, the primary point of contention being the parameters of 'obligation,' which the FCA does not define. Construing 'obligation' broadly, several courts have imposed FCA liability for failure to report environmental and regulatory violations in order to avoid potential fines or sanctions.").

[69] *See* United States *ex rel.* Marcy v. Rowan Cos., Inc., 520 F.3d 384, 391–92 (5th Cir. 2008); United States *ex rel.* Bain v. Ga. Gulf Corp., 386 F.3d 648, 657–58 (5th Cir. 2004); Am. Textile Mfrs. Inst., Inc. v. Ltd., Inc., 190 F.3d 729, 739 (6th Cir. 1999).

[70] *See* Justin P. Tschoepe, *A Fraud Against One Is Apparently a Fraud Against All: The Fraud Enforcement and Recovery Act's Unprecedented Expansion of Liability Under the False Claims Act*, 47 HOUS. L. REV. 741, 764–67 (2010) (noting that "even the courts that recognized the theory of implied certification had previously used common law concepts such as

likely to occur in healthcare fraud cases, because Medicare and Medicaid condition government payment on compliance with certain key regulations. Failure to comply with these regulations frequently gives rise to implied false certification liability.[71]

But one need not understand all the complexities of FCA fraud liability for regulatory noncompliance to recognize the inconsistency between, on the one hand, the principle that the plaintiff does not have to be familiar with the FCA, and, on the other hand, the objectively reasonable belief requirement. As discussed above, the objectively reasonable belief requirement disqualifies a plaintiff from protection if the plaintiff's suspicions are based solely upon what later turns out to be mere regulatory noncompliance, rather than on the kind of noncompliance that constitutes an implied false certification or reverse false claim.[72] If the plaintiff cannot satisfy the objectively reasonable belief prong because of her reasonable confusion regarding non-covered and covered regulatory noncompliance, she does not receive any benefit from the subjective belief prong, which purports not to require plaintiff's comprehension of the nuances of the FCA. In effect, the objectively reasonable belief prong requires what the subjective belief prong says is not necessary: that the plaintiff must have understood the law prior to engaging in the allegedly protected activity. A plaintiff who lacked sufficient knowledge of FCA coverage

intent to avoid allowing simple technical noncompliance with a regulation to result in liability under the FCA").

[71] *See, e.g.*, Mikes v. Strauss, 274 F.3d 687, 700–01 (2d Cir. 2001) (concluding that implied false certification liability may properly be based on the Social Security Act's requirement that treatments be "reasonable and necessary" in order to receive Medicare reimbursement, *see* 42 U.S.C. § 1395y(a)(1)(A) (2006)); United States *ex rel.* Wright v. Cleo Wallace Centers, 132 F. Supp. 2d 913, 926 (D. Colo. 2000) (holding that "a person who knowingly submits claims to the government for the purpose of acquiring federal Medicaid funds while not in compliance with all relevant laws, rules and regulations may constitute a false claim under the FCA, even without an affirmative or express false statement of such compliance").

[72] *See supra* Part II.A.1.

will only succeed on her retaliation claim if, by blind luck, her suspicions give rise to a viable FCA fraud claim.

This rigorous plausibility requirement is problematic for several reasons. First, the statute mentions no plausibility requirement whatsoever.[73] The absence of statutory language requiring any degree of plausibility has led some commentators to conclude that courts should only expect plaintiffs to have harbored minimally reasonable suspicions of FCA fraud.[74] Second, by refusing to protect actions investigating regulatory violations not actually covered by the FCA fraud provision but that are easily confused with covered activities, the judicial implementation of the 1986 retaliation provision undermines the goal of assuring whistleblowers that they will be protected.[75] Given the substantial uncertainty on the part of most laypeople as to whether suspicions of fraud will reveal actual violations of the law, and of the FCA, in particular, few employees ever know that their investigations will reveal FCA fraud violations.[76] But because the 1986 retaliation provision

[73] *See* Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 72 (D.C. Cir. 2008) (Tatel, J. dissenting) (noting that "the statute's plain text . . . requires only that the act the employee engaged in was somehow 'in furtherance of *an action* under this section,' . . . not 'an action that is reasonably likely to succeed,' or even 'a non-frivolous action'") (emphasis in original) (citing False Claims Act, 31 U.S.C. § 3730(h) (2006), *amended by* 31 U.S.C. § 3730(h) (Supp. 2010) and 31 U.S.C. § 3730(h) (Supp. 2011)).

[74] *Id.* (stating that courts "should avoid reading into the statute any more than is absolutely necessary to achieve [the goal of discouraging frivolous claims], and [that] a minimal reasonableness requirement will suffice").

[75] *See* S. REP. NO. 99-345, at 27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299 (explaining the Senate Judiciary Committee's intention "to halt companies and individuals from using the threat of economic retaliation to silence 'whistleblowers,' *as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts*") (emphasis added).

[76] *See Hoyte*, 518 F.3d at 72 (Tatel, J. dissenting) (noting that "[e]xpecting laypeople to know with any degree of certainty whether their employers' actions violate the FCA's often vague provisions is simply unrealistic, especially when courts themselves disagree over what constitutes a viable FCA claim").

frequently does not protect employees when the defendant's suspicious conduct later turns out not to violate the FCA, even when the employee's suspicions of fraud were reasonable from a lay perspective, employees will likely hesitate before taking action in furtherance of meritorious investigations of FCA fraud.

B. Employer Knowledge Under the 1986 Provision

Although the 1986 provision never expressly mentions a knowledge requirement, courts have nonetheless inferred one, relying on both the prima facie showing recommended by the Senate Report to the 1986 amendments[77] and on the presumption that the employer could not possess the retaliatory intent necessary to establish a violation unless it is aware that the employee is investigating fraud.[78] The employer obviously has such knowledge when it knows the plaintiff has filed a qui tam claim, given testimony for the government, or reported concerns to the government without the employer's authorization.[79] Difficult cases usually involve internal reports of fraud to the employer, often by

[77] *See* S. REP. NO. 99-345, at 35 (1986) (explaining that under the amended FCA, as with other Federal whistleblowing statutes, "the whistleblower must show the employer had knowledge the employee engaged in 'protected activity' and, two, the retaliation was motivated, at least in part, by the employee's engaging in protected activity"). *See also* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 736 (D.C. Cir. 1998) (citing the prima facie showing mentioned in the Senate Report).

[78] *See* United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996).

[79] *See, e.g.*, United States *ex rel.* Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1261 (D.C. Cir. 2004) (holding that "when an employee acts outside his normal job responsibilities or alerts a party outside the usual chain of command, such action may suffice to notify the employer that the employee is engaging in protected activity"); Boze v. Gen. Elec. Co., No. 4:07CV-74-M, 2009 WL 2485394, at *2 n.3 (W.D. Ky. Aug. 11, 2009) (defendant did not even contest that it knew that grand jury testimony counted as protected activity); Thompson v. Quorum Health Res., LLC, No. 1:06-CV-168, 2009 WL 4758752, at *6 (W.D. Ky. Dec. 7, 2009) (defendant had knowledge where it knew plaintiff filed a qui tam case).

internal compliance employees whose job duties require them to uncover and put a stop to practices that expose their employers to liability. In this context, plaintiffs may satisfy the knowledge requirement by proving that their employer had either actual or constructive notice of their protected activity.[80] The knowledge requirement for internal whistleblowing has evolved to include two different standards: (1) a liberal standard that applies to employees whose job duties do not involve the investigation of fraud, and (2) a heightened standard that applies to so-called "fraud-alert" employees, who do have such job duties.[81]

1. Non-Corporate Compliance Employees Need Only Provide Notice of Conduct That Is Reasonably Likely to Further an FCA Fraud Action

Under the liberal standard applied to non-fraud-alert employees, the defendant need not have known that the employee was likely to file or participate in an FCA fraud action against the defendant.[82] Rather, the plaintiff need only show that she engaged in activity that would reasonably notify an objective employer of that possibility. Thus, the element is satisfied if the employer should have known of a reasonable possibility of an FCA suit, given its knowledge of facts that should objectively create knowledge of a nexus to FCA litigation.[83] In this sense, the kind of knowledge the

[80] *See* Schuhardt v. Wash. Univ., 390 F.3d 563, 568 (8th Cir. 2004).

[81] *See* Fanslow v. Chi. Mfg. Ctr., Inc., 384 F.3d 469, 483–84 (7th Cir. 2004) (collecting cases).

[82] *See* United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 238 (1st Cir. 2004) (noting that "the employer need not know that the employee has filed or plans to file a qui tam action, nor even necessarily be aware of the existence of the FCA"); *Yesudian*, 153 F.3d at 742 (indicating that the employee need not "'suggest[] to defendant' that he is contemplating such an action").

[83] *See* Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008) (finding knowledge where plaintiff made "vague" reference to "civil and criminal violations"); *Karvelas*, 360 F.3d at 238 (holding that "[w]hat the employer must know is that the plaintiff is engaged in . . .

defendant must have mirrors the kind of activity in which the plaintiff must be engaged.[84] Under the liberal standard, therefore, the plaintiff need only show the employer's knowledge both of the activity itself and that the activity relates to an investigation into fraud on the government, not that the employer knew the activity was connected to potential FCA litigation.[85]

2. Corporate Compliance Employees Must Engage in Extraordinarily Adversarial Conduct to Notify Their Employers of Their Protected Activity

In cases involving plaintiffs whose regular job duties include investigation of fraud, courts have unanimously applied a heightened notice requirement.[86] They have done

investigation or other activity concerning false of fraudulent claims that the employer knowingly presented to the federal government"); *Fanslow*, 384 F.3d at 484 (finding knowledge where employer knew of investigation, but had no notice of FCA violation in particular); *Yesudian*, 153 F.3d at 742 (holding that "[w]hat defendant must know is that plaintiff is engaged . . . in activity that reasonably could lead to a False Claims Act case").

[84] *Yesudian*, 153 F.3d at 742.

[85] *See Fanslow*, 384 F.3d at 484 (holding that plaintiff "had to show only that [defendant] was aware of his investigation" concerning the legality of program funded by the government); United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1270 (9th Cir. 1996) (holding that defendant's knowledge of plaintiff teacher's report of defendant's regulatory violations to state authorities could not have notified defendant of investigation into fraud on the federal government).

[86] *See* United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1523 n.7 (10th Cir. 1996) ("[I]ndividual[s] whose job entails the investigation of fraud . . . must make clear their intentions of bringing or assisting in an FCA action in order to overcome the presumption that they are merely acting in accordance with their employment obligations."); Maturi v. McLaughlin Research Corp., 413 F.3d 166, 173 (1st Cir. 2005); United States *ex rel.* Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1261 (D.C. Cir. 2004); Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 567–68 (6th Cir. 2003); Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 191 (3d Cir. 2001); Eberhardt v. Integrated Design Constr., Inc., 167 F.3d 861, 868 (4th Cir. 1999); Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951–52 (5th Cir. 1994).

so even in suits by employees whose corporate compliance duties are at best ancillary to their primary job duties.[87] The heightened notice requirement is extremely difficult to satisfy. To establish knowledge, plaintiffs must rebut a presumption that they are merely acting in accordance with their employment obligations.[88] Some courts claim that such notice can either be "accomplished by expressly stating an intention to bring a qui tam suit" or by engaging in conduct that "a factfinder could reasonably conclude would put the employer on notice that litigation is a reasonable possibility."[89] They contend that such actions should include expressly characterizing the employer's conduct as illegal or fraudulent or recommending that legal counsel become involved.[90] Reporting concerns outside the organization

[87] *See Maturi*, 413 F.3d at 168, 173 n.17 (applying requirement to the president and vice president of government contractor); *Williams*, 389 F.3d at 1261–62 (applying requirement to chief contract negotiator, whose primary duties were assessing reasonableness of Navy contracts, analyzing cost and pricing data, and participating in contract negotiations); *Yuhasz*, 341 F.3d at 562 (applying requirement to an employee who was "hired to design and establish, and then operate as manager, a testing laboratory" and "charged with submitting the required certifications of compliance with technical specifications of the alloys"); Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd. 277 F.3d 936, 944–45 (7th Cir. 2002) (applying requirement to an anesthesiologist); *Hutchins*, 253 F.3d at 194 (rejecting plaintiff's argument that "his job description as a paralegal did not contain 'monitoring or reporting' activities" because "his inquiry into the Westlaw and LEXIS billing was in furtherance of his job duties" and "there was no reason to believe that [plaintiff] would use the information he obtained to bring a qui tam suit").

[88] *Yuhasz*, 341 F.3d at 567–68. *See also Ramseyer*, 90 F.3d at 1523 n.7.

[89] *See Eberhardt*, 167 F.3d at 868–69.

[90] *See id. See also Robertson*, 32 F.3d at 952 (holding that internal complaints by employee with regular corporate compliance duties did not notify employer of investigation of potential fraud, when he "never characterized his concerns as involving illegal, unlawful, or false-claims investigations" and "identified no change in his conduct that might have objectively demonstrated his qui tam intentions"); *see also* Schuhardt v. Wash. Univ., 390 F.3d 563, 568 (8th Cir. 2004) (holding that plaintiff's "statements to her supervisors that [defendant's] billing practice was fraudulent and illegal [were] sufficient").

(usually to a government agency or auditor) is also sometimes sufficient to put an employer on notice.[91] However, other courts have found even such extraordinary efforts insufficient under the heightened notice standard.[92]

[91] *See Williams*, 389 F.3d 1251, 1262 (D.C. Cir. 2004) (holding that going outside the organization could have given notice).

[92] *See Brandon*, 277 F.3d 936, 939–40, 944–45 (7th Cir. 2002) (holding that the defendant employer did not have notice of the "distinct possibility" that plaintiff might file a qui tam claim because he "never explicitly told the shareholders that he believed they were violating the FCA and had never threatened to bring a qui tam action," even though he "protested that the shareholders were firing him only because of his challenges to their Medicare claims and that he planned to 'take them to court,'" and "used terms like 'illegal,' 'improper,' and 'fraudulent' when he confronted the shareholders about the billing practices"). *See also Maturi*, 413 F.3d at 173–74 (holding that president of company had not sufficiently notified the board of directors of the possibility of a qui tam case, even though he wrote a letter warning that the fact that chairman's son was receiving two salaries "could be a potential problem should [the Defense Contract Audit Agency] uncover" it, because he did not expressly characterize defendant's conduct as "fraudulent behavior or express a desire to involve any other individual or entity"); *Yuhasz*, 341 F.3d at 567–68 (holding that "by informing [defendant] that its certifications were illegal and that other companies had incurred liability under the FCA for false claims, [plaintiff] was simply performing his ordinary duties" and that "[t]he mere fact that [plaintiff] told [defendant] that its certifications of compliance were 'unlawful and illegal' does not establish notice" because employees charged with investigating fraud "must make clear their intentions of bringing or assisting in an FCA action in order to overcome the presumption that they are merely acting in accordance with their employment obligations"); *Ramseyer*, 90 F.3d at 1523 (dismissing complaint that only alleged "that plaintiff advised her superiors that defendants were not complying with the minimum program requirements of Medicaid" because "plaintiff never suggested to defendants that she intended to utilize such noncompliance in furtherance of an FCA action[,]" "that she was going to report such noncompliance to government officials . . . [or] provide any indication that she was contemplating her own qui tam action").

3. Criticism of the Heightened Notice Requirement

a. The Heightened Notice Requirement Finds Weak Support in the Statutory Text, Legislative History, and Rational Policy

Curiously, in applying the heightened notice requirement, courts do not cite statutory text or legislative history, except for the general proposition that knowledge of protected activity is in fact a requirement.[93] In part, the heightened notice requirement arises from the notion that knowledge of protected activity requires not only knowledge of the activity itself, but also knowledge of that activity's nexus to potential FCA litigation—meaning knowledge that the activity is actually "in furtherance of" such litigation.[94] But this understanding of the employer knowledge requirement contravenes the judicial conception of protected activity, which purports to accept that lay plaintiffs need not understand the complexities of the FCA.[95] Indeed, as the D.C. Circuit has observed, "a plaintiff who need not even have heard of the False Claims Act can hardly be required to inform his supervisor that he intends to utilize his allegations in furtherance of an action under that Act."[96] In effect, by requiring that plaintiffs use "magic words"[97] such

[93] *See supra* note 77 and accompanying text.

[94] *See Brandon*, 277 F.3d at 944 (noting that plaintiff had failed to engage in conduct that the employer could have reasonably interpreted as a "precursor to [FCA] litigation"); *see also Robertson*, 32 F.3d at 952 (holding that the plaintiff could not rebut testimony by defendant concerning lack of knowledge of nexus to potential FCA litigation where plaintiff admitted that the alleged protected activity was consistent with his job duties).

[95] *See supra* Part II.A.1 and note 61 and accompanying text.

[96] United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 742 (D.C. Cir. 1998) (quotations omitted).

[97] Fanslow v. Chi. Mfg. Ctr., Inc., 384 F.3d 469, 484 (7th Cir. 2004). *See also* United States *ex rel.* Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1262 (D.C. Cir. 2004) (rejecting "the Fifth Circuit's view that

as "qui tam," "illegal," or "fraudulent" when reporting internal concerns to their employers, the heightened knowledge requirement renders illusory any purported accommodation of the legal ignorance of lay employees under the protected activity prong. In this regard, the heightened knowledge requirement also undermines the Congressional intent to protect preliminary investigations into FCA violations because the plaintiff will generally not use such bluntly accusatory language before she has confirmed her initial suspicions.[98]

The heightened notice requirement also finds support in the tendency of courts to see the performance of regular job duties as inconsistent with protected activity, because the employer is unlikely to guess that regular job duties constitute protected activities in furtherance of an FCA claim.[99] In part, this approach depends on the notion that the employer could not have known that internal reports might further an FCA action without also knowing of the reporting employee's adversarial intent.[100] The validity of

an employee whose job responsibilities coincide with statutorily protected activity must incant talismanic words to satisfy the notice element").

[98] *See Yesudian*, 153 F.3d at 740 (finding a Congressional intent to protect whistleblowers "while they are collecting information about possible fraud, *before* they have put all the pieces together") (emphasis in original).

[99] *See* United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1523 (10th Cir. 1996) (relying on the implicit dichotomy between protected activity and regular job duties in reasoning that "[t]he monitoring and reporting activities" that "plaintiff was required to undertake in fulfillment of her job duties" did not count as "steps to put defendants on notice that she was acting 'in furtherance of' an FCA action"); Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 567 (6th Cir. 2003) (relying on same implicit dichotomy in reasoning that an employer "cannot be charged with notice" from plaintiff's internal reports "that its certifications were illegal and that other companies had incurred liability under the FCA for false claims" because plaintiff was "simply performing his ordinary duties"); *Robertson*, 32 F.3d at 952 (relying on the same implicit dichotomy).

[100] *See Ramseyer*, 90 F.3d at 1523 (holding that employer had no knowledge because "plaintiff took no steps to put defendants on notice that she was acting 'in furtherance of' an FCA action—*e.g.*, that she was

this notion is dubious, because damning internal reports or warnings written by compliance officials on behalf of the defendant qualify as party admissions that the government or a qui tam plaintiff may use in furtherance of an FCA fraud case against the defendant, regardless of the non-adversarial intent of the declarant employee. Given that internal reports are admissible against them, employers should always have notice of the fact that such reports might further an FCA case.[101]

The presumed dichotomy between job duties and activities that could warn an employer of incipient FCA litigation finds far stronger support in the statutory text, which defines protected activity as "lawful acts done by the employee *on behalf of the employee or others* in furtherance of" FCA litigation.[102] One could reasonably exclude the defendant employer from the term "others" because any contrary reading would seem to render the "on behalf of" clause superfluous. Thus, the defendant employer might legitimately argue that it could not have known that a plaintiff's internal investigation constituted protected activity on behalf of a private qui tam plaintiff or the government, because the employer reasonably assumes that its employees perform their investigatory duties on behalf of the employer.[103] In this sense, an employer may be entitled

furthering or intending to further an FCA action rather than merely warning the defendants of the consequences of their conduct").

[101] Such a statement is a classic party admission of scienter under the FCA fraud provision. *See* FED. R. EVID. 801(d)(2)(D) (defining as admissible non-hearsay any "statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship"); 31 U.S.C. § 3729(b) (Supp. 2010). To contest the admissibility of the employee's reports under Rule 801(d)(2)(D), the employer would have to argue that employee was not acting within the scope of her job duties and thus forego the application of the heightened notice standard.

[102] False Claims Act, 31 U.S.C. § 3730(h) (2006), *amended by* 31 U.S.C. § 3730(h) (Supp. 2010) and 31 U.S.C. § 3730(h) (Supp. 2011) (emphasis added).

[103] The Fourth Circuit is the only court of appeals to directly confront the possible implications of the "on behalf of" clause. *See* Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861, 867 (4th Cir. 1999)

to treat a suggestion for improvement from an internal compliance employee as what it seems to be, rather than as a precursor to litigation.[104]

b. The Heightened Notice Requirement Expects Plaintiffs to Take Unrealistic Actions That Ultimately Would Not Benefit Any of the Interested Parties

Even if the "on behalf of" clause provides some support for the heightened notice requirement, judicial interpretations of the statute have evolved to hold plaintiffs to a nearly impossible and counterproductive standard. Such interpretations are problematic for a number of reasons. First, as the Southern District of New York and the D.C. Circuit have observed, a requirement that the employee "expressly accuse the employer of defrauding the government or threaten a qui tam action based thereon . . . is wholly unrealistic in an employment context,"[105] because "many an employee may well decide that kind of protection is not worth obtaining, and so forego an investigation altogether."[106]

Furthermore, the judicially-created heightened notice requirement contravenes the qui tam section of the FCA itself, which dictates that qui tam complaints be kept secret from the defendant in order to protect the government's interest in investigating criminal matters without tipping off

(defendant arguing that allegedly protected activity could not be performed on behalf of the employer). The court held that internal reporting could constitute protected activity if the plaintiff notifies the employer "that a *qui tam* suit under section 3730 is a reasonable possibility." *Id.* at 868.

[104] *See* Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 733 (7th Cir. 1999). *See also* Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 193 (3d Cir. 2001).

[105] Mikes v. Strauss, 889 F. Supp. 746, 753 (S.D.N.Y. 1995). *See also* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 743 (D.C. Cir. 1998).

[106] *Yesudian*, 153 F.3d at 743.

investigation targets at a sensitive stage.[107] Nor does the heightened notice standard serve the legitimate objectives of employers. Instead, insofar as it renders uncertain the protection afforded to internal reports of fraud, the heightened notice requirement encourages whistleblowers to seek recourse outside the institution because external reporting more easily satisfies the employer notice requirement.[108] By encouraging whistleblowers to bypass internal reporting procedures, the heightened notice requirement undermines the efforts of well-meaning employers to avoid committing FCA fraud before whistleblowers or the government press charges.[109]

But even if requiring some form of heightened notice were appropriate for cases involving corporate compliance employees, the judicial conception of "job duties" under the 1986 provision does not capture whether the plaintiff's job duties included investigation of fraud. Indeed, in applying the notice requirement, courts focus on whether the employee had some abstract obligation to prevent the employer from committing illegal acts. As a result, courts often disregard evidence that superiors and co-workers actively discouraged the employee from carrying out their alleged duty to monitor and prevent fraud.[110] Such evidence

---

[107] *See* False Claims Act, 31 U.S.C. § 3730(b) (2006); *Yesudian*, 153 F.3d at 743 (citations and quotations omitted).

[108] *See supra* note 79 and accompanying text.

[109] *See Yesudian*, 153 F.3d at 742.

[110] For instance, *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 567–68 (6th Cir. 2003) held that reporting fraud was part of the plaintiff's abstract job duties and dismissed the complaint citing the heightened notice standard, even though the complaint contained an allegation that the defendant, through the plaintiff's supervisor, "intimated that, by not issuing false and fraudulent claims for payment pursuant to the government contracts, [the plaintiff] was not adequately performing his duties." Complaint at 23, ¶75, Yuhasz v. Brush Wellman, Inc., 181 F. Supp. 2d 785 (N.D. Ohio 2000) (No. 3:00CV7237). Likewise, *Maturi v. McLaughlin Research Corp.*, 413 F.3d 166, 174 (1st Cir. 2005) disregarded evidence that the son of the chairman of the board threatened to have the plaintiff fired if he reported his concerns of fraud, even though the chairman of the board ultimately fired the plaintiff. *But see* United States v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1261–62 (D.C. Cir. 2005)

of internal pressures to look the other way should foster skepticism regarding an employer's claims that its employees had a clear obligation to investigate and report fraud.

The "job duty" analysis also frequently overlooks employers' failures to inform fraud-alert employees of their special obligations to clearly express their concerns about potential FCA liability, or to foster an environment where employees feel safe from retaliation.[111] When faced with defendant employers' self-serving claims regarding an employee's primary job duties in other areas of the law, courts have placed the burden on the employer to overcome exacting judicial scrutiny.[112] The relative insensitivity to similar facts regarding the true nature of the plaintiff's job duties in the FCA retaliation context is an inexplicable divergence from well-settled methods of evaluating job duties. At worst, it is an indication of judicial indifference to the policies underlying the FCA. This lazy approach has led courts to apply the heightened notice standard to nearly

(rejecting, at the motion to dismiss stage, defendant's argument that encouraging the Navy to challenge the figures presented by the company was part of plaintiff's job duties as chief contract negotiator, because "[defendant's] swift suspension of [plaintiff] following his disclosure could lead a reasonable factfinder to conclude that management considered [plaintiff's] conversation with NAVAIR well beyond the scope of his responsibilities").

[111] *See, e.g.*, Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 194 (3d Cir. 2001) (disregarding the fact that plaintiff's job description as a paralegal did not encompass a duty to monitor or report fraud, because the employer had asked him to investigate billing costs).

[112] For instance, in the Fair Labor Standards Act context, employers bear the burden of proving their claims regarding plaintiff's job duties, and courts generally engage in a rigorous factual inquiry before ruling in favor of defendants. *See, e.g.*, *In re* Novartis Wage and Hour Litig., 611 F.3d 141, 155–57 (2d Cir. 2010); Dalheim v. KDFW-TV, 918 F.2d 1220, 1224 (5th Cir. 1990). In contrast, courts in the FCA retaliation context frequently accept as true defendant's self-serving characterization of plaintiff's job duties. *See, e.g.*, *Hutchins*, 253 F.3d at 194–95 (rejecting the plaintiff paralegal's argument that his job duties did not include monitoring fraud on a motion to dismiss because plaintiff's alleged protected activity related to a one-time assignment to investigate billing for legal research).

every occupation under the sun, despite a low likelihood that the plaintiffs are true fraud-alert employees.[113]

III. LIABILITY UNDER THE 2010 PROVISION

As discussed above, Congress enacted two separate amendments to the retaliation provision.[114] First, the 2009 FERA amendments altered the retaliation provision to read:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.[115]

Next, the 2010 Dodd-Frank Act replaced the FERA text with the following:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.[116]

In interpreting the new FCA retaliation provision, courts should rely on the statutory canon that alterations to

---

[113] *See supra* note 87 and accompanying text.

[114] *See supra* Part I.

[115] False Claims Act, 31 U.S.C. § 3730(h) (Supp. 2010), *amended by* 31 U.S.C. § 3730(h) (Supp. 2011).

[116] 31 U.S.C. § 3730(h) (Supp. 2011).

statutory text presumably intend to change the law,[117] especially when the legislative history corroborates that presumption.[118] While the scope of protected persons under the new provision also raises potential ambiguities,[119] this Note only discusses the protected activity and knowledge elements under the new provision.

A. Protected Activity Under the 2010 Provision

On its face, the 2010 retaliation provision protects two types of activity. One clause, like the 1986 provision,

---

[117] *See* Brewster v. Gage, 280 U.S. 327, 337 (1930); Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 263 (1992); Hiivala v. Wood, 195 F.3d 1098, 1103 (9th Cir. 1999).

[118] *See* United States v. Dickerson, 310 U.S. 554, 561 (1940) (holding that the application of the *Brewster* canon "is a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence where . . . it exists" and that the contrary legislative history there rebutted the presumption that a change in language had legal significance); McElroy v. United States, 455 U.S. 642, 650 (1982). Here, the legislative history clearly suggests Congress's intent to supersede judicial interpretations of the FCA that it considered overly narrow and restrictive. *See* S. REP. NO. 110-507, at 6, 9, 22, 24 (2008); H.R. REP. NO. 111-97, at 5–8 (2009); S. REP. NO. 111-10, at 4 (2009). Although some of these reports relate to versions of the legislation that were not passed, they were written with regard to bills with substantively similar language to the enacted amendments and during a time frame of continued consideration of amendments to the FCA. *See supra* Part I. As such, they would have informed Congress's understanding of the enacted amendments' language.

[119] Although the new provision clearly intends to broaden coverage beyond common law employees, the term "contractor" may raise the issue of coverage of non-natural persons that act as contractors or agents. Private auditing companies could conceivably claim that they were denied future business because of an unfavorable audit that exposed a client's fraudulent activity. From a policy standpoint, such a reading may have merit, because refusal to protect corporations from retaliation may allow FCA defendants to avoid retaliation protections applicable to natural persons and thereby obtain control over whistleblowing activity by outsourcing their compliance duties and simply terminating the contract if the contracting corporation uncovers too much fraud. But given the complex questions this issue poses regarding the scope of corporate personhood, this Note does not strive to resolve it.

protects "acts . . . in furtherance of an action under this section"[120]—meaning an FCA fraud action brought by a private plaintiff-relator or a direct action brought by the government.[121] This Note refers to this clause as "the litigation clause" because, like the similar language in the 1986 provision, it protects activity with a nexus to FCA litigation. The second clause protects "acts . . . in furtherance . . . of other efforts to stop 1 or more violations of this subchapter," which includes the False Claims Act.[122] This Note refers to this clause as "the opposition clause."[123]

1. The Litigation Clause Protects the Same Activity as the 1986 Provision

While the litigation clause resembles the "in furtherance" clause of the 1986 statute, the 2009 and 2010 provisions both omit the critical "to be filed" language that courts had relied upon in ruling that the 1986 provision covered not just acts in furtherance of an actually filed or successful FCA fraud claim, but also acts that rendered the filing of such a suit reasonably possible.[124] Although defendants will likely argue that this deletion signifies congressional intent to limit protected activity to acts in furtherance of actually filed FCA fraud suits, such a reading finds little support in the

[120] False Claims Act, 31 U.S.C. § 3730(h) (Supp. 2011).

[121] *See* False Claims Act, 31 U.S.C. § 3730(a)–(b) (2006).

[122] Although this Note will not explore the use of the term "this subchapter," the new retaliation provision may protect government whistleblowers who make efforts to stop government officials from taking actions outside the scope of their statutory authority under 31 U.S.C. §§ 3723–3733, which are also contained in the relevant subchapter. Although the text commands such a reading, there is little evidence that Congress intended to protect actions in opposition to violations of statutes other than the FCA.

[123] The FCA opposition and litigation clauses closely parallel the so-called "opposition" and "participation" clauses of Title VII's retaliation provision. *See* 42 U.S.C. § 2000e-3(a) (2006). *See infra* note 138 and accompanying text (discussing further implications of similarity to the Title VII retaliation provision).

[124] *See supra* note 52 and accompanying text.

legislative history of the amendments.[125] First, Congress made clear that the amendments were intended to correct and clarify court decisions limiting the scope of the FCA and undermining the retaliation provision's effectiveness.[126]

Second, the omission of the "to be filed" clause is readily explained as the result of a drafting error in the FERA retaliation provision. The fact that the FERA text protects only "acts . . . in furtherance of other efforts to stop 1 or more violations" strongly suggests a drafting error, because the adjective "other" would only make sense if the drafters meant to include another type of protected activity prior to term "other efforts to stop."[127] The Dodd-Frank amendments correct this mistake by protecting "acts . . . in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter."[128] Under the 2010 provision, the term "other" makes sense, because it follows a specifically enumerated effort to stop FCA violations, namely, actions in furtherance of a lawsuit under the FCA. The fact that earlier versions of the proposed amendments to the FCA protected the same two categories of activity as the Dodd-Frank provision also supports an inference that the later FERA amendments contained a drafting error.[129] These

---

[125] Although *Brewster v. Gage*, 280 U.S. 327, 337 (1930) established that changes in statutory text should be read to signify a change in law, courts may disregard changes when the legislative history does not support the change. *See supra* note 118.

[126] S. REP. NO. 111-10, at 4 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 433. *See also* 155 CONG. REC. 1295, 1299 (daily ed. June 3, 2009) (statement of Rep. Berman) (explaining that the FERA retaliation provision "protects not only steps taken in furtherance of a *potential or actual* qui tam action, but also steps taken to remedy the misconduct through methods such as internal reporting . . . and refusals to participate in the misconduct that leads to the false claims, whether or not such steps are clearly in furtherance of a potential or actual qui tam action") (emphasis added).

[127] *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624–25 (2009).

[128] *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(b)(2)(c), 124 Stat. 1376, 2079 (2010).

[129] *See* False Claims Corrections Act of 2007, H.R. 4854, 110th Cong. § 3(e) (as introduced in the House, Dec. 19, 2007); False Claims

earlier versions of the section both preserved the 1986 provision's "to be filed" language.[130] Thus, the reinsertion of the litigation clause by the Dodd-Frank Act was likely meant to restore the earlier versions of the retaliation provision that expressly protected all activities covered under the 1986 provision, not to confine coverage to actions in furtherance of actually filed or successful FCA suits.

2. The Opposition Clause Expands Coverage to Include Activity with No Nexus to Plausible FCA Litigation

Even if courts read the omission of the 1986 provision's "to be filed" language in the 2009 and 2010 provisions to limit the scope of coverage under the litigation clause to acts in furtherance of actually filed FCA fraud cases, a plaintiff seeking protection for acts in furtherance of potential FCA suits might still find protection under the opposition clause, which on its face requires no nexus with FCA litigation.[131] Still, the question remains whether the clause's coverage of "acts . . . in furtherance of . . . other efforts to stop 1 or more violations" of the FCA includes acts in furtherance of efforts to stop both potential and actual violations or only actual violations.[132] At the very least, the opposition clause contemplates something more than general efforts to stop fraud, because it requires the plaintiff to attempt to stop "1

Corrections Act of 2009, H.R. 1788, 111th Cong. § 3(e) (as reported by the H. Comm. on the Judiciary, Mar. 30, 2009).

[130] *See id.*

[131] Technically, the opposition clause is a catch-all for all classes of protected activity, because the adjective "other" in the clause suggests that all forms of protection covered by the litigation clause are also "efforts to stop" FCA violations. Nonetheless, it is useful to distinguish between the clauses, if only to preserve still-relevant aspects of the FCA retaliation doctrine that applied to the 1986 provision that so closely resembles the litigation clause.

[132] Some commentators have concluded that the new retaliation provision restricts protected activity to efforts to stop only actual violations. *See* Robert Salcido, *The 2009 False Claims Act Amendments: Congress' Efforts to Both Expand and Narrow the Scope of the False Claims Act*, 39 PUB. CONT. L.J. 741, 784 (Summer 2010).

or more" violations of the FCA. However, requiring proof of an actual violation of the FCA would require plaintiffs to satisfy the rigorous standards of FCA fraud liability to receive protection.[133] This would exclude the previously protected activity of investigating fraud prior to determining that the defendant violated the FCA.[134]

Instead, in accordance with interpretations of the 1986 retaliation provision[135] and the legislative intent to broaden coverage,[136] courts should interpret the new retaliation provision to protect plaintiffs taking good faith steps to stop reasonably suspected FCA violations at the time they suffered retaliation. The scope of protected activity should not depend upon whether actual FCA violations can be proven. This reading of the statute furthers the FCA's goal of protecting lay employees.[137] Moreover, this reading is also consistent with the predominant interpretations of other retaliation statutes, which hold that plaintiffs only need to

[133] Proof of an actual FCA fraud violation is especially rigorous at the pleading stage, due to the application of the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *See supra* note 53 and accompanying text. Requiring such proof would substantially restrict FCA retaliation coverage.

[134] *See* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 740 (D.C. Cir. 1998).

[135] *See supra* Part II.A.

[136] *See* S. REP. NO. 110-507, at 6 (2008) ("[I]t is important that the Committee revisit the FCA and correct erroneous court interpretations that have limited the scope and application of the FCA in contravention of Congress's intent in passing the 1986 Amendments."); *id.* at 9 ("The False Claims Act Corrections Act, S. 2041, seeks to clarify conflicting interpretations of the FCA, to provide an affirmative answer to unresolved questions created over the years by litigation, and to bring the FCA back into line with congressional intent . . . . The legislation also . . . strengthens anti-retaliation protections for qui tam whistleblowers."); H.R. REP. NO. 111-97, at 5–8 (2009) ("Unfortunately, since the 1986 amendments were enacted, several court decisions have limited the reach of the False Claims Act, jeopardizing billions in Federal funds . . . . Since the 1986 amendments, courts have also limited the scope of the False Claims Act's anti-retaliation provisions."); *id.* at 14 (explaining that the legislation "would broaden protections for whistleblowers by expanding the False Claims Act's anti-retaliation provision"); *supra* note 126.

[137] *See Yesudian*, 153 F.3d at 741 (D.C. Cir. 1998).

have a good faith, reasonable belief that they were engaging in protected activity, even when the statutory text does not contain language analogous to the 1986 provision's "to be filed" clause.[138]

This interpretation of the opposition clause is also more faithful to Congress's intent to protect both attempts to remedy fraud internally and refusals to participate in fraudulent activity, whether or not such actions are clearly in furtherance of a potential or actual qui tam action.[139] In accordance with the good faith, reasonable belief standard

---

[138] *See* Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1311–12 (11th Cir. 2002) (applying good faith, reasonable belief standard to Age Discrimination in Employment Act retaliation provision); Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor, 992 F.2d 474, 478–79 (3d Cir. 1993) (applying good faith, reasonable belief standard to Clean Air Act retaliation provision); Monteiro v. Poole Silver Co., 615 F.2d 4, 8–9 (1st Cir. 1980) (applying good faith, reasonable belief standard to Title VII retaliation provision). Title VII's retaliation provision is particularly relevant to the interpretation of the scope of the opposition clause, since Title VII also contains its own opposition clause protecting activity with no nexus to litigation. *See* 42 U.S.C. § 2000e-3 (2006); Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (explaining that acceptable forms of protected activity under Title VII's analogous opposition clause include formal charges of discrimination, "as well [as] informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges"). Like the 2010 FCA retaliation provision here, however, § 2000e-3 requires the plaintiff to oppose "any practice made an unlawful employment practice by this subchapter" without clarifying whether the employee must oppose an actual violation of Title VII or have a good faith, reasonable belief that such a violation has occurred. Nonetheless, courts have applied the good faith, reasonable belief standard to the opposition clause of § 2000e-3. When drafting the language of the FCA retaliation provision, Congress no doubt relied upon the assumption that courts would interpret the FCA retaliation provision in the same manner as the similarly written Title VII provision. Courts should therefore interpret the FCA similarly, in accordance with Congressional expectations. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–67 (1987) (relying on "presumption that similar language in two labor law statutes has a similar meaning").

[139] 155 CONG. REC. 1295, 1299 (daily ed. June 3, 2009) (statement of Rep. Berman).

applied under the 1986 provision, the plaintiff would still have to show that she actually and reasonably believed that the defendant was defrauding the government, and that the plaintiff's alleged protected activity was reasonably calculated to further an effort to stop the fraud.[140] Under this standard, internal reporting and investigation of suspected fraud on the government should usually qualify for protection, because the purpose behind internal monitoring activity is to ensure that companies comply with the law, not to assist them in avoiding enforcement.[141] Empowering employees to fully investigate potential false claims is the goal behind the FCA retaliation provision.[142]

While courts may continue to require plaintiffs to express their suspicions about fraud by using "magic words" such as "fraudulent," "illegal," or "qui tam,"[143] courts should hesitate to apply such a requirement where the alleged FCA fraud would not connote the term "fraud" to laypeople. In

[140] *See supra* Part II.A. In assessing the objective reasonableness of the plaintiff's belief that the defendant is engaging in fraud, courts should consider the objective circumstances that informed that belief. Such circumstances should include, at a minimum, the opportunity the plaintiff had to investigate the suspected fraud, the strength of the evidence suggestive of fraud which inspired the initial investigation, and the defendant's attempts to cooperate with or foster a thorough investigation (or lack thereof). *See* Allen v. Admin. Review Bd. 514 F.3d 468, 477 (5th Cir. 2008) (holding in the Sarbanes-Oxley Act whistleblower retaliation context that "the objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee").

[141] *See infra* note 162 and accompanying text.

[142] *See Yesudian*, 153 F.3d at 740 (D.C. Cir. 1998) (discussing "Congress' intent to protect employees while they are collecting information about a possible fraud, *before* they have put all the pieces of the puzzle together") (emphasis in original).

[143] The statutory text and legislative history do not express an intent to overturn this requirement. *See* Brewster v. Gage, 280 U.S. 327, 337 (1930) (holding that presumption of intent to change the law arises when legislature changes relevant text); United States v. Dickerson, 310 U.S. 554, 561 (1940) (holding that a lack of legislative history suggesting intent to change the law can rebut the presumption that a change in relevant text signifies a change in the law).

particular, the amended reverse false claims provision no longer requires affirmative fraudulent statements.[144] It therefore does not connote the colloquial use of the term "fraud," which generally implies some type of affirmative act.[145] Whereas the prior version of the reverse false claims provision only covered such affirmative acts (i.e. filing false statements to conceal an obligation),[146] the FCA now also covers situations in which a defendant avoids an obligation to pay the government by remaining silent.[147] Thus, under the revised FCA, the inquiry should be whether the employee made an effort to stop the defendant from concealing or consciously ignoring a commercial obligation to pay or pay back the government, regardless of whether the defendant's behavior is described as illegal or fraudulent by the employee.[148] A reverse false claim is often akin to a surreptitious breach of contract, whereby the defendant covers up information that would trigger an obligation to pay

[144] The FERA added a clause to the reverse false claims provision, which prohibits "knowingly conceal[ing] or . . . improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or payment to the Government," 31 U.S.C. § 3729(a)(1)(G) (2010 Supp.), and defines "obligation" to include "retention of any overpayment." § 3729(b)(3). In this manner, the FERA both eliminates the requirement of an affirmative act of concealment and extends liability. JOHN E. STEINER, ANDREW B. WACHLER, AMY K. FEHN & JENNIFER COLAGIOVANNI, HEALTH LAW & COMPLIANCE UPDATE § 2.04 (2011).

[145] "Fraud" generally connotes some type of affirmative misrepresentation or trick. MERRIAM WEBSTER COLLEGIATE DICTIONARY 498 (11th ed. 2003) (defining "fraud" as an "intentional perversion of the truth" or "an act of deceiving or misrepresenting").

[146] *See* False Claims Act, 31 U.S.C. § 3729(a)(7) (2006), *amended by* 31 U.S.C. § 3729(a)(1)(G) (Supp. 2010).

[147] *See* 31 U.S.C. § 3729(a)(1)(G) (Supp. 2011). *See also* S. REP. NO. 111-10, at 14 (2009), *reprinted in* 2009 U.S.C.C.A.N. 430, 433.

[148] *See* Brief for Appellee at 23, United States v. Bourseau, 531 F.3d 1159 (9th Cir. 2008) (Nos. 06-56741, 06-56743). Although this quotation was written prior to the passage of the amendments, the Senate Committee Report cited the government's *Bourseau* brief for its definition of the term "fixed" in the context of the definition of an "obligation" to pay. *See* S. REP. NO. 110-507, at 18 n.62 (2008); S. REP. NO. 111-10, at 14 n.11 (2009).

money back to either the government or a government grantee.[149] In light of this fact, the employee should only need to express her concerns regarding (1) the employer's concealment of information in order to reduce an obligation to recompense the government or (2) the employer's failure to correct material misunderstandings of the government which the employer knew were false.[150]

In summary, by limiting employers' power to interfere with compliance efforts, the good faith, reasonable belief standard promotes the establishment of corporate compliance departments with legally-sanctioned authority to investigate reasonable suspicions of fraud. Insofar as defendant employers' investment in compliance programs does not allow them to unreasonably interfere with such investigations or refusals to cooperate, the retaliation provision converts compliance employees into dual agents of the government and the employer. Employees can still demand employment benefits from the employer, even though they might act against the employer's interest. In this sense, the retaliation provision functions like a tax on defendants that funds an internal regulatory infrastructure. Corporate compliance officials will have the ability to actively pursue possible fraud against the government and

[149] *See* Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc., 190 F.3d 729, 741 (6th Cir. 1999) (holding that "31 U.S.C. § 3729(a)'s definition of 'obligation' certainly includes those arising from acknowledgements of indebtedness, final judgments, and breaches of government contracts").

[150] This interpretation of the Act would almost certainly supersede decisions like *McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 517 (6th Cir. 2000), which held that the plaintiff had not engaged in protected activity when she complained to her employer regarding a scheme to falsify internal records not shown to its customers to avoid refunding payments to its customers, some of which included the government. Under the current law, such a complaint should count as an effort to stop a reverse false claim. Even if the allegedly protected activity in *McKenzie* did not have a sufficient nexus to FCA litigation or reflect a clear intent to stop fraud specifically against the government, her complaints in part concerned concealment to reduce an obligation to repay government customers, and therefore expressed a good faith, reasonable belief the defendant had made reverse false claims against the government.

reap the potentially lucrative rewards of the relator's share of qui tam recovery.[151] By forcing employers to unify the job duties of government regulators, private attorneys general, and corporate compliance employees, the 2010 retaliation provision reduces the needless transaction costs incurred under traditional regulation by government employees working outside defendant organizations.[152]

B. Employer Knowledge Under the 2010 Provision

1. The 1986 Provision's Heightened Notice Requirement Is Inapplicable to Knowledge of Opposition Clause Activity

Like the 1986 retaliation provision, the 2010 provision does not mention knowledge, which complicates the derivation of doctrinal requirements.[153] Given the fact that the litigation clause simply covers activity previously covered

---

[151] In this sense, internal compliance employees are much like attorneys of the government who make their living based on the tax revenue from the industries they monitor, except that the government purchases whistleblower services by offering a contingency fee with an extreme risk-benefit ratio rather than a government salary.

[152] Whereas traditional regulation requires government employees to gather evidence through subpoenas of documents from and interrogation of reluctant insiders whose well-being depends upon continuing wages paid by the defendant, the FCA retaliation provision taxes the industry by directly purchasing the loyalty of the insiders with the possibility of sharing in recovery against the defendant. In theory, this purchase of loyalty decreases the transaction costs of investigation by diminishing the resistance of insiders with valuable information. *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 61 (2002) ("In comparison to all other private justice models, the qui tam FCA 'common good' private justice action is extremely successful in bringing forth helpful inside information."). *Cf.* Mary K. Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 191 (2007) ("The sheer number of anti-retaliation laws illustrate that whistleblowers are a critical component to effective law enforcement in a complex society as insiders often furnish invaluable assistance in the investigation and prosecution of public corruption and corporate fraud.").

[153] *See supra* Part II.B. and notes 77 and 78 and accompanying text.

by the 1986 provision,[154] the plaintiff should have to make the same showing as required by the 1986 provision to prove the employer had knowledge of litigation clause activity. Employer knowledge of opposition clause activity, on the other hand, does not square with the standard for employer knowledge under the 1986 provision, because that standard tests whether the employer had actual or constructive knowledge of the plausibility or possibility of FCA fraud litigation based on the plaintiff's engagement in the alleged protected activity.[155] However, opposition clause activity requires no nexus to FCA litigation, which renders the primary inquiry of the 1986 employer knowledge standard irrelevant.[156] Moreover, given their obligation to police fraud, internal compliance employees are the most likely insiders to oppose FCA fraud violations. Thus, the most important issue after the amendments is whether the heightened notice requirement will continue to operate in regard to opposition clause activity under the 2010 provision. The text and legislative history of the recent amendments strongly indicate that the heightened notice standard is inapplicable to claims involving opposition clause activity under the 2010 retaliation provision.

As discussed above, the drafters of the amendments specifically designed the opposition clause to protect internal investigation and compliance efforts.[157] However, because the heightened notice requirement applies whenever the protected activity is part of the plaintiff's job duties, the requirement often frustrates claims based on internal activity by forcing plaintiff employees to make extraordinary and unrealistic efforts to notify their employers of the

---

[154] *See supra* Part III.A.1.

[155] *See supra* Part II.B.

[156] *See supra* Part III.A.2.

[157] *See* 155 CONG. REC. 1295, 1299 (daily ed. June 3, 2009) (statement of Rep. Berman) (noting that the amendment protects "internal reporting to a supervisor or company compliance department and refusals to participate in the misconduct that leads to the false claims, whether or not such steps are clearly in furtherance of a potential or actual qui tam action") (emphasis added).

protected nature of their activity.[158] If courts were to apply the heightened notice standard to opposition clause activity, they would fail to give effect to the obvious intent of the law by requiring plaintiffs to engage in further activity beyond internal reporting and investigation to notify their employers. Indeed, if read in such a restrictive manner, the 2010 provision differs little from the 1986 provision, because even the 1986 provision covered internal reporting and investigation when plaintiffs made the requisite efforts to overcome the presumption that they were engaging in protected activity rather than performing their regular job duties.[159]

Moreover, by removing the "on behalf of" clause, the 2010 amendment deleted the only textual support for the presumed dichotomy between protected activity and regular job duties upon which the heightened notice standard depends.[160] The removal of this language signifies Congress's intent to protect all covered activity, regardless of on whose behalf the activity is performed.[161] The omission of the "on behalf of" clause eliminates any right for employers to treat a suggestion for improvement from compliance employees as anything but a protected "effort to stop" fraud on the government.[162]

---

[158] *See supra* Part II.B.2–3 and notes 90, 92, and 105–09 and accompanying text.

[159] *See supra* Part II.B.2 and notes 90 and 91 and accompanying text.

[160] *See supra* Part III.B.3.a and notes 102–104 and accompanying text.

[161] *See supra* note 41 (discussing presumption that changes in statutory text signify changes in law).

[162] The only other possible purpose that suggestions from internal compliance officials could serve is to inform employers of a potential violation of the FCA and to give them the option of either correcting non-compliance or risking liability. To suggest that internal reports of suspected fraud present defendants with the choice between following mandatory legal requirements or ignoring the risk of noncompliance is tantamount to saying that corporate compliance serves the purpose of aiding and abetting reckless refusals to comply with a known legal obligation when the employer wishes to choose that option. Courts should reject any such arguments as contrary to public policy, because the FCA prohibits reckless disregard for the truth or falsity of claims made on the

2. The Notice Standard Under the Opposition Clause Must Balance the Legitimate Interests of Employees, Employers, and the Government

Although the 1986 provision's heightened notice requirement is inapplicable to opposition activity under the 2010 provision, employers still deserve notice that (1) the plaintiff reasonably suspected that the employer was committing fraud on the government, and (2) the employee was in fact trying to stop the fraud—that is, notice that the plaintiff engaged in protected opposition clause activity. Under a broad interpretation of these requirements, nearly all reasonable forms of internal review of claims on the government would notify employers of the employee's protected "efforts to stop" FCA violations, since an ever-present purpose of internal review and investigation of claims on the government is to prevent the company from assuming FCA liability. Generally, employees accept employer control because employers have the power to take adverse actions against them. Thus, reading the retaliation provision to protect all activities in pursuit of internal compliance would threaten to give corporate compliance employees total control over the manner in which they carry out their duties when investigating reasonably suspected fraud. Congress likely did not intend such an extreme result, as it would ultimately impose new costs on taxpayers by raising the cost of doing business with the government.[163] Instead, in construing the knowledge requirement under the opposition clause, courts should recognize that the FCA's

government. *See* False Claims Act, 31 U.S.C. § 3729(b)(1)(A)(iii) (Supp. 2010).

[163] *See* Neal v. Honeywell Inc., 33 F.3d 860, 864 (7th Cir. 1994) (noting that "[t]o avoid the risk that ordinary personnel actions would be misunderstood as 'retaliation' . . . employers would accord potential plaintiffs privileged status. Making whistleblowers untouchable would not aid the United States. An increase in the expected cost of doing business does not come from investors; customers ultimately pay the tab, and here the customer is the federal taxpayer").

goal of preventing fraud[164] is not served by stripping well-meaning employers of the power to reasonably supervise their corporate compliance departments.[165]

To accommodate the legitimate interests of well-meaning employers while still effectuating Congress's intent to expand coverage, courts should resort to the legal mechanism of constructive knowledge. Constructive knowledge is the principle that "one is chargeable with knowledge of that which in the exercise of reasonable care he should have known."[166] The main question in deriving a test for constructive knowledge in the FCA context is what standard of reasonableness applies to defendant employers. Courts generally charge defendant employers with knowledge of FCA fraud whenever the offending acts of their agents are within the scope of their employment, regardless of the employer's knowledge or culpability.[167] However, most of the decisions that a corporation makes, acting through its human agents, are not the subject of director attention.[168] Thus, except in those cases where decision-makers at the top of the corporation directly perpetuate or condone known fraud,[169] organizational liability attaches under the theory that defendant corporations are responsible for knowing and policing the failures of the internal governance and billing employees that oversee claims made on the government. This model of vicarious liability does not necessarily impose unfair requirements upon senior management, because corporate fiduciary duties already require senior

---

[164] *See, e.g.*, United States *ex rel.* A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 444 (6th Cir. 2005) ("The history of the FCA reveals that the principal goal underlying the statute is to prevent fraud perpetrated on the Government.").

[165] *See infra* notes 171–73 and accompanying text.

[166] Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1, 13 (1963) (Goldberg, J., dissenting).

[167] *See* United States *ex rel.* Shackelford v. Am. Mgmt., 484 F. Supp. 2d 669, 676 (E.D. Mich. 2007).

[168] *See In re* Caremark Intern. Inc. Deriv. Litig., 698 A.2d 959, 968 (Del. Ch. 1996).

[169] In such cases, the court can find actual rather than constructive knowledge.

management to take good faith, reasonable steps to implement information and reporting systems that are designed to provide timely and accurate information sufficient to allow management and the board to reach judgments concerning the corporation's compliance with the law.[170]

The FCA itself recognizes the importance of allowing defendant corporations to make such good faith efforts to prevent or remedy violations. In this regard, the FCA expressly permits the reduction of damages when defendants made good faith efforts to correct violations before the government or a qui tam plaintiff filed suit.[171] Moreover, courts have read the knowledge element of FCA fraud liability to encourage boards of directors to implement reporting systems reasonably designed to prevent fraud.[172]

---

[170] *Caremark*, 698 A.2d at 970. *See also* McCall v. Scott, 239 F.3d 808, 822, 824 (6th Cir. 2001) (interpreting *Caremark* oversight duties to apply in the context of FCA fraud liability); *In re* Pfizer Inc. S'holder Deriv. Litig., 722 F. Supp. 2d 453, 455, 462 (S.D.N.Y. 2010) (holding that defendant directors likely failed in their duty to monitor, oversee, and prevent the illegal conduct of the company where board received notice of massive FCA settlements, FDA warning letters, and qui tam suits); Miller v. U.S. Foodservice, Inc., 361 F. Supp. 2d 470, 480 (D. Md. 2005) (holding that "first and foremost, directors and officers must assure that a reporting system exists which is 'in concept and design adequate' to provide appropriate and timely information to them so that they may satisfy their monitoring responsibility" (*quoting Caremark*, 698 A.2d at 970)); Miller v. Schreyer, 257 A.D. 2d 358, 362 (N.Y. App. Div. 1999) ("It is hardly unreasonable to require directors to implement basic financial oversight procedures sufficient to disclose a patently improper scheme.").

[171] *See* 31 U.S.C. § 3729(a)(2) (2006). Although the reduced damages provision does not use the term "good faith," it does not permit reduction of damages unless the defendant cooperates with a government investigation prior to the filing of a suit against it. In this sense, the provision does not sanction bad faith efforts by the defendant to feign cooperation upon discovering that a claim has been filed against it.

[172] *See* United States *ex rel.* Hefner v. Hackensack Univ. Med. Ctr., 495 F.3d 103, 110 (3d Cir. 2007) (holding that defendant did not have scienter where good faith compliance system broke down); United States v. Stevens, 605 F. Supp. 2d 863, 867 (W.D. Ky. 2008) (finding that doctor acted with reckless disregard as to the truth or falsity of claims for reimbursement that were being submitted by his pain management clinic,

Thus, if the 2010 retaliation provision were to strip directors of their ability to monitor the risks of FCA fraud liability, it would contravene the FCA itself.

3. Courts Should Allow Defendant Employers to Affirmatively Disprove Notice by Demonstrating That They Had Implemented Reasonable Reporting Procedures and That the Plaintiff Failed to Avail Herself of Such Procedures

Instead of forcing corporations to relinquish all control over compliance departments and internal reporting procedures, courts should evaluate how well defendants' reporting and monitoring systems encourage corporate compliance employees to raise concerns regarding FCA fraud liability. Specifically, courts should hold that, to establish the employer's constructive knowledge of either the requisite reasonable suspicion of an FCA violation or the effort to stop that violation, plaintiffs must have made good faith attempts to notify the defendant employer through the reasonable reporting procedures established by the employer. Corporate

---

because that doctor failed to take any reasonable steps to ensure that billings were correct, gave complete control of billings to person with no prior experience with medical billing, and did not know or inquire into what codes were being used to bill for his services); United States *ex rel.* Hunt v. Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d 430, 441 (E.D. Pa. 2004) (holding that allegations that defendant's compliance programs were either non-existent or insufficient could show FCA scienter); United States v. Rachel, 289 F. Supp. 2d 688, 696 (D. Md. 2003) (holding that failure to satisfy fiduciary duties to oversee company billing activity could demonstrate reckless disregard under the FCA); United States *ex rel.* Perales v. St. Margaret's Hosp., 243 F. Supp. 2d 843, 856 (C.D. Ill. 2003) (holding that evidence that defendant received and considered relevant publications in this area of the law, established a corporate compliance committee, and routinely consulted counsel in drafting the contracts and agreements defeated allegation of scienter); UMC Elecs. Co. v. United States, 43 Fed. Cl. 776, 794 (1999) (noting that "a failure to make a minimal examination of records constitutes deliberate ignorance or reckless disregard, and a contractor that deliberately ignored false information submitted as part of a claim is liable under the False Claims Act").

compliance employees should know that their job function is to provide employers with such knowledge.[173] A corporation will usually still be vicariously liable for FCA fraud regardless of whether senior management had actual knowledge of the fraudulent acts.[174] However, a compliance employee who failed in her duty to report through established procedures should have no right to claim that the employer had the requisite knowledge of her protected activity, since the employer's lack of knowledge is the fault of the employee herself.[175]

Following analogous precedent dealing with the problem of organizational knowledge in the sexual harassment context, courts should interpret the knowledge requirement to provide corporate defendants with the affirmative defense that the employee unreasonably failed to take advantage of reasonable internal reporting procedures.[176] In the absence

[173] *See* United States *ex rel.* Milam v. Regents of the Univ. of Cal., 912 F. Supp. 868, 888 (D. Md. 1995) (finding "no evidence that [defendant director] acted in reckless disregard or with deliberate ignorance of the truth or falsity of the statements in the grant applications. As Director of BTRC, he relied on the principal investigators beneath him to account for the accuracy of the grant applications . . . . [A]s director of a large research institution, he was entitled to delegate responsibility for scientific accuracy to his subordinates who are trained scientists and researchers.").

[174] *See, e.g.*, United States v. O'Connell, 890 F. 2d 563 (1st Cir. 1989) (holding employer vicariously liable under the FCA for the acts of its employee, a general manager and one-third owner, even though the acts of the employee did not benefit the corporation). *See also* United States v. Hangar One, Inc., 563 F.2d 1155, 1158 (5th Cir. 1977) (upholding vicarious liability under the FCA when low-level employee acted within the scope of employment and for the purpose of benefiting the employer).

[175] Likewise, one could also argue that internal compliance employees who do not avail themselves of internal reporting procedures do not engage in protected activity insofar as any reasonable "effort to stop" must include an attempt to communicate concerns of fraud to corporate decision-makers with the power to prevent or stop the fraud.

[176] *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). Although often presented as interpretations of common law agency, these cases really concern the fairness of imputing knowledge of, and therefore liability for, uncorrected sexual harassment by supervisory employees to defendant corporations.

of such reporting procedures, however, courts should impute knowledge of the plaintiff's protected activity whenever the defendant knew that the plaintiff investigated or refused to condone conduct that the defendant should have known might have been fraudulent. In such a case, the employee need not have expressly described the conduct as fraudulent or illegal.[177] When evaluating affirmative defenses of reasonable internal reporting procedures, courts must carefully assess the objective reasonableness of the procedures established by the defendant. Because the defendant carries the burden of proving an affirmative

See Meritor, 477 U.S. at 69–73 (discussing arguments regarding employer knowledge and rejecting standard that holds employers vicariously liable regardless of knowledge); *Ellerth*, 524 U.S. at 771 (holding that defendant employer could not be held liable where "[t]he company had a policy against sexual harassment, and respondent admitted that she was aware of the policy but nonetheless failed to tell anyone with authority over [the harassing supervisor] about his behavior," because the defendant employer "*cannot be charged with knowledge of [the supervisor's] alleged harassment or with a failure to exercise reasonable care in not knowing about it*") (emphasis added). Ultimately, the policy goals that motivated the announcement of the *Faragher* and *Ellerth* defenses are applicable to FCA retaliation. *See Faragher*, 524 U.S. at 806 (reasoning that the affirmative defense furthers statutory policy by "recogniz[ing] the employer's affirmative obligation to prevent violations and giv[ing] credit here to employers who make reasonable efforts to discharge their duty"). The primary purpose of Title VII—"to influence primary conduct"—motivated the Court to establish an affirmative defense that rewards employers for their efforts to prevent discrimination and harassment. *Id.* The FCA's "purpose of punishing and preventing . . . frauds" should similarly motivate courts to establish an analogous defense in the FCA retaliation context. United States v. Bornstein, 423 U.S. 303, 309 n.5 (1976).

[177] *See Faragher*, 524 U.S. at 780 (holding that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim"). When an employer fails to provide reasonable avenues through which employees can comfortably report their concerns, the employer assumes the responsibility to discover information that that employee would have reported to it had the employer implemented adequate reporting procedures.

defense, the defendant should have the burden of demonstrating reasonableness.[178]

Any standard of reasonableness requires sufficient dissemination of the reporting policy to all employees against whom defendants raise the affirmative defense.[179] A defendant's failure to disseminate a policy sufficiently or to educate employees regarding its contents constitutes unreasonable disregard of the protected status of an employee's whistleblowing activity. An organization cannot expect its employees to carry out an obligation to report without informing them of the existence of that obligation, explaining how the reporting procedures work, and maintaining a culture that does not punish those who properly report reasonable concerns.

A reasonable reporting program should also make clear that supervisors have no authority to deny employees the opportunity to avail themselves of reporting avenues or to

---

[178] *See id.* at 807–08 (discussing defendant's burden).

[179] *See id.* at 808 (noting that defendant would not likely carry the burden of his affirmative defense, in part because it "failed to disseminate its policy against sexual harassment" among the class of employees involved in the case). *See also* THE OFFICE OF INSPECTOR GENERAL OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES AND THE AMERICAN HEALTH LAWYERS ASSOCIATION, *Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors*, at 2 (Apr. 2, 2003), http://oig.hhs.gov/fraud/docs/complianceguidance/040203CorpRespRsceGuide.pdf (last visited Apr. 14, 2011) ("It is important, therefore, that organizations respond appropriately to a suspected compliance violation and, more critically, to a government investigation without damaging the corporation or the individuals involved. The Board should confirm that processes and policies for such responses have been developed in consultation with legal counsel and are well communicated and understood across the organization."). *See also* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C) (2010) (requiring an organization to publicize a system in order to satisfy the minimal requirement of reasonable due diligence). Although applicable only in the criminal context, the Sentencing Guidelines should establish the minimum requirement of a compliance program in the civil FCA context, because the Sentencing Guidelines establish the minimum requirements of a reasonable compliance program for the closely analogous criminal False Claims Act. *Compare* Criminal False Claims Act, 18 U.S.C. § 287 (2006) *with* False Claims Act, 31 U.S.C. § 3729 (Supp. 2010).

retaliate against employees for so availing themselves. A reasonable reporting program must make clear this limitation on supervisory authority both during general education and enforce this limitation as a matter of practice. If the words of an employer's policy manual claim to limit the authority of supervisors in this manner, but in practice supervisors discourage reporting or retaliate against employees for reporting, the reporting program is not reasonable. Thus, an employer acts with unreasonable disregard to its employees' engagement in protected activity when it fails to monitor the program adequately and thereby fails to prevent its supervisors' attempts to undermine a reporting program.[180]

Furthermore, any standard of reasonableness also requires procedures that check for conflicts of interests. No plaintiff should have to report suspected fraud to the very people that the employee reasonably believes are guilty of that fraud.[181] Just as courts excuse shareholders for not demanding that a conflicted board of directors instigate litigation on behalf of the corporation against themselves for their own alleged misdeeds,[182] courts should recognize the futility of requiring employees to report concerns of fraud to those reasonably suspected of fraud. A defendant that relies upon an obviously defective reporting policy unreasonably disregards the protected activity of its employees and therefore assumes constructive knowledge. An ideal

---

[180] *See Faragher*, 524 U.S. at 808 (noting that defendant could not carry the burden of its affirmative defense as a matter of law, in part because it "made no attempt to keep track of the conduct of supervisors"); U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(A) (requiring an organization to ensure the program is followed to satisfy the minimum standards of due diligence).

[181] *See Faragher*, 524 U.S. at 808 (noting that defendant could not carry the burden of its affirmative defense as a matter of law, in part because the "policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints").

[182] *See* Rales v. Blasband, 634 A.2d 927, 933 (Del. 1993) (excusing shareholder plaintiffs from having to make a request that directors sue the corporation, before instituting their own derivative suit, on the grounds of "demand futility").

program would provide for anonymous reporting to avoid such conflicts, but this need not be required if the policy otherwise protects against conflicts of interest.[183]

A provision requiring that the defendant affirmatively prove the reasonableness of the reporting policy should also address whether the plaintiff employee was actually a "corporate compliance employee" that had a clear *ex ante* obligation to use available reporting channels. While this analysis may seem to resemble the problematic application of the "job duties" defense under the 1986 retaliation provision,[184] the proposed affirmative defense more deeply scrutinizes the realities of the workplace. Under the proposed defense, the employer has the burden of proving not merely that the employee had a duty to report in the abstract. The employer also must prove that the alleged corporate compliance employee was sufficiently educated of her reporting responsibilities and that company culture and supervisory conduct would not have dissuaded a reasonable person from reporting the suspected FCA violations.

IV. CONCLUSION

Courts should read the statutory text of the FCA amendments to effectuate prevention of false claims by encouraging cooperation between internal compliance employees and defendant employers. Under this Note's proposed conception of organizational knowledge, the employer's failure to discharge the duties of effective communication results in the employer assuming constructive knowledge. An employee's failure to utilize reasonable reporting channels, however, bars the employee from claiming she had a good faith reasonable belief that she had engaged in protected activity. Encouraging effective

[183] *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C); Kimberly D. Baker & Arissa M. Peterson, *Corporate Ethics and Governance in the Health Care Marketplace: Post-Caremark Implications for Health Care Organization Boards of Directors*, 3 SEATTLE J. SOC. JUST. 387, 402 (2004); Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 497 (2009).

[184] *See supra* Parts II.B.2–3.

internal reporting benefits employers, employees, and the government.

Under the new retaliation provision, corporate compliance employees will enjoy substantially more security and freedom in performing their job duties. They will no longer face the "Hobson's choice of reporting outside the organization, or remaining silent."[185] On the other hand, employers that make reasonable efforts to establish effective reporting procedures will enjoy "the upper hand in managing uncertainty and exercising judgment."[186] Furthermore, "allowing the employer to first investigate and correct possible violations prevents potential high costs to both the employee and the organization, which will avoid both reputational harms and the costs of undergoing a government investigation."[187] Finally, by encouraging more effective corporate compliance before serious false claims violations occur, the 2010 retaliation provision should help the government save enforcement costs by allowing agencies to focus on cases that mandate intervention.[188] By accommodating the interests of all relevant parties while at the same time expanding retaliation coverage and better preventing fraud, this Note's proposed interpretation of 2010 FCA retaliation best implements the congressional intent behind the recent amendments.

[185] Lobel, *supra* note 183, at 462.

[186] *Id.*

[187] *Id.*

[188] *Id.*