

## It Takes Time: The Need to Extend the Seal Period for *Qui Tam* Complaints Filed Under the False Claims Act

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### ABSTRACT

Each year, 10% of all federal government spending is lost due to fraud, which adds up to over \$350 billion a year. Unfortunately, many well-meaning federal judges are inadvertently making it easier for wrongdoers to retain these ill-gotten gains by unnecessarily cutting short the investigative time for the government to evaluate fraud allegations brought by whistleblowers under the False Claims Act (FCA). The FCA is the federal government's primary tool to recover funds obtained through the submission of false claims. Because the government is unable to detect most fraud cases absent the help of whistleblowers, Congress included *qui tam* provisions in the FCA to authorize private individuals to receive a portion of the amount recovered as a reward. To obtain a reward, however, the whistleblower—known as a “relator”—must file a *qui tam* complaint against the wrongdoer. The *qui tam* complaint is filed under seal and served only upon the government. The FCA provides the government an initial sixty-day period to evaluate the *qui tam* complaint and determine whether it elects to intervene. The FCA also permits

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extensions to this period upon a showing of “good cause.” When the government takes over *qui tam* cases, it obtains a recovery 95% of the time. On the other hand, when the government declines, the relator recovers in only 5% of cases. Therefore, it is imperative that the courts provide the government with a full opportunity to make an election determination. However, the courts are not applying a proper standard for granting more time to intervene in *qui tam* cases, which creates two significant harms. First, cutting off the government from completing its investigation by applying a rigid and improper definition of the FCA’s “good cause” standard allows fraudfeasors to keep billions of dollars in taxpayers’ funds without a resolution on the merits. Second, because of a circuit split, the definition of good cause for the continuation of the seal under the government’s primary fraud statute depends solely upon where the case is filed.

The following hypothetical underscores the problem and the need for a uniform standard. Assume a whistleblower sends the government a letter or calls a hotline to report that a hospital is committing Medicare fraud. Under the tiered FCA statute of limitations, the government has a minimum of six years and maximum of ten years to file an FCA complaint, depending on when the fraud is discovered. The FCA authorizes the government to issue subpoenas for documents and take deposition testimony during the investigative period. No court permission is needed to take such informal discovery. In fact, the only limitation is the FCA’s six- or ten-year statute of limitations.

Suppose instead the same whistleblower with the same facts desired to obtain a reward for reporting fraud. Thus, instead of calling a hotline, she filed a *qui tam* complaint in federal court (which is a prerequisite to obtaining a reward). In that situation, the court keeps the *qui tam* case under seal for the initial sixty days, and longer upon request and a showing of good cause. Under this scenario, the FCA still permits the government to conduct informal discovery, including issuing subpoenas for documents or deposition testimony in order to make a decision to intervene in the *qui tam* complaint.

The problem is that if no reward is sought, the government has six to ten years to investigate the allegations, but if a reward is sought, some courts limit the government to six months or even as little as sixty days. In fact, the amount of time the government is granted to conduct an investigation in a *qui tam* case is dependent upon the judge’s view of “good cause.” As a result, the amount of time ranges from sixty days to nine years, depending on which part of the country the federal case is filed or even upon which judge is drawn.

In reality, it often takes between three and six years for the government to properly investigate and bring a complex fraud case that satisfies Rule 9(b) and fulfills the duty to conduct a parallel criminal investigation without prematurely or wrongfully accusing a company of defrauding the government. Certainly the right of the government to conduct an in-depth fraud investigation and fully utilize the investigative tools provided under the FCA should not depend upon whether a whistleblower is seeking a reward or on a particular court's view of good cause. Moreover, the lack of a uniform standard has resulted in a wide disparity of legal opinions that makes the result of whether the government can spend the necessary time to determine if fraud occurred almost totally dependent upon where the federal FCA case is filed.

This Article proposes a uniform standard for interpreting the FCA's "good cause" requirement that comports with the goals, purposes, and statutory language. Specifically, it argues that requests by the government for extensions of the seal period should be liberally granted for up to three years provided that the government's investigation is still active and ongoing, and up to six years provided that the government can show a need for more time due to the size or complexity of the case or other circumstances requiring more time than an ordinary fraud investigation. To go beyond six years, however, this Article proposes that the government must obtain a partial lifting of the seal to notify the defendant of the allegations and obtain its consent.

## I. INTRODUCTION

Each year, nearly 10% of all federal government spending is lost due to fraud,<sup>1</sup> which adds up to over \$350 billion a year.<sup>2</sup> Because the government is unable to detect most instances of fraud absent the help of whistleblowers, Congress included *qui tam*<sup>3</sup> provisions in the False Claims Act (FCA)<sup>4</sup> to authorize private individuals called relators<sup>5</sup>—also referred to as *qui tam* plaintiffs or whistleblowers—to receive a reward consisting of a portion of the amount recovered. In order to be eligible for a reward, a whistleblower must file a civil *qui tam* suit on behalf of the government against a fraudfeasor for submitting false claims to the government for payment.<sup>6</sup> Overnight, the *qui tam* provisions of the FCA became the government’s best weapon for combating fraud against the government.<sup>7</sup> Unfortunately, Congress amended the FCA numerous times in an attempt to provide rewards when help was needed, but prevent *qui tam* plaintiffs from obtaining recovery without meaningful contribution to the suit.<sup>8</sup> One of the biggest mistakes occurred in 1943 when Congress limited the filing of *qui tam* suits if they were “based upon information in the possession of the government.”<sup>9</sup> Because this restricted the availability of recoveries, the number of *qui tam* suits dried up immediately and fraud against the government flourished.<sup>10</sup> In fact, from 1943 until 1986, there were only six *qui tam* suits brought per year.<sup>11</sup>

After realizing it had “killed the goose that laid the golden egg,”<sup>12</sup> Congress amended the *qui tam* provisions in 1986 to remove the re-

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1. Joel D. Hesch, *The False Claims Act Creates a “Zone of Protection” That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361, 368–69 (2014) [hereinafter Hesch, *Zone of Protection*]; Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 224 (2012) [hereinafter Hesch, *Breaking the Siege*].

2. Hesch, *Breaking the Siege*, *supra* note 1, at 225 nn.37–39.

3. “*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’” Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

4. 31 U.S.C. §§ 3729–3733 (2012).

5. A “relator” is one who relates the fraud action on behalf of the government. United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 n.7 (1st Cir. 2004) (“A ‘relator’ is ‘[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official.’” (citing BLACK’S LAW DICTIONARY 1289 (6th ed. 1990))).

6. 31 U.S.C. § 3729(a)(1)(A)–(G) (2012).

7. Hesch, *Breaking the Siege*, *supra* note 1, at 232.

8. *Id.* at 230–32 (outlining the various times Congress amended the FCA).

9. *Id.* at 231.

10. *Id.*

11. *Id.* at 232.

12. *Id.* at 231.

striction. This opened the floodgates<sup>13</sup> and the *qui tam* provisions once again became the federal government's primary tool to recover ill-gotten gains.<sup>14</sup> For instance, between 2010 and 2014, the government recouped \$20 billion in taxpayers' dollars using the FCA.<sup>15</sup> During that time period, 70% of all of the government's FCA recoveries were *qui tam* cases.<sup>16</sup> The combination of enlisting federal whistleblowers and allowing the government sufficient time to complete its investigation has worked remarkably well and needs to be protected. Today however, it is not Congress that is tinkering with the FCA. Instead, some courts are reducing the effectiveness of the *qui tam* provisions by inappropriately restricting the amount of time the government is allowed to investigate the *qui tam* allegations.

Congress established a particular protocol for private individuals seeking a whistleblower reward for reporting fraud against the government. Specifically, a whistleblower may not receive a reward for calling a hotline or informally reporting fraud against the government; rather, she must file a *qui tam* complaint under seal and serve it only upon the government.<sup>17</sup> The FCA provides an initial sixty-day period for the government to evaluate the fraud allegations.<sup>18</sup> To obtain longer than sixty days to conduct its investigation, the FCA permits the government to file an *ex parte* application asking the court to keep the case under seal for additional time.<sup>19</sup> These extensions allow the government to continue its investigation of the relator's fraud allegations and make an election to either intervene and take over the suit, or decline and allow the relator to proceed alone.<sup>20</sup> Pursuant to the FCA, the government may make as

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13. *Id.* at 232.

14. *E.g.*, *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010) (“The FCA is the government’s ‘primary litigation tool’ for recovering losses resulting from fraud.”); *Avco Corp. v. U.S. Dep’t of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989) (“The False Claims Act is the government’s primary litigative tool for the recovery of losses sustained as the result of fraud against the government.”).

15. U.S. DEP’T OF JUSTICE, FRAUD STATISTICS—OVERVIEW, OCT. 1, 1987–SEPT. 30, 2014 (Nov. 20, 2014) [hereinafter FRAUD STATISTICS], available at <http://www.taf.org/DOJ-FCA-Statistics-2014.pdf>. In addition, since 1986 and through 2014, the DOJ has recovered \$44.7 billion under the FCA. Of this amount, \$30.2 billion or 67.6% was from *qui tam* cases brought by relators. *Id.*

16. *Id.*

17. 31 U.S.C. § 3730(b)(1), (2) (2012).

18. 31 U.S.C. § 3730(b)(2) (2012).

19. *Id.*

20. 31 U.S.C. § 3730(b)(4) (2012) (“Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—(A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.”).

many requests for extensions as needed, provided a showing of “good cause” supports the requests.<sup>21</sup> Although the FCA does not define good cause, the overall structure and goal of the FCA is geared towards permitting the government sufficient time to use the investigative tools and subpoenas for documents and testimony before making a decision to intervene.<sup>22</sup> These investigative devices are needed because, depending upon the complexity of the allegations, it can take the government several years to complete a fraud investigation.<sup>23</sup>

Despite the importance of an investigation, some courts have refused to grant the government sufficient time to utilize the discovery tools available under the FCA to investigate allegations contained in a *qui tam* complaint. This refusal frustrates the ability of the government to recover a greater portion of the funds lost to fraud. This has the effect of both artificially imposing a shorter statute of limitations and eliminating the use of civil investigative demand (CID)<sup>24</sup> devices, and ultimately defeats the purpose of the FCA, resulting in fraudfeasors improperly keeping billions of dollars in taxpayers’ funds without a resolution on the merits.

As discussed above, the need for whistleblowers is obvious. The need for a full investigation by the government is also just as clear. When the government intervenes in *qui tam* cases, it obtains a recovery 95% of the time.<sup>25</sup> In cases where the government declines to intervene, the relator is permitted to continue alone on behalf of the government, but only obtains recovery in 5% of cases.<sup>26</sup> Therefore, it is imperative that the government be given a full opportunity to elect whether to intervene

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21. 31 U.S.C. § 3730(b)(3) (2012) (“The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera.”).

22. See 31 U.S.C. § 3733 (2012). See also *infra* Part III.A.

23. U.S. GOV’T ACCOUNTABILITY OFFICE, FALSE CLAIMS ACT: INFORMATION ON FALSE CLAIMS ACT LITIGATION 31 (2005), available at <http://www.gao.gov/assets/100/93999.pdf>. As discussed in Part V, a typical fraud investigation lasts three years, while complex investigations take six years, and extremely large or extremely complex cases have lasted eight years.

24. 31 U.S.C. § 3733 (2012). See also *infra* Part III.A. The FCA contains a provision that authorizes the Attorney General to issue Civil Investigative Demands (CIDs) to compel a person or entity suspected of violating the FCA to produce documents, answer written interrogatories, or give oral testimony. 31 U.S.C. § 3733 (a)(1)(A)–(C) (2009). However, a CID may only be issued prior to the government filing its own FCA complaint or intervening in a relator’s *qui tam* complaint—while the *qui tam* case is under seal.

25. JOEL D. HESCH, WHISTLEBLOWING: REWARDS FOR REPORTING FRAUD AGAINST THE GOVERNMENT 103 (2013) [hereinafter HESCH, WHISTLEBLOWING] (“[O]ver 95 percent of whistleblowers receiv[e] rewards in cases where DOJ intervenes.”).

26. *Id.* at 104 (“Over 95 percent of cases DOJ declines, the whistleblower does not receive a reward at all.”).

when a relator files a *qui tam* complaint, as permitted under the FCA. This requires that the government have time to fully investigate the allegations and make an informed decision to pursue the case. Indeed, the FCA permits the government to issue subpoenas for documents and even take deposition testimony as part of its investigation without first obtaining court permission.<sup>27</sup> When the investigation is cut short, the default is that the government will decline the case and rely upon the relator to pursue and prove by herself that the government was defrauded, which is rarely a success. Consequently, when a court denies the government a full investigation, the accused fraudfeasor is de facto allowed to keep the federal funds.

Unfortunately, an increasing number of courts are becoming resistant to granting the government's requests for more time to retain the seal and investigate *qui tam* allegations by improperly imposing a heightened standard for good cause beyond the intent or goals of the FCA.<sup>28</sup> Sadly, the government ends up declining many *qui tam* fraud allegations based on time limits instead of merits.<sup>29</sup> In fact, the government declines nearly 80% of all *qui tam* cases.<sup>30</sup>

There are two problems stemming from courts' improper understanding and application of the FCA's good cause requirement. First, some courts are applying a standard for approving extensions of the seal that is neither correct nor uniform. As a result, the amount of time granted to the government to conduct its investigations varies widely, and is dependent upon which part of the country a federal *qui tam* case is filed or which particular judge is assigned.<sup>31</sup> For instance, in some jurisdictions, courts routinely place *qui tam* cases on administrative hold so that

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27. 31 U.S.C. § 3733(a)(1) (2012) ("Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—(A) to produce such documentary material for inspection and copying, (B) to answer in writing written interrogatories with respect to such documentary material or information, (C) to give oral testimony concerning such documentary material or information, or (D) to furnish any combination of such material, answers, or testimony.").

28. See discussion *infra* Part III.A.

29. As indicated, the government declines 80% of cases. Although the government does not state a reason why it is declining, courts have noted: "The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney." *United States ex rel. Chandler v. Cook Cnty., Ill.*, 277 F.3d 969, 974 n.5 (7th Cir. 2002), *aff'd*, 538 U.S. 119 (2003).

30. Hesch, *Zone of Protection*, *supra* note 1, at 418.

31. See discussion *infra* Part III.A.

these unique cases do not count negatively towards judges as long-pending cases.<sup>32</sup> In those locations, the government can investigate the allegations for many years.<sup>33</sup> Other courts keep the cases on their active docket sheets, but willingly grant years of extension requests, provided the government shows that its investigation remains active and ongoing.<sup>34</sup> Still other courts grant only limited amounts of time, such as between six and eighteen months.<sup>35</sup>

The second problem resulting from a lack of a proper standard is that there is a trend by some courts to drastically restrict the amount of time permitted to investigate complex fraud allegations. At least one court has issued a standing order that seeks to limit most cases to sixty days.<sup>36</sup> The order specifically states that neither informal discovery nor settlement negotiations will be considered sufficient grounds for extending the seal period. The judge further noted that the court will determine, “as commanded by the statute, whether the government has shown ‘good cause.’” However, the judge provided no guidance regarding what constitutes good cause.

The basic concern is that some courts restrict the investigation time so severely that it effectively prevents the government from conducting a proper investigation. Indeed, some courts cut the time so short that it precludes the use of the CIDs.<sup>37</sup> Accordingly, declining to extend the seal until the government has completed its investigation basically results in not only an automatic declination, but also the defendant keeping the taxpayers’ funds without any resolution on the merits.

When a whistleblower does not seek a reward by filing a *qui tam* suit, the only limitation on the government is the FCA’s two-tiered statute of limitations, which provides for a minimum of six years and is extended to ten years if the government files suit within three years of

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32. Both while working for the DOJ and in private practice representing relators, the author was aware of numerous districts where *qui tam* cases were placed on administrative hold upon the request of DOJ during the pendency of its investigation. *See, e.g.*, U.S. *ex rel.* Mallavarapu v. Acadiana Cardiology, LLC, No. CIV.A.04-732, 2010 WL 3896425, at \*16–17 (W.D. La. Aug. 16, 2010).

33. *Id.*

34. *See* discussion *infra* Part III.A.

35. *Id.*

36. Standing Order, *In Re* All Qui Tam Actions Filed Under the Federal False Claims Act Pending on the Docket of United States District Judge Joseph F. Anderson, Jr., 3:13-mc-452-JFA (D.S.C. Nov. 18, 2013), available at <http://law.justia.com/cases/federal/district-courts/south-carolina/scdce/3:2013mc00452/206011/1>.

37. *See supra* note 24.

learning of the fraud allegations.<sup>38</sup> On the other hand, when a relator files a *qui tam* suit, the case remains under seal as long as the court grants the government's motions to extend the seal beyond the initial sixty days upon a showing of good cause. Thus, the question is whether Congress intended to shorten the investigatory time merely because a reward is sought. As the following hypotheticals indicate, it would be illogical for Congress to allow the government to enlist whistleblowers through the *qui tam* reward mechanism, but allow courts to arbitrarily cut off the government's investigatory tools by narrowly interpreting good cause for extensions of the seal, thus severely restricting the amount of time the government has to investigate *qui tam* complaints. The hypotheticals highlight the need for a uniform and correct interpretation of the term good cause for granting additional time to investigate the allegations under seal.

First, suppose a whistleblower calls a hotline to report a hospital committing Medicare fraud. Under the FCA, the government has at least six years (or in some instances ten years) from the date of the false claim to file an FCA complaint.<sup>39</sup> During that time, the government does not need court permission to take informal discovery utilizing the FCA's CID provisions.<sup>40</sup>

Second, suppose instead the same whistleblower with the same facts desired to obtain a reward for reporting the fraud, so she filed a *qui tam* complaint (a prerequisite to obtaining a reward under the FCA). In that situation, the FCA requires a court to keep the case under seal for at least sixty days, and longer upon request and a showing of good cause.<sup>41</sup> During this period, the FCA permits the government to conduct the exact same informal discovery under the CID provisions prior to making a decision to intervene in the *qui tam* complaint, including issuing subpoenas for documents or deposition testimony.<sup>42</sup>

In the first hypothetical, the government has at least six unfettered years from the date of the alleged misconduct to conduct informal discovery without court permission, merely because the whistleblower did

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38. 31 U.S.C. § 3731(b) (2012) ("A civil action under section 3730 may not be brought . . . (1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last."). See discussion *infra* Part V.

39. 31 U.S.C. § 3731(b) (2012).

40. *Id.*

41. 31 U.S.C. § 3730(b)(2) (2012).

42. 31 U.S.C. § 3733 (2012).

not ask for a reward for reporting the fraud.<sup>43</sup> The only difference in the second hypothetical is that the whistleblower wanted a reward, and by law, had to file a *qui tam* suit to be eligible.

The second hypothetical's result may be drastically different depending solely upon where the case is filed due to the different standards being applied to the good cause requirement for extensions of the seal. For instance, if a court too strictly interprets good cause, then the court will likely cut short the government's investigation and limit the government to somewhere between sixty days and eighteen months, which often results in the case being declined based on time limits.<sup>44</sup> On the other hand, if the judge correctly views the good cause element as more of a procedural device to help ensure that the government's investigation is still active or ongoing, then the government is permitted the time it takes to make a decision on the merits instead of declining because of time constraints.

Assume that in the first hypothetical the government spent five years investigating the hotline allegations and an additional eleven months negotiating a settlement resulting in a recovery of \$10 million. In this scenario, the government fully investigated the allegations and even reached a settlement without any court filings or approvals. Assume in the second hypothetical the court denied the government more than eighteen months to investigate the allegations because of the court's definition of good cause. Because the government had not finished its investigation, it was not willing to publically accuse the hospital of Medicare fraud and therefore declined to intervene in the case. Because the relator lacks the resources to fight the hospital in what will be protracted and complex fraud allegations,<sup>45</sup> assume the relator dismisses the action. Thus, in the second scenario, the defendant keeps the \$10 million and there is never any determination regarding the merits of the fraud allegations.

The only difference in the two cases is that the court cut short the government's investigation. Congress did not intend to eliminate the government's ability to utilize the FCA's investigatory subpoena powers by allowing courts to significantly reduce the time available to investigate complex fraud allegations solely because a whistleblower sought a reward and filed a *qui tam* complaint. Indeed, Congress enacted the *qui*

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43. *Id.*

44. See discussion *infra* Part III.A.

45. Hesch, *Zone of Protection*, *supra* note 1, at 402-03 ("[T]he DOJ declines to intervene in over three-fourths of all *qui tam* cases due to lack of resources. Relators also often lack the necessary resources to continue when the DOJ declines a case.").

*tam* provisions to broaden the reach of the FCA and give the government more opportunities to recover more funds lost due to fraud. It would be illogical to view the *qui tam* provisions in such a manner that they curtail the government's investigation.

This Article proposes a standard for determining whether the FCA's "good cause" requirement is satisfied. Part II introduces key provisions of the FCA that provide for extensions to the initial sixty-day seal period. Part III discusses the importance of the seal period. Part IV gathers cases where courts have granted or denied extensions and addresses the inconsistencies between the various courts. Part V proposes a uniform standard for determining good cause when the government requests an extension of the seal to complete its fraud investigation. Specifically, it argues that extensions of the seal should be liberally granted for up to three years for typical fraud allegations. During this period, the government need only show that its investigation remains active and ongoing. After three years, the government can obtain additional extensions of up to three additional years, provided that more time is needed due to the size or complexity of the case, other circumstances requiring more time than a typical fraud investigation, or the government obtaining a partial lifting of the seal. Part VI addresses a related issue regarding the statute of limitations for FCA claims and the "relation back" of the government's intervention to the initial complaint filed by the relator, and explains why Congress did not intend the statute of limitations to be a factor when deciding whether to grant extensions of the seal. Part VII concludes.

## II. GOVERNMENT INTERVENTION IN *QUI TAM* SUITS

The False Claims Act (FCA) was created to allow ordinary citizens to aid in the detection of fraud committed against the government.<sup>46</sup> The *qui tam* statute allows private individuals, known as relators, to file suit on behalf of the United States and recover a percentage of any awarded recovery.<sup>47</sup> Since Congress performed a major overhaul on the False Claims Act in 1986, the Act has become the leading weapon for fighting fraud against the federal government.<sup>48</sup> Following the 1986 amendments, and through 2013, the FCA has led to the recovery of over \$38 billion in taxpayers' dollars.<sup>49</sup> To participate as a relator and have a chance at re-

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46. Hesch, *Breaking the Siege*, *supra* note 1, at 230.

47. *Id.*

48. See discussion *supra* notes 14–16.

49. See *supra* note 15.

covery, the individual must obtain his own attorney and follow the statutory requirements of the FCA.<sup>50</sup>

The FCA makes it a violation to knowingly present, or cause to be presented, a false or fraudulent claim for payment or approval.<sup>51</sup> Relators who suspect fraud has occurred must file a detailed complaint and serve on the government a statement of all material evidence.<sup>52</sup> The FCA requires that the “complaint must be filed under seal,”<sup>53</sup> which means that all records relating to the case must be kept on a secret docket by the clerk of the court. “Copies of the complaint are given only to the United States Department of Justice (DOJ), including the local United States Attorney, and to the assigned judge of the district court.”<sup>54</sup> The *qui tam* complaint remains sealed for a minimum of sixty days,<sup>55</sup> during which time the DOJ investigates the relator’s allegation. Before the seal period expires, the government must either decide whether to intervene, or, for good cause, seek an extension of the seal period.<sup>56</sup> While sixty days is the minimum allotted time for a complaint to remain under seal, the statute contains no limit to how long the case may remain under seal.<sup>57</sup> Rather, the FCA established a process whereby the government must seek extensions beyond sixty days.<sup>58</sup> Once the government has decided whether it will intervene, a court order will be entered to unseal the complaint, which is then served on the defendant.

If the government chooses to intervene, the relator may continue to participate in the case, however the government will do the bulk of the work. If the government does not intervene, the relator may proceed without the aid of the government.<sup>59</sup> However, the government may still

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50. 31 U.S.C. §§ 3729–3733 (2012).

51. *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 248 (4th Cir. 2011) (citing 31 U.S.C. § 3729(a)(1)).

52. 31 U.S.C. § 3730(b)(2) (2012).

53. *Id.*

54. U.S. DEP’T OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS, available at <https://www.doioig.gov/docs/falseclaimsact.pdf> (last visited Dec. 29, 2014).

55. 31 U.S.C. § 3730(b)(2) (2012).

56. 31 U.S.C. § 3730(b)(2), (3) (2012).

57. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.04[B], at 4-166 (3d ed. 2008, 2009-1 Supp.).

58. CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 11.17 (2d ed. 2010 & Supp. 2014).

59. 31 U.S.C. § 3730(c)(3) (2012). In nearly every instance, the government seeks at least one extension.

file a motion to intervene at a later date upon a showing of good cause.<sup>60</sup> Whether the government intervenes has a significant effect on the likelihood of success—in over 95% of cases in which the government intervenes it obtains a recovery. By contrast, in cases where the government declines to intervene, only 5% result in recovery.<sup>61</sup> Thus, it is critical that the government has sufficient time to investigate the relator’s claims before deciding whether to accept or decline the case.

### III. IMPORTANCE OF THE SEAL PERIOD

The seal functions to “allow[] the *qui tam* relator to start the judicial wheels in motion and protect his litigative rights, while allowing the government the opportunity to study and evaluate the relator’s information for possible intervention in the *qui tam* action or in relation to an overlapping criminal investigation.”<sup>62</sup> As such, the seal period is the government’s primary tool to separate the wheat from the chaff without tipping off the defendant.

In addition to allowing the government to investigate the relator’s claims in secrecy, the Fourth Circuit Court of Appeals noted that the seal period serves other functions:

- (1) to permit the United States to determine whether it already was investigating the fraud allegations (either criminally or civilly);
- (2) to permit the United States to investigate the allegations to decide whether to intervene;
- (3) to prevent an alleged fraudster from being tipped off about an investigation; and,
- (4) to protect the reputation of a defendant in that the defendant is named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene.<sup>63</sup>

Thus, the legislature adopted the seal period not only to best serve the interest of detecting fraud against the government, but also to protect the subjects of *qui tam* claims.<sup>64</sup>

Much like a grand jury investigation, the need for secrecy in a *qui tam* investigation contemplates that the relators will share information

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60. *Id.* Under the FCA, if the government intervenes, a relator receives a minimum of 15% and up to 25% of the judgment amount. 31 U.S.C. § 3730(d)(1) (2010). If the government declines to join the suit, the relator receives an even higher amount of 25% to 30%. *Id.* at § 3730(d)(2) (2010).

61. HESCH, WHISTLEBLOWING, *supra* note 25, at 140.

62. United States *ex rel.* Howard v. Lockheed Martin Corp., No. 1:99-CV-285, 2007 WL 1513999, at \*1 (S.D. Ohio 2007) (quoting United States *ex rel.* Lujan v. Hughes Aircraft Co., 67 F.3d 242, 245 (9th Cir. 1995)) (internal quotation marks omitted).

63. Am. Civil Liberties Union v. Holder, 673 F.3d 245, 249–50 (4th Cir. 2011) (citing S. REP. NO. 99-345, at 24–25 (1986)).

64. *Id.*

with the government in a manner that avoids tipping off the targets of the investigation.<sup>65</sup> Not only is a relator authorized to produce inside information to the government, but he must do so in “secrecy.”<sup>66</sup> Because the Attorney General is responsible for investigating both criminal and civil fraud violations of federal laws, whenever the Attorney General receives a copy of a *qui tam* complaint, he shares the complaint with both the civil and criminal divisions of the DOJ.<sup>67</sup> Hence, a person who files *qui tam* is simultaneously reporting potential civil and criminal violations for fraud against the government. Indeed, the Federal Circuit Court of Appeals noted, “the public policy interest at stake[,] the reporting of possible crimes to the authorities[,] is one of the highest order.”<sup>68</sup>

*A. The FCA’s Civil Investigative Demand Provisions Require Sufficient Time to Investigate*

In 1986, Congress overhauled the FCA due to a rise in fraud in the “1980s when the military paid \$600 for toilet seats and \$748 for pliers.”<sup>69</sup> One of the special features added was a section entitled Civil Investigative Demands (CID).<sup>70</sup> The CID provision authorized the Attorney General to issue CIDs to compel a person or entity suspected of violating the FCA to produce documents, answer written interrogatories, or give oral testimony.<sup>71</sup> The purpose of the FCA’s CID provision was “to remove barriers to the Government’s investigation of civil fraud cases prior to the Government’s filing of a case.”<sup>72</sup> Unfortunately, because CIDs had to be issued by the Attorney General and certain other restrictions applied,

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65. United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 743 (D.C. Cir. 1998) (quoting S. REP. NO. 99-345, at 24, reprinted in 1986 U.S.C.C.A.N. at 5289).

66. *Id.*

67. *Am. Civil Liberties Union*, 673 F.3d at 250.

68. *Fomby-Denson v. Dep’t of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001) (citing *W.R. Grace & Co., v. Local Union 759*, 461 U.S. 757, 766 (1983)).

69. Hesch, *Zone of Protection*, *supra* note 1, at 364 (internal quotation marks omitted).

70. 31 U.S.C. § 3733 (2012).

71. “Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—(A) to produce such *documentary material* for inspection and copying, (B) to answer in writing written *interrogatories* with respect to such documentary material or information, (C) to give *oral testimony* concerning such documentary material or information, or (D) to furnish any combination of such material, answers, or testimony.” 31 U.S.C. § 3733 (a)(1)(A)–(C) (2009) (emphasis added).

72. SYLVIA, *supra* note 58, at § 10.70.

they were rarely used.<sup>73</sup> In addition, this new provision stated that a CID must be issued *before* commencing an FCA suit, and it was unsettled whether this meant that it could be used in a *qui tam* action.<sup>74</sup>

In 2009, Congress amended the CID provision of the FCA to remove all of these barriers.<sup>75</sup> In addition to delegating authority to issue CIDs,<sup>76</sup> the 2009 amendments also clarified that CIDs may be issued *after* a *qui tam* case has been filed provided they are utilized *before* the government makes an intervention decision.<sup>77</sup>

The critical point for purposes of this Article is that CIDs must be issued prior to making an intervention decision in a *qui tam* case.<sup>78</sup> Accordingly, Congress intended the seal period to be long enough to enable the government to draft and serve document requests and interrogatories, and take depositions—a process that can take several months.<sup>79</sup> Moreover, the seal period must be long enough for the defendants to respond to CIDs and produce required items; this also can take many months. Finally, the seal period must be long enough to enable the government to utilize the information—another process that can take several more months. It is also common for a defendant to want to discuss the information and allegations with the government before the government intervenes and publicly accuses the defendant of committing fraud against the government. All told, the CID and related investigative process can often take a few years.

Thus, the fact that the FCA contains an initial sixty-day period, followed by the ability to request additional time upon a showing of good cause, is not an attempt to limit an investigation to sixty days or even a few months, but merely represents a process by which the government must periodically show that it is still actively investigating the allegations. Indeed, the 2009 amendments specifically strengthened the availability and use of CIDs, which demonstrates that Congress intended that the government would be provided sufficient time to fully use these tools

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73. *See id.*

74. *Id.*

75. *Id.* *See also* 31 U.S.C. § 3733 (a)(1)(A)–(C) (2009).

76. Prior to the amendment, only the Attorney General could issue a CID. This amendment permitted the Attorney General to delegate to U.S. Attorneys the authority to issue CIDs. 31 U.S.C. § 3733 (a)(1)(A)–(C) (2009). As a result, the use of CIDs has increased.

77. 31 U.S.C. § 3733 (a)(1)(A)–(C) (2009).

78. SYLVIA, *supra* note 58, at § 10.71.

79. *E.g.*, 31 U.S.C. § 3733 (a)(2)(B)(ii) (2009) (the CID for documents must “prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying”); *id.* at § 3733(h)(4) (when taking a CID deposition, the government must provide “a reasonable opportunity to examine and read the transcript” of at least thirty days).

and conduct a complete investigation before making an intervention decision in a *qui tam* case. Again, a CID can only be issued in a *qui tam* case prior to government intervention.<sup>80</sup> It is illogical to read the good cause provision for extending the seal to be a shorter time period than it takes to utilize CIDs authorized in the same statute.

In reality, it takes years for the government to properly investigate fraud allegations. A government report found that “[c]ases in which DOJ intervened took a median of 38 months to conclude and ranged from 4 months to 187 months.”<sup>81</sup> Large, complex, or multijurisdictional cases can require a significantly longer seal period, with many cases requiring that the complaints remain sealed for many years. For instance, a recent large *qui tam* case was kept under seal for eight years. In 2012, GlaxoSmithKline LLC agreed to pay \$2 billion to settle allegations that it violated the FCA by unlawfully promoting certain prescription drugs.<sup>82</sup> The settlement was based upon four *qui tam* suits, the first of which was filed in 2003, and they were each combined into one complaint when the government intervened in October 2011, amounting to a seal of eight years.<sup>83</sup> Other large cases have been kept under seal for five or six years. For instance, a *qui tam* case filed in 2007<sup>84</sup> remained under seal until May 2013, when Ranbaxy Laboratories Ltd. agreed to settle the *qui tam* case for \$350 million.<sup>85</sup> In 2012, the government consolidated, unsealed, and settled four *qui tam* suits, the first of which was filed five years prior, against Abbott Laboratories pursuant to a global FCA settlement in the amount of \$800 million.<sup>86</sup> In 2009, the government asked to unseal a *qui tam* case filed five years prior and announced an FCA settlement with

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80. SYLVIA, *supra* note 58, at § 10.71.

81. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-320R, INFORMATION ON FALSE CLAIMS ACT LITIGATION 3 (2006), available at <http://www.gao.gov/assets/100/93999.pdf>.

82. *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data*, U.S. DEP'T OF JUSTICE (July 2, 2012), <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>.

83. *See id.*; GLAXOSMITHKLINE SETTLEMENT FACT SHEET, U.S. DEPARTMENT OF JUSTICE (2012), available at [http://www.justice.gov/sites/default/files/usao-ma/legacy/2012/10/09/Settlement\\_Fact\\_Sheet.pdf](http://www.justice.gov/sites/default/files/usao-ma/legacy/2012/10/09/Settlement_Fact_Sheet.pdf).

84. The *qui tam* was filed in April 2007. GSK SETTLEMENT AGREEMENT, U.S. DEP'T OF JUSTICE (2012), available at <http://www.justice.gov/iso/opa/resources/692013513142957691677.pdf>.

85. *Generic Drug Manufacturer Ranbaxy Pleads Guilty and Agrees to Pay \$500 Million to Resolve False Claims Allegations, cGMP Violations and False Statements to the FDA*, U.S. DEP'T OF JUSTICE (May 13, 2013), <http://www.justice.gov/opa/pr/generic-drug-manufacturer-ranbaxy-pleads-guilty-and-agrees-pay-500-million-resolve-false>.

86. *See Abbott Labs to Pay \$1.5 Billion to Resolve Criminal & Civil Investigations of Off-label Promotion of Depakote*, U.S. DEP'T OF JUSTICE (May 7, 2012), <http://www.justice.gov/opa/pr/2012/May/12-civ-585.html>; ABBOTT LABS SETTLEMENT AGREEMENT, U.S. DEPARTMENT OF JUSTICE (2012), available at [http://www.justice.gov/sites/default/files/opa/legacy/2012/05/07/Settlement\\_Agreement.pdf](http://www.justice.gov/sites/default/files/opa/legacy/2012/05/07/Settlement_Agreement.pdf).

Quest Diagnostics in the amount of \$302 million.<sup>87</sup> In 2004, the first of nine *qui tam* suits was filed against Pfizer, Inc., all of which were consolidated and unsealed when the government announced a global FCA settlement five years later in the amount of \$1 billion.<sup>88</sup> In addition, this Article discusses numerous other cases where the seal was extended between four and nine years.<sup>89</sup>

In short, the actual investigation period for cases in which the government intervenes can take three years for standard cases and six years for large and complex cases, and even as much as eight years in a rare situations.<sup>90</sup>

### *B. Governmental Agencies' Procedural Processes Take Additional Time*

Leaving aside the time it takes to conduct the factual investigation discussed above, the amount of time it takes for the government to make an intervention decision is also lengthened by the internal procedural processes of the Attorney General's office and the various affected governmental agencies. These procedural processes are time consuming and take months to conclude, regardless of the complexity of the allegations. The FCA requires that the relator serve a copy of the *qui tam* complaint upon both the Attorney General<sup>91</sup> and the U.S. Attorney's Office

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87. *Quest Diagnostics to Pay U.S. \$302 Million to Resolve Allegations That a Subsidiary Sold Misbranded Test Kits*, U.S. DEP'T OF JUSTICE (Apr. 5, 2009), <http://www.justice.gov/opa/pr/quest-diagnostics-pay-us-302-million-resolve-allegations-subsidiary-sold-misbranded-test-kits>.

88. PFIZER SETTLEMENT AGREEMENT, U.S. DEP'T OF JUSTICE (2009), available at <http://www.justice.gov/usao/ma/news/Pfizer/Pfizer%20Settlement%20Agreement.pdf>.

89. See *infra* notes 114, 150, 151, 159, 162, and 164.

90. The context of allowing the government sufficient time to conduct a full investigation is also shaped by the Federal Rules of Civil Procedure. Courts have universally held that FCA complaints must satisfy the strict pleading requirements of Rule 9(b), which requires the complaint to "state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). Courts universally apply the heightened pleading requirements of Rule 9(b) to FCA cases, and frequently dismiss *qui tam* cases based upon varying strict standards. See Charis Ann Mitchell, Comment, *A Fraudulent Scheme's Particularity Under Rule 9(B) of the Federal Rules of Civil Procedure*, 4 LIBERTY L. REV. 337 (2010). This heightened standard of pleading requires a more thorough investigation of a relator's claims. Following a thorough investigation, the government may need to amend the complaint to ensure that the pleading standard is met. Sixty days is simply not a sufficient time period to investigate possible fraud claims and plead each with sufficient particularity. This means that with respect to complex fraud allegations, which typically involve hundreds of false claims over many years, the complaint must state the who, what, why, when, and how of each fraud allegation. See *id.* at 356. Thus, a thorough investigation is needed.

91. Hesch, *Breaking the Siege*, *supra* note 1, at 265 ("[T]he Attorney General [is] the only government official with authority to compromise an FCA case or common-law fraud claim.") The Attorney General and his delegated agents have the exclusive authority to enforce the FCA and to prosecute claims for fraud on the government. See 31 U.S.C. § 3730 (2012) (stating that FCA claims can only be brought by the Attorney General or a private person suing in the name of the United States); see also 31 U.S.C. § 3711(b)(1) (2008) (providing that agencies are permitted to settle and

(USAO) where the complaint was filed.<sup>92</sup> By law, the Attorney General is the only government official with authority to settle an FCA case.<sup>93</sup> However, the Attorney General delegated authority to certain attorneys in DOJ offices in Washington, D.C.; these offices are the Civil Division, Commercial Litigation Branch, Fraud Division (DOJ Civil Frauds), and in cases under certain dollar thresholds, to USAOs nationwide.<sup>94</sup>

Once a *qui tam* complaint is served on the Attorney General, the DOJ Civil Frauds attorney assigned to the case will contact the assigned Assistant U.S. Attorney (AUSA) to coordinate the particular roles of each office.<sup>95</sup> Cases under \$1 million are typically delegated to the USAO.<sup>96</sup> In most cases where the allegations exceed \$1 million, the case is jointly handled between DOJ Civil Frauds and the USAO.<sup>97</sup> The DOJ Civil Frauds attorney and the AUSA (collectively “DOJ attorneys”) review the *qui tam* complaint and the relator’s statement of material evidence in support.<sup>98</sup> Next, “the DOJ attorneys will contact the affected

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compromise certain claims but not fraud claims); 28 C.F.R. § 0.45(d) (2008) (assigning common law fraud claims to the Assistant Attorney General, Civil Division). The Assistant Attorney General may delegate authority to certain attorneys in the DOJ offices in Washington, D.C., and in cases with certain dollar thresholds to the USAO nationwide. 28 C.F.R. pt. 0, subpt. Y, app. (2011).

92. The FCA requires: “A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.” 31 U.S.C. § 3730(b)(2) (2012). Rule 4 requires service upon both the U.S. Attorney’s Office and the Attorney General. FED. R. CIV. P. 4(i)(1)(A)–(B).

93. Hesch, *Breaking the Siege*, *supra* note 1, at 265. See 31 U.S.C. § 3730 (2012) (stating that FCA claims can only be brought by the Attorney General or a private person suing in the name of the United States); see also *id.* § 3711(b)(1) (providing that agencies are permitted to settle and compromise certain claims but not fraud claims); 28 C.F.R. § 0.45(d) (2011) (assigning common law fraud claims to the Assistant Attorney General, Civil Division).

94. 28 C.F.R. pt. 0, subpt. Y, app. (2011) (assigning FCA cases where damages will not exceed \$1,000,000 to the USAO).

95. *Id.* at § 1(b) (delegating FCA cases where damages will not exceed \$1,000,000 to the USAO and allowing the USAO to accept settlement offers “in which the gross amount of the original claim does not exceed \$5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed \$1,000,000”).

96. *Id.*

97. HESCH, WHISTLEBLOWING, *supra* note 25, at 105. (“Depending upon the size and complexity, the case will be placed into one of four categories: personally handled by DOJ Civil Frauds[;] jointly handled between both offices[;] primarily assigned to the U.S. Attorney’s Office and monitored by DOJ Civil Frauds[;] or specifically delegated to the U.S. Attorney’s Office.”); see also *id.* (“The two offices will collectively decide the best handling on a case-by-case basis. However, under a civil directive, cases with damages under \$1 million are routinely delegated to the U.S. Attorney’s Offices, with assistance being freely provided by DOJ Civil Frauds upon request. A case over \$1 million can be handled by the U.S. Attorney’s Office and monitored by DOJ Civil Frauds. But expect DOJ Civil Frauds to remain actively involved in the larger and more complex cases. In all instances where a case is not delegated, DOJ Civil Frauds must be involved in approving intervention, settlement, or the amount of a whistleblower reward.”).

98. *Id.*

government[] agency where the fraud occurred in order to [apprise] it of the allegations, solicit input, and request investigative and auditing support.”<sup>99</sup> In fact, before the DOJ attorneys can make a formal intervention decision, they must seek input and a recommendation from the affected government agency, such as the Centers for Medicaid and Medicare Services or the Department of Defense.<sup>100</sup> “During this agency review process, the agency will enlist a myriad of its own program officials to evaluate the case, such as quality assurance representatives or other knowledgeable witnesses.”<sup>101</sup>

Finally, once the DOJ attorneys obtain a recommendation from the affected agencies, they must obtain formal approval from DOJ officials possessing actual authority to approve a recommendation.<sup>102</sup> To obtain formal approval, DOJ attorneys prepare a memorandum, which is reviewed by a supervisor and signed by the Director of the Civil Fraud Section. After the DOJ Attorney drafts a memo, it typically takes three to five weeks for DOJ to formally sign off on an intervention memo. In sum total, even if the allegations lack merit or were easy to investigate, it can take three to five weeks simply for the procedural processes to occur. This period is in addition to the time required to conduct the factual investigation, which can take up to three years for standard cases and six years or longer for large and complex cases.

*C. The Legislative History is Not Controlling and Fails to Account for True Investigative Efforts and Time*

Within the FCA’s legislative history, a Senate Report suggested that the initial sixty-day period should be sufficient time to conduct an investigation.<sup>103</sup> Specifically, it stated,

The Committee intends that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision. Consequently, “good cause” would not be established merely

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99. *Id.*

100. *Id.*

101. *Id.*

102. The author was a DOJ attorney for over fifteen years, and therefore has firsthand experience with the internal process of seeking government approval for intervening in *qui tam* cases.

103. S. REP. NO. 99-345 (1986), *reprinted in* 1986 U.S.C.A.N. 5266.

upon a showing that the Government was overburdened and had not had a chance to address the complaint.<sup>104</sup>

However, history and the reality of fraud investigations have proved this generic assumption incorrect. Indeed, there are multiple reasons why these few statements in the legislative history should not be given weight. First, as shown above, the actual factual investigation can take up to three years for standard cases and six years (or longer) for large and complex cases. Second, the FCA's CID provisions, which were strengthened by a 2009 amendment, can only be used during the seal period and would be effectively eliminated by a sixty-day limit on investigation.<sup>105</sup> Third, the procedural process of obtaining authority to make an election decision takes three to five weeks, which is in addition to the time required for the factual investigation. Fourth, the heightened pleading requirements of Rule 9(b) applies to *qui tam* cases, which also demands a more complete investigation than is possible in such a short amount of time.<sup>106</sup>

Finally, the assumptions in the legislative history that such a short amount of time would be sufficient should also be ignored because they are simply incorrect predictions based upon a lack of information. Indeed, by 1986, at the time of the Senate Report, very few *qui tam* cases had been filed under the FCA. In fact, Deputy Assistant Attorney General Stuart Schiffer estimated that before the proposed amendments to the FCA, DOJ had recovered \$60 million for all FCA cases.<sup>107</sup> The 1986 amendments sparked drastic change in FCA recovery. The differences in the size and complexity of *qui tam* cases would start and continue to grow steadily until today. The total *qui tam* recoveries during the first five years of the new FCA, 1987 through 1991, amounted to \$128 million, which was more than double the preamendment history of the FCA.<sup>108</sup> The upward trend continued each year, culminating in settlements of over \$14 billion for *qui tam* cases for the five-year period of

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104. *Id.* at 24–25.

105. See 31 U.S.C. § 3733 (a)(1)(A)–(C) (2009).

106. See FED. R. CIV. P. 9(b).

107. *False Claims Reforms Act: Hearing on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 28 (1985) (statement of Stuart Schiffer, Deputy Assistant Attorney General, Civil Division, U.S. Dep't of Justice), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2014/03/30/hear-j-99-52-1985.pdf>. In addition, as stated earlier, from 1943 until 1986, there were only six *qui tam* suits brought per year. See source cited *supra* note 11 and accompanying text.

108. See FRAUD STATISTICS, *supra* note 15. Not surprisingly, there were no recoveries during 1987, which was the first year after the 1986 amendments, and only \$2 million recovered in 1988, because of the time it takes to investigate and settle fraud cases. *Id.*

2010 through 2014.<sup>109</sup> Today, the average *qui tam* case now exceeds \$1 million, with seventy-five individual cases exceeding \$100 million, thirteen exceeding \$500 million, and four exceeding \$1 billion.<sup>110</sup>

Needless to say, it takes considerably more time to investigate today's larger and more complex cases. Therefore, the concept of good cause cannot remain stagnant or be dependent upon the comments of a few congressmen in 1986 regarding what they predicted to be an appropriate amount of time to investigate allegations of fraud against the federal government. If anything, good cause must expand with the circumstances facing the government today, which includes a staggering estimate that 10% of all government spending is being lost to fraud.<sup>111</sup> Investigating and recouping even a fraction of the massive fraud that is taking place can hardly be achieved in sixty days or even six months. A particular fraudfeasor alleged to be cheating the government out of tens of millions of dollars today should not be allowed to escape a full investigation merely because in 1986 the size and complexity of cases were a mere fraction of what they are today. Fortunately, Congress had the wisdom to place within the FCA statute itself a "good cause" standard rather than a fixed amount of time so that the government can complete its investigations based upon the context and circumstances of each individual case.<sup>112</sup>

The next Part reviews the cases in which courts have addressed the length of time a *qui tam* case should remain under seal, and points out how the lack of a uniform or statutory-based standard has resulted in vastly different and often incorrect rulings. Thereafter, Part V of this Article proposes a standard for good cause based upon the statutory language of the FCA and its purposes and goals.

#### IV. EXTENSIONS GRANTED FOR GOOD CAUSE

While the FCA permits extensions of the investigatory seal period for "good cause," it does not specify the standard by which good cause is to be measured. As such, the term has been open for interpretation by courts and the meaning drastically varies across jurisdictions. Many courts freely grant long extensions lasting many years, while a few are

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109. *Id.*

110. *Top False Claims Act Cases by Civil Award Amount*, TAXPAYERS AGAINST FRAUD EDUC. FUND, <http://taf.org/general-resources/top-100-fca-cases> (last visited Jan. 2, 2015).

111. Hesch, *Zone of Protection*, *supra* note 1, at 368–69; Hesch, *Breaking the Siege*, *supra* note 1, at 224.

112. See 31 U.S.C. § 3730(b)(3) (2012).

beginning to refuse to grant any extensions.<sup>113</sup> Often, even the courts that grant liberal extensions do so without ever defining good cause or particularizing the specific reasons the extensions were granted.<sup>114</sup> The following sections describe cases that have granted or denied requests for extensions of time.

The United States Supreme Court has never addressed the standard for granting extensions to the seal period. Additionally, no circuit court of appeals has squarely addressed or defined what constitutes “good cause” for the government to extend the seal period. To better understand the problem, the cases discussing the extension of the seal period are discussed below.

#### *A. Early Court Responses to Requests to Extend the Seal*

In 1991, the District Court for the Northern District of Illinois became the first to address what may constitute good cause to extend the seal period.<sup>115</sup> In *U.S. ex rel. Kalish v. Desnick*, the government sought an extension to the sixty-day seal period for an investigation that required coordinated efforts with the Department of Health and Human Services and the Office of the Inspector General.<sup>116</sup> The initial extension request stated that additional time was needed to facilitate deliberations between the agencies regarding the relator’s allegations.<sup>117</sup> Based on the government’s request, the court denied the request for extending the seal period, finding it “too lacking in specifics to show good cause for an extension.”<sup>118</sup> Relying upon the 1986 legislative history, the court stated that the extensions “require more than a showing that the government

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113. *United States ex rel. Martin v. Life Care Ctrs. of Am., Inc.*, 912 F. Supp. 2d 618, 626 (E.D. Tenn. 2012) (“[T]he Government is put **ON NOTICE** that, in all future *qui tam* proceedings under the False Claims Act, the Court will expect the Government to provide notice regarding its intervention within the statutorily mandated 60-day period.” (emphasis in original)).

114. *See, e.g.*, *United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1325 (M.D. Fla. 2001) (seal in place for six years); *United States ex rel. Franklin v. Parke-Davis*, 147 F. Supp. 2d 39, 43 (D. Mass. 2001) (seal in place for almost four years); *United States ex rel. Singh v. Bradford Reg’l Med. Ctr.*, Civil No. 04–186 Erie, 2007 WL 1576406, at \*1 (W.D. Pa. May 31, 2007) (government obtained four extensions); *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006) (under seal for eight years); *United States ex rel. Yannacopolous v. Gen. Dynamics*, 457 F. Supp. 2d 854, 857 (N.D. Ill. 2006) (under seal for seven years).

115. *United States ex rel. Kalish v. Desnick*, 765 F. Supp. 1352, 1355 (N.D. Ill. 1991).

116. *Id.* at 1353–54.

117. *Id.*

118. *Id.* at 1354.

had been unable to address the complaint.”<sup>119</sup> As such, the court ordered that the complaint be unsealed.<sup>120</sup>

On motion for reconsideration, the government filed a more specific motion, informing the court that the relator had only recently provided the DOJ with the critical statement of material evidence.<sup>121</sup> As such, the government investigation would require additional time.<sup>122</sup> However, the court found that the motion still lacked sufficient facts to show good cause to keep the case documents sealed.<sup>123</sup> This case was the first to illustrate that courts have very little guidance for determining whether extension requests establish good cause.

A few years later, in 1994, the Fourth Circuit Court of Appeals faced the issue of whether the government’s failure to comply with the sixty-day seal period, subject to extensions for good cause, was a jurisdictional bar.<sup>124</sup> The district court had granted eight extensions of the seal for a total of twenty-one months prior to the government intervening.<sup>125</sup> Neither the court, nor the defendant, argued that twenty-one months was too long a time period. Rather, the defendant moved to dismiss the case based upon the fact that the government had missed two of the eight deadlines before filing motions for extensions. The defendant argued that the sixty-day timetable and any extensions granted were jurisdictional requirements and, therefore, once the government failed to timely intervene, it was barred from doing so at a later point.<sup>126</sup>

On appeal of the dismissal decision, the Fourth Circuit noted that the enactment of § 3730(b)(3) was not to ensure “that the government should be prevented from abusing the extension privilege, but rather that, because the intervention decision may at times require substantial, time-consuming investigation, the government should not be bound in all cases to a sixty-day period in deciding whether to intervene in *qui tam* actions.”<sup>127</sup> The court further noted that “the public is best served by placing with the government the ‘primary responsibility for prosecuting [false claims] action[s].’”<sup>128</sup> As such, the Fourth Circuit determined that

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119. S. REP. NO. 99-345, at 24–25 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5289–90, Appendix B-2.

120. *Kalish*, 765 F. Supp. at 1354.

121. *Id.* at 1354–55.

122. *Id.*

123. *Id.* at 1356–57. The court did, however, find that because of the late filing of the SME, the government had additional time to decide whether to intervene after the seal was lifted. *Id.*

124. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994).

125. *Id.* at 1341.

126. *See id.* at 1342.

127. *Id.* at 1345.

128. *Id.* at 1346 (emphasis omitted).

the case was improperly dismissed.<sup>129</sup> Just one year later, a case out of the Eastern District of Missouri was permitted to remain under seal for nearly two full years.<sup>130</sup>

District courts in California and Louisiana also faced the issue of how long a case could remain under seal in the late 1990s.<sup>131</sup> In *United States ex rel. Costa v. Baker & Taylor, Inc.*, the government requested an additional extension of the seal on a *qui tam* complaint that had been granted extensions and remained under seal for nearly eighteen months. The Northern District of California, however, improperly balanced the government's interest in extending the seal against the interest of the defendant in receiving notice of the claim and refused to allow the government additional extensions of the seal period.<sup>132</sup> In so doing, the court noted that "good cause" is a substantive requirement that can "only [be] satisf[ied] by stating a convincing rationale."<sup>133</sup> Unfortunately, the court provided no guidance regarding what might constitute a sufficiently convincing rationale. The court also ignored several justifications offered by the government for an extension—including an ongoing criminal investigation, insufficient time to make a decision, and interference with settlement negotiations—before ultimately holding that the government had not met its burden of showing good cause.<sup>134</sup> By denying the extension without properly evaluating good cause, the court essentially eliminated the statutory provision for extending the seal period.

In similar fashion, a district court in Louisiana erroneously refused to grant further extensions after one year and eight months.<sup>135</sup> The court was responding in frustration, rather than applying a rule based upon statutory intent, because the government had missed deadlines under which it had already agreed to make a decision.<sup>136</sup>

### *B. Mixed Treatment of the Standard During the Next Decade*

In 2000, the District Court for the District of New Mexico permitted several extensions of the seal period in *U.S. ex rel. Downy v. Corn-*

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129. *Id.* at 1347.

130. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 902 F. Supp. 189, 190 (E.D. Mo. 1995).

131. *United States ex rel. LaCorte v. Smithkline Beecham Clinical Labs., Inc.*, No. CIV. A. 97-0942, 1998 WL 840012, at \*1 (E.D. La. Nov. 121998); *United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1190 (N.D. Cal. 1997).

132. *Costa*, 955 F. Supp. at 1190.

133. *Id.* at 1191.

134. *Id.* at 1190-92.

135. *LaCorte*, 1998 WL 840012 at \*2.

136. *Id.*

*ing, Inc.*<sup>137</sup> The government ultimately declined intervention, and the relator continued to pursue the case individually.<sup>138</sup> After the case was served on the defendants, the defendants moved to have the complaint dismissed.<sup>139</sup> One of the defendants' challenges was that the statute of limitations was not tolled until the complaint became unsealed.<sup>140</sup> In discussing this argument, the court noted that such an approach would improperly "pressure the government to act immediately," rather than request the extensions expressly permitted by the FCA.<sup>141</sup> Acknowledging that this move may be a favorable policy for defendants, the court found that the statute and legislative history do not indicate that Congress intended this result.<sup>142</sup> The court also recognized that the rationale for sealing an FCA complaint is similar to the rationale for sealing criminal indictments.<sup>143</sup> In 2001, multiple courts permitted cases to remain sealed for several years as the government investigated violations of the FCA.<sup>144</sup>

In 2002, a state court was asked to interpret "good cause" under the California version of the FCA, which permitted the State to "dismiss the action for good cause notwithstanding the objections of the *qui tam* plaintiff if the *qui tam* plaintiff has been notified . . . of the motion and the court has provided the *qui tam* plaintiff with an opportunity to oppose the motion and present evidence at a hearing."<sup>145</sup> The court began by noting that it is not unusual for a statute not to define the term "good cause."<sup>146</sup> Rather, "[i]t usually falls to the courts to establish the boundaries of good cause," for the "concept is relative and depends on all the circumstances."<sup>147</sup> This position reinforces the problems that exist as a result of the current statute's dependence on a finding of the amorphous "good cause" standard.

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137. *United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160, 1162 (D.N.M. 2000).

138. *Id.*

139. *Id.* at 1163.

140. *Id.* at 1170–71.

141. *Id.* at 1171.

142. *Id.*

143. *Id.*

144. *See United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1328 n.16 (M.D. Fla. 2001) (seal in place for six years); *United States ex rel. Franklin v. Parke-Davis*, 147 F. Supp. 2d 39, 43 (D. Mass. 2001) (seal in place for over three years); *United States ex rel. Goodstein v. McLaren Reg'l Med. Ctr.*, 97-CV-72992-DT, 2001 WL 34091259, at \*1 (E.D. Mich. Nov. 12, 2001) (seal in place for three years).

145. *Laraway v. Sutro & Co., Inc.*, 116 Cal. Rptr. 2d 823, 829–30 (2002). The court noted that the federal FCA did not include the "good faith" language for dismissing an FCA case over the objection of a relator. *Id.* at 830. Nevertheless, this discussion of the definition of good faith is instructive.

146. *Id.* at 829.

147. *Id.* at 830.

The California court went on to state that good cause “may be based on any matter relevant to the determination.”<sup>148</sup> The court concluded that as a general rule, “‘good cause’ includes reasons that are fair, honest, in good faith, not trivial, arbitrary, capricious, or pretextual, and reasonably related to legitimate needs, goals, and purposes.”<sup>149</sup> This analysis illustrates a broad spectrum of possible motives that can meet the good cause standard.

In the following years, several cases were permitted to remain under seal for lengthy periods of time. For instance, in Massachusetts, the complaint in *United States ex rel. Health Outcomes Technologies v. Hallmark Health Systems, Inc.* was kept under seal for eight years.<sup>150</sup> In the Second Circuit, the complaint in *United States v. Baylor University Medical Center* was kept under seal for eight years,<sup>151</sup> as a result of sixteen separate requests.<sup>152</sup> The district court granted these motions because the case involved complex interpretation of Medicare laws that had undergone significant changes during the seal period.<sup>153</sup> After unsealing the case, the defendants argued that the statute of limitations had run because the government’s intervention did not relate back to the filing by the relator.<sup>154</sup> After a spate of similar motions to dismiss, the issue of relation back was eventually mooted by the 2009 amendments to the FCA because Congress mandated that relation back must occur.<sup>155</sup>

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148. *Id.*

149. *Id.*

150. *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 349 F. Supp. 2d 170, 172 (D. Mass. 2004).

151. *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006). The defendant did not argue that “good cause” was not satisfied and the court did not address whether eight years was too long; rather, the defendant argued that the government’s intervention should not relate back to the filing of the relator’s *qui tam* complaint. *Id.* at 267.

152. *Id.* at 266.

153. *Id.*

154. *Id.* at 267. After the government filed complaints-in-intervention, the defendants moved to dismiss the claims based upon the statute of limitations. *Id.* The district court dismissed claims unrelated to the FCA, but determined that the FCA claims were proper because “the controlling date for statute-of-limitations purposes was the date of the original *qui tam* complaint, and all claims had accrued within the applicable limitations period of that original complaint.” *Id.* On appeal, the Second Circuit reversed the decision of the district court ordering dismissal of the FCA claims. *Id.* at 268. The court reasoned that the statute was not yet tolled until the government elected to intervene. The court also determined that the complaints-in-intervention did not “relate back” to the relator’s prior *qui tam* complaint, which was filed eight years earlier. *Id.* at 270. Since the 2009 amendments to the FCA, Congress has mandated that relation back must occur. As such, the eight-year seal period would not interfere with the validity of the government’s claims today.

155. See *infra* Part VI. The FCA’s statute of limitations does not affect the good cause decision.

In 2006, the Northern District of Illinois retained a relator's complaint for over seven years.<sup>156</sup> The court reasoned that “[i]n FCA cases, it is appropriate to deny a motion to unseal a court file if unsealing would disclose confidential investigative techniques, reveal information that would jeopardize an ongoing investigation, or injure non-parties.”<sup>157</sup> Such materials include documents that provide “some substantive details regarding the government’s methods of investigation.”<sup>158</sup> In the same year, the Northern District of California upheld the seal in another FCA case for nearly five years.<sup>159</sup>

In 2007, the courts continued to grant necessary extensions of the seal period. The Western District of Washington granted “repeated” applications to the court to enlarge the seal period.<sup>160</sup> This “lengthy investigation ultimately resulted in [the United States’] decision to intervene and in the filing of a joint stipulation of dismissal in settlement of all civil claims.”<sup>161</sup> That same year, the Southern District of Ohio allowed a case to remain fully under seal for over four years,<sup>162</sup> and the Western District of Pennsylvania granted each of the government’s five requests for extensions (amounting to some ten months) prior to making a decision to decline.<sup>163</sup> That same year, the District of Massachusetts permitted a complaint to remain under seal for over nine years.<sup>164</sup> There, the

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156. *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 457 F. Supp. 2d 854, 857 (N.D. Ill. 2006).

157. *Id.* at 858.

158. *Id.* See also *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 930 (10th Cir. 2005) (seal extended for two years; the issue on appeal did not address the length of the seal period, but centered around the power of the government to dismiss a case after declining to intervene).

159. *United States ex rel. Lee v. Horizon W., Inc.*, No. C 00–2921 SBA, 2006 WL 305966, at \*1 (N.D. Cal. Feb. 8, 2006).

160. *United States ex rel. Erickson v. Univ. of Wash. Physicians*, 339 F. Supp. 2d 1124, 1125 (W.D. Wash. 2007).

161. *Id.*

162. *United States ex rel. Howard v. Lockheed Martin Corp.*, No. 1:99-CV-285, 2007 WL 1513999 (S.D. Ohio May 22, 2007).

163. *United States ex rel. Singh v. Bradford Reg’l Med. Ctr.*, Civil No. 04–186 Erie, 2007 WL 7705584 (W.D. Pa. June 6, 2007). There, the court noted that the seal needed to be extended in order for the government to obtain additional information needed to make an intervention decision. *Id.* at \*3. Due to the government’s diligent efforts to investigate and the complexity and extent of the allegations, the court found that good cause existed for extending the seal. *Id.* at \*4.

164. *In re Pharm. Indus. Average Wholesale Price Litig.*, 498 F. Supp. 2d 389, 392 (D. Mass. 2007). Once unsealed, the defendants moved to dismiss the case, claiming it was time barred by the statute of limitations. *Id.* at 393. Relying on *United States v. St. Joseph’s Reg’l Health Ctr.*, 240 F. Supp. 2d 882 (W.D. Ark. 2002), and *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006), the defendants claimed that the statute was not tolled until the government filed its complaint in intervention, and that the complaint did not relate back to the relator’s *qui tam* complaint filed nine years earlier. *In re Pharm. Indus.*, 498 F. Supp. at 395–99. However, the court dismissed this argument, noting that “[t]he unique structure of the FCA supports the government’s position that

defendant challenged the sufficiency of the initial complaint, claiming that the government's failure to diligently investigate the claims permitted the removal of the seal.<sup>165</sup> While the court recognized that a nine-year seal period is not typical, the court also noted that the defendant failed to provide evidence that the government acted in bad faith or in a prejudicial manner.<sup>166</sup> Instead, the government presented evidence that the defendants were aware of the litigation early on and took efforts to convince the government not to intervene in the case, potentially delaying the ultimate decision.<sup>167</sup> As such, the court found that the extensions were neither improper nor prejudicial.<sup>168</sup>

In 2008, one judge in the Northern District of Alabama demonstrated particular confusion over the confines of the seal period.<sup>169</sup> The judge ordered that the FCA mandates that the government must make a decision regarding intervention during the initial sixty-day period.<sup>170</sup> The judge opined that any extensions granted for good cause apply to the seal period only, not to the time to make the decision about intervention.<sup>171</sup> This case has not been followed and has been recognized as a misinterpretation of law by FCA experts.<sup>172</sup>

Three years later, in 2011, one *qui tam* case in the District of Maryland remained under seal for three and a half years.<sup>173</sup> In another case in the District of South Carolina, the court granted nineteen extension requests before it said that no more extensions would be granted in the case.<sup>174</sup>

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the government's complaint should be treated as an amended complaint that relates back to the relator's complaint under Rule 15(c)(1).” Again, the issue of tolling became moot by the 2009 amendments to the FCA. See discussion *supra* at text accompanying notes 70–78.

165. *In re Pharm. Indus.*, 498 F. Supp. 2d at 398–99.

166. *Id.* at 399.

167. *Id.*

168. *Id.*

169. *United States ex rel. Law v. Spurlock*, 582 F. Supp. 2d 1350, 1352 (N.D. Ala. 2008).

170. *Id.*

171. *Id.*

172. SYLVIA, *supra* note 58, at § 11.17.

173. *United States ex rel. Rostholder v. Omnicare, Inc.*, 799 F. Supp. 2d 547 (D. Md. 2011).

174. *United States ex rel. Knight v. Reliant Hospice, Inc.*, No. 3:08–3724–CMC, 2011 WL 1321584 (D.S.C. Apr. 4, 2011). In addition, in determining whether to allow the government to intervene at a later date following an initial denial of intervention, the Northern District of Alabama has considered a variety of factors, including when the government determined that the alleged fraud was of great magnitude, whether there was discovery of additional evidence revealed through an unrelated investigation, and whether intervention would protect the interest of the relator. See *United States v. Aseracare, Inc.*, No. 2:12-cv-0245-KOB, 2012 WL 5308779 (N.D. Ala. 2012).

*C. A Few Recent Cases Narrowly Addressing Extension Requests*

Unfortunately, some courts have recently disregarded the extension provision provided in the FCA, and at least one court has intimated that sixty days should be viewed as the maximum time allowed to investigate *qui tam* claims.<sup>175</sup> In 2012, a judge in the Eastern District of Tennessee issued a ruling putting the government on notice that, going forward, *qui tam* proceedings would be sealed only for “the statutorily mandated sixty-day period.”<sup>176</sup> The judge acknowledged the statute’s good cause requirement, but stated that previous extensions of the seal period were “an error the Court does not intend to repeat.”<sup>177</sup> The decision was reached despite the fact that all the parties had been in favor of keeping the seal in place for the prior four years, and were now in favor of an additional extension.<sup>178</sup> In fact, the news media was the driving force for lifting the seal.<sup>179</sup>

After the Tennessee district court rejected any additional extensions, it proceeded to articulate a good cause standard that is inconsistent with the standard drafted by the legislature: “The court will expect [the government] to delineate a clear rationale for the extension[, which] . . . will be met with significant scrutiny—allegations regarding a lack of resources or manufactured complexity simply will not suffice.”<sup>180</sup> In so ruling, the court essentially created a strict scrutiny standard for the good cause requirement. This is simply not what Congress intended.

Equally troubling, and most recently, a judge in the District of South Carolina issued a standing order limiting the vast majority of cases to the sixty-day seal period.<sup>181</sup> The court expressed that it was displeased that several of its current *qui tam* cases were required to be reported on the court’s semi-annual report of long-pending cases.<sup>182</sup> Thus, the court stated that discovery and settlement negotiations are no longer sufficient

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175. See *United States ex rel. Martin v. Life Care Ctrs. of Am., Inc.*, 912 F. Supp. 2d 618, 625 (E.D. Tenn. 2012); *United States ex rel. LaCorte v. Smithkline Beecham Clinical Labs., Inc.*, No. CIV. A. 97-0942, 1998 WL 840012 (E.D. La. 1998); *United States ex rel. Law v. Spurlock*, 582 F. Supp. 2d 1350, 1352 (N.D. Ala. 2008).

176. *Martin*, 912 F. Supp. 2d at 625.

177. *Id.* at 626.

178. *Id.*

179. *Id.*

180. *Id.*

181. Standing Order, *In Re All Qui Tam Actions Filed Under the Federal False Claims Act Pending on the Docket of United States District Judge Joseph F. Anderson, Jr.*, 3:13-mc-452-JFA (D.S.C. Nov. 18, 2013), available at <http://law.justia.com/cases/federal/district-courts/south-carolina/scdce/3:2013mc00452/206011/1>.

182. *Id.* at 1–2.

reasons for extending the seal period of a case.<sup>183</sup> The court, however, failed to provide any examples of what *would* constitute good cause for extending the seal period.<sup>184</sup> While the judge did not say outright that no more extensions would be granted, he did express clear disapproval of all extension requests recently granted in the district.<sup>185</sup>

*D. Several Courts Indefinitely Seal Cases During the Government's Investigation*

In sharp contrast, many courts routinely place *qui tam* cases on administrative hold so that these unique cases do not count negatively towards judges as long-pending cases.<sup>186</sup> In those jurisdictions, once the sealed *qui tam* case is administratively stayed, the government no longer files motions for extensions.<sup>187</sup> Most of these courts simply wait until the government asks that the case be placed back on the regular docket, while other courts ask the government to periodically inform them whether the case should still be on hold.<sup>188</sup> In these settings, the government is automatically granted sufficient time to issue subpoenas or conduct discovery, as permitted under the FCA.

In sum, based upon the varying standards being used by the courts, there is a need for a uniform, statutory-based approach for addressing whether good cause exists for continuing the seal on *qui tam* cases while the government conducts its investigation and makes a decision to intervene.

V. THERE SHOULD BE A PRESUMPTION THAT COMPLAINTS SHOULD BE KEPT UNDER SEAL FOR AT LEAST THREE YEARS, PROVIDED THAT PROGRESS IS BEING MADE, AND SIX YEARS IF MORE TIME IS NEEDED DUE TO THE SIZE OR COMPLEXITY OF THE ALLEGATIONS

The statutory language, purposes, and goals of the FCA demonstrate that “good cause” was intended to be a flexible standard designed to permit the government a full opportunity to complete its investigation in a manner without interference by the defendant or other interested parties. This Article argues that the proper standard for applying the good cause requirement should be that requests by the government for exten-

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183. *Id.* at 2–3.

184. *See id.*

185. *Id.* at 3.

186. *See* United States *ex rel.* Mallavarapu v. Acadiana Cardiology, Civil Action No. 04–732, 2010 WL 3896425, at \*16–17 (W.D. La. Aug. 16, 2010).

187. *Id.*

188. *Id.*

sions of the seal period be liberally granted for up to three years, provided that its investigation remains active and ongoing, and up to six years if the government can show a need for more time due to the size or complexity of the case or other circumstances requiring more time than an ordinary fraud investigation. To go beyond six years, however, this Article proposes that the government must obtain a partial lifting of the seal to notify the defendant of the allegations and obtain consent.

There is a strong statutory and practical basis for selecting two separate timelines for extending the seal without notice to the defendant, complete with different standards. With respect to the initial three-year period, there are two reasons why that time is justified. First, the average time it takes the government to intervene in a case is slightly over three years.<sup>189</sup> According to a Government Accountability Office (GAO) report released in 2006, which evaluated the False Claims Act, “[c]ases in which DOJ intervened took a median of 38 months to conclude and ranged from 4 months to 187 months.”<sup>190</sup> As earlier addressed, providing the government with the time it actually takes to conduct a fraud investigation is the ultimate goal and purpose of the FCA. Because three years reflects the average time necessary to make an intervention decision, requests for extensions within that period should be granted provided the government informs the court that its investigation is active and progressing.

Second, another portion of the FCA uses a three-year period of time that is linked to the timing of the government’s investigation. Specifically, the FCA contains a unique statute of limitations that reflects an acknowledgement that a standard *qui tam* investigation can take three years.<sup>191</sup> Under the two-tiered FCA statute of limitations, the government has an absolute six years from the date of the submission of a false claim to bring an FCA suit. However, the statute of limitations is extended to ten years provided that the government finishes its investigation *within three years* of when officials charged with investigating have notice of the fraud allegations.<sup>192</sup> In other words, if the government files an FCA suit within three years from when a government official with authority to

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189. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 81, at 31.

190. *Id.*

191. 31 U.S.C. § 3731(b)(1)–(2) (2012) (“A civil action under section 3730 may not be brought (1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.”).

192. *Id.*

act upon fraud learns of the allegations, the statute of limitations is ten years. If, however, the government takes longer than three years to act, the statute of limitations is six years. Thus, Congress chose to provide the government with an “incentive” whereby it rewarded the government with a longer statute of limitations if it completes its fraud investigations within three years. In doing so, Congress implicitly recognized within the FCA itself that three years—and not the initial sixty days—was a good benchmark for how long most investigations should take and built a reward system into the FCA for acting within three years.<sup>193</sup> At the same time, however, Congress wanted to ensure that the government had a minimum of six years to complete its investigation. Thus, the FCA has a unique dual statute of limitations, which is premised upon the length of the government’s investigation.

With respect to the second three-year period of time proposed by this Article, there is equal support within the FCA for allowing the government longer time to investigate more complicated cases. This Article advocates for a six-year standard for extensions for two reasons. First, six years is the amount of time it may actually take to investigate larger or more complicated cases. The GAO found that although the average FCA investigation took thirty-eight months, in many cases it was considerably longer.<sup>194</sup> In fact, courts have found that extensions of seven or eight years can satisfy the good cause standard because of special circumstances.<sup>195</sup> Thus, there remains a strong need for the government to continue to investigate larger or more complicated cases beyond three years.

Second, the FCA’s statute of limitations grants the government a minimum of six years to investigate all fraud allegations.<sup>196</sup> Even though Congress sought to incentivize the government to finish its investigations within three years by rewarding it with a ten-year statute of limitations, Congress chose to retain the six-year minimum should the government need longer than three years to complete its investigation. Thus, the stat-

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193. *Id.*

194. *Id.*

195. *See* *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006) (eight years); *United States ex rel. Yannacopolous v. Gen. Dynamics*, 457 F. Supp. 2d 854, 857 (N.D. Ill. 2006) (over seven years); *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys.*, 349 F. Supp. 2d 170, 172 (D. Mass. 2004) (eight years). This Article recognizes that there may be rare cases where six years is still not sufficient or where the interests of justice warrant a longer period of time. Therefore, this Article proposes that for any extensions beyond six years, the government would need to show extraordinary circumstances. One reason would include if there already had been a partial lifting of the seal whereby the defendant had notice of the *qui tam* suit and it consented to the government’s further request.

196. 31 U.S.C. § 3731(b)(1)–(2) (2012).

utory framework recognizes that although most investigations may take up to three years, the government should not be limited to less than six years to complete its investigation. Accordingly, this Article adopts a two-tiered presumption of good cause, consisting of three- and six-year frameworks depending upon how large or complex the case.<sup>197</sup>

Because “good cause” is designed to be flexible enough to account for varying circumstances and the needs of the government to complete its investigation, this Article also proposes a different standard within each of the two categories of time. As recognized above, different sizes and types of cases naturally take different amounts of time to investigate. Accordingly, the standards for good cause should reflect the purpose of each time frame. The first three-year time period is designed to capture the smaller and less complicated fraud cases, whereas the second three-year time period is reserved for cases taking longer than normal, typically due to some special circumstance, such as size or complexity.<sup>198</sup> In addition, within the second three-year time period, a court should liberally grant extensions in situations where the government has previously obtained a partial lifting of the seal to inform the defendant of the *qui tam* complaint, and the defendant informs the government that it consents to further extensions. By consenting, the defendant voluntarily waives any argument that the passage of time hinders its rights. In fact, in such situations, a defendant desires that the seal remain in place because such preservation advances its rights.

Often, it is advantageous for a defendant to allow the investigation to be completed before fraud allegations become public. For instance, it provides the parties an opportunity to discuss defenses and settlement without outside influences. In fact, when there has not been a *qui tam* complaint filed and the government is facing the expiration of the standard six-year statute of limitations, a defendant may choose to enter into a tolling agreement and waive the statute of limitations, rather than force the government to file suit, to preserve its rights.<sup>199</sup> Thus, this Article argues that the government and defendant should be permitted to reach a

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197. In recent years, there have been over a hundred *qui tam* cases that settled for over \$50 million, which were complex fraud cases consisting of hundreds of false claims. *Top False Claims Act Cases by Civil Award Amount*, TAXPAYERS AGAINST FRAUD EDUC. FUND, <http://taf.org/general-resources/top-100-fca-cases> (last visited Jan. 2, 2015). It would not be unreasonable to expect that cases over \$5 million could take more than three years, and the largest cases to take the full six years.

198. In the following paragraphs, this Article suggests that a case is presumed to be complex if the damages are \$10 million, and also proceeds to elaborate other indicia of complexity.

199. While working for the government, the author has executed several agreements with defendants to waive or extend the FCA’s statute of limitations while investigating fraud in non-*qui tam* investigations.

consensus that a government investigation be allowed to proceed beyond six years. A court should allow the government to have additional extensions of the seal, even beyond six years, if the court partially lifts the seal and the defendant consents to extensions of the seal.

With respect to the initial three-year period, there should be a presumption that the government is permitted to utilize three full years to complete its investigation. Accordingly, courts should liberally grant extensions within the initial three-year period as long as the investigation is still active and ongoing. However, because some investigations are completed prior to three years, the courts may require the government to either notify them when the investigation is complete, or to submit an application for an extension every six to twelve months and confirm that the investigation is still ongoing and more time is needed. Thus, a court has the option of placing a case on administrative hold or ruling on periodic motions. For instance, a court may place a *qui tam* case on administrative hold to prevent it from being counted towards timelines or the age of the case on the docket.<sup>200</sup> In that setting, the court could require the government to periodically submit a status report stating that the investigation is still ongoing. If the court chooses to keep a case on the regular docket, albeit sealed, the court should liberally grant extensions upon verification by the government that the investigation is still active and ongoing.

With respect to requests for time after the initial three-year period and up to six years, a proper standard for “good cause” would require at least some showing that the particular investigation requires more time than ordinary—or, alternatively, that the defendant consents. Accordingly, the courts could require the government to make applications for an extension every six to twelve months, and to not only confirm that the investigation is still ongoing but to state the reasons why more time is needed, such as size, complexity, or other circumstances requiring more time than an ordinary case.<sup>201</sup> However, courts should still liberally grant extensions of time when the government articulates a good faith basis. Examples of a proper basis for allowing up to six years include cases where the allegations are that the loss to the government is \$10 million or larger, the number of false claims exceeds 100, the fraud scheme is occurring at multiple locations or on a nationwide basis, or the fraud

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200. “The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

201. The court may still keep the case on administrative hold and require the government to submit status reports containing the same type of information.

scheme is particularly complex. In addition, the court should liberally grant extensions if the defendant is not only aware of the FCA allegations, but consents to the continuation of the seal.

Given the purpose of the investigatory time period, courts should presume that the government is acting in good faith and should not deny a motion merely because the court believes that the investigation could have been conducted more quickly. In addition, good cause can also include good faith settlement discussions with the defendant regardless of the size of the case. In those circumstances, in all likelihood the case has been partially unsealed and the defendant has been provided with at least a redacted complaint. Moreover, the defendant is in agreement that the case should remain under seal, which clearly would satisfy the definition of good cause. Indeed, reaching a settlement prior to unsealing the case benefits the defendant, for example by protecting its reputation.<sup>202</sup> Thus, good cause would be presumptively met in all situations where there already had been a partial lifting of the seal whereby the defendant had notice of the *qui tam* suit and consented to the government's further request.

Finally, the court may extend the seal beyond six years in rare or unusual cases. Examples include cases larger than \$100 million, instances where there will likely be a consolidation of multiple *qui tam* suits, or when the defendant is notified and consents. Again, the purpose of the *qui tam* provisions is to augment and enlarge—not constrict—the government's investigatory tools and ultimate recoveries of funds lost due to fraud. In sum, the government should be allowed at least the same investigatory powers and length of time that it would be allowed if a *qui tam* suit had not been filed.

#### *A. Other FCA "Good Cause" Provisions Support the Proposed Standard*

There are two other "good cause" provisions built into the FCA, one of which is particularly instructive and supports the standards proposed by this Article.<sup>203</sup> The most analogous "good cause" FCA provi-

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202. For instance, when the government announces a fraud investigation or FCA suit, the public may be concerned about whether the company may be barred from future government contracts, thus impacting stock prices and the ability to obtain contracts with other companies. As stated earlier, courts have recognized the importance of protecting the reputation of the defendant during the time the government is investigating fraud allegations. *See supra* text accompanying note 63.

203. *See* 31 U.S.C. § 3730(c)(2)(B) (2012); 31 U.S.C. § 3730(c)(3) (2012). This Article does not discuss 31 U.S.C. § 3730(c)(2)(B) because no court has addressed this provision, which reads: "The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is

sion provides that if the government declines to intervene in a *qui tam* case and the relator proceeds alone, the government can petition the court to allow it to reenter the case at a later date upon a showing of good cause.<sup>204</sup> Specifically, the FCA reads:

If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.<sup>205</sup>

This provision recognizes that, at times, the government may make a decision to decline a case after conducting its investigation, but seek permission to later intervene. Congress chose the exact same "good cause" standard here as it did for making an intervention decision. Because both good cause provisions relate to government intervention, they should be afforded similar treatment.

A review of the case law pertaining to this subpart of the FCA shows that courts have treated this good cause provision very liberally, and, in fact, have granted every single motion by the government, permitting the government to intervene in *qui tam* cases after initially declining to intervene.<sup>206</sup> For instance, courts have found good cause when the government later "realized that the alleged fraud was of greater magnitude than it originally had believed, and where the Government has received additional evidence about a case through a related civil case."<sup>207</sup> This highlights the need for the courts to adopt a similarly flexible and deferential approach when seeking additional time to make the election decision. Again, Congress designed the FCA to be the government's primary fraud investigative tool. Courts should give deference and liberally find good cause for not only reentering a *qui tam* case, but also for deciding whether to take the case in the first place.

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fair, adequate, and reasonable under all the circumstances. Upon a showing of *good cause*, such hearing may be held in camera." (emphasis added).

204. 31 U.S.C. § 3730(c)(3) (2012).

205. *Id.* (emphasis added).

206. Sylvia, *supra* note 58, at § 11.22.

207. *Id.*

### B. *The Unique FCA Context*

Attempting to look outside of the FCA for a definition or standard is not particularly fruitful because there is no standard definition of the term “good cause” within American jurisprudence. Rather, good cause is highly context specific. It is used in literally hundreds of different settings, each with its own guiding principles, which typically apply only in that particular framework.<sup>208</sup>

As indicated, context is everything when it comes to good cause. The following analogy reinforces the point that the purposes and goals of the FCA’s seal period must be taken into account when ruling on good cause. Assume that a national organization establishes a running program where a marathon is run in every state. Under the rules, competitors are told that water stations will be placed every three miles, an ambulance will be located at the halfway point, and that the police will block off traffic throughout the city. The rules also state that the race will end in six hours, regardless of the distance traveled. The rules, however, do not specifically state that the race is twenty-six miles long. Based on these instructions, races in most states place the finish line twenty-six miles away. However, in a few states, a few race officials set the finish line at one mile because they think twenty-six miles is too far or might take too long. In the context of the rules already in place—with aid stations placed every three miles, and a maximum time allotted of six hours—it would be unreasonable to assume that the race should be limited to just one mile.

Here, the seal provision must be read in context with other rules governing the FCA. First, Congress intended a lengthy statute of limitations for investigating allegations of fraud against the government, and even included a unique provision under which it extended the statute of limitations from six to ten years as an incentive to complete the investigation within three years.<sup>209</sup> Thus, enforcing an absolute sixty-day period against a three- or six-year stretch is illogical.

Second, the context of good cause under the FCA is also measured by the CID provisions that authorize the government to take depositions, and utilize interrogatories and document requests as part of its investiga-

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208. For instance, West’s Encyclopedia of American Law defines “good cause” as follows: “Legally adequate or substantial grounds or reason to take a certain action. *The term good cause is a relative one and is dependent upon the circumstances of each individual case.* For example, a party in a legal action who wants to do something after a particular Statute of Limitations has expired must show good cause, or justification for needing additional time. A serious illness or accident might, for example, constitute good cause.” WEST’S ENCYCLOPEDIA OF AMERICAN LAW 113 (2d ed. 2005) (emphasis added).

209. 31 U.S.C. § 3731(b)(1)–(2) (2012).

tion.<sup>210</sup> In fact, it is critical in the context of good cause that the FCA specifically limits these CID tools during the pendency of the government's investigation. Because it generally takes many months (or even years) to employ these devices effectively and conduct a proper investigation of complex allegations of fraud against the government, the seal period must be viewed as a marathon, *not* a sprint. Insisting upon a short investigatory time is tantamount to entirely eliminating the CID provisions. Good cause in this context must allow the government to plod along its path as long as it does not stop making progress. Thus, it would be unreasonable for a judge to determine that the government's investigation is a sprint that *must* be completed in sixty days or six months.

Third, the FCA's unique *qui tam* provisions and procedures also impact the definition or standard of "good cause." Specifically, the only way for a whistleblower to claim a reward for reporting fraud against the government is to file a *qui tam* suit.<sup>211</sup> If the whistleblower chose not to claim a reward, there would be no *qui tam* filed and consequently no applicable "good faith" clause.<sup>212</sup> The statute of limitations would be the only constraint upon the government's investigation. Thus, shortening the time for a government investigation merely because a reward application has been filed does not warrant holding that the government must sprint through its investigation and forego using the CID provisions that it could otherwise use if a whistleblower had called a hotline to report the fraud. In other words, it is both unjustifiable and patently illogical that Congress would affirmatively empower the government to utilize CIDs and then fail to provide sufficient time to use them.

In sum, based on the unique context of the FCA, this Article proposes a good cause standard that is consistent with the goals, purposes, and actual language of the FCA. Given this context, good cause means extending the FCA's seal period until the conclusion of the government's investigation. Accordingly, requests by the government for extensions of the seal period should be liberally granted for up to three years, provided that the investigation remains active and ongoing; up to six years, provided that the government can show a need for more time due to the size or complexity of the case or other circumstances requiring more time than an ordinary fraud investigation; and beyond six years with the consent of the defendant.

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210. 31 U.S.C. § 3733 (2012). *See also supra* Part III.A.

211. 31 U.S.C. § 3730(b)(1)–(2) (2012).

212. 31 U.S.C. § 3730(b)(3) (2012) ("The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera.").

This standard ensures that the government has sufficient time to fully investigate the alleged fraud and make a decision regarding intervention based upon the merits of the case and utilization of the CID devices available only during the seal period rather than upon a judge's preference for how long an investigation should take. Having fraud allegations determined on the merits also promotes and protects vital interests of both the government and the accused. Congress clearly intended the FCA to be a strong tool for the people, and with a seal period of up to six years dependent upon making progress and longer with consent of the defendant, it can be.

#### VI. THE FCA'S STATUTE OF LIMITATIONS DOES NOT AFFECT THE GOOD CAUSE DECISION

One objection raised by a commentator arguing for brevity of the seal period is that a lengthy extension would violate or improperly lengthen the statute of limitations.<sup>213</sup> This argument had much greater weight prior to 2009 when Congress amended the FCA's statute of limitations. In response to several court rulings that had the effect of limiting the seal period due to the FCA's statute of limitations, Congress amended the statute of limitations to provide that the government's intervention would relate back to the date of filing of the relator's *qui tam* complaint, even if it would effectively lengthen the FCA's six or ten year statute of limitation.<sup>214</sup> The FCA now reads:

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. *For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.*<sup>215</sup>

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213. Laura Hough, *Finding Equilibrium: Exploring Due Process Violations in the Whistleblower Provisions of the Fraud Enforcement and Recovery Act of 2009*, 19 WM. & MARY BILL RTS. J. 1061, 1062, 1073–78, 1089 (2011).

214. 31 U.S.C. § 3731(c) (2012); *see also* sources cited *infra* note 217.

215. 31 U.S.C. § 3731(c) (2012) (emphasis added).

As elaborated below, Congress has the unfettered right to lengthen or even eliminate a statute of limitations for bringing a fraud action, as well as the right to grant the government lengthy sealing of the *qui tam* complaint to allow it to fully investigate the allegations. Here, Congress has unequivocally expressed that the statute of limitations should not be a barrier to granting lengthy extensions of the seal on *qui tam* cases.

Consider the following: Assume that a company submitted a false claim on July 1, 2000, and that the relator filed a *qui tam* five years later, on July 1, 2005. The government moved for—and was granted—several extensions of time, each with the relator’s consent, consisting of four years. On July 1, 2009, the government filed a notice that it was intervening and the case was unsealed.

Under the pre-2009 version of the FCA, absent a court applying an equitable-based relation back analysis (such as Rule 15 of the Federal Rules of Civil Procedure), the statute of limitations would have run on the government because it intervened nine years after the date of the false claim, which is longer than the FCA’s general six-year statute of limitations, and the ten-year limitation period would not apply because the government did not act within three years of learning of the fraud. Thus, absent relation back, the statute of limitations would appear to expire against the government, although not for the relator.

Prior to amending the FCA in 2009, most courts conducted either a due process analysis or relied upon Rule 15(c)(1)(C),<sup>216</sup> which required notice to the defendant and lack of prejudice.<sup>217</sup> Either way, some form of balancing was required to determine whether it would be fair to relate the government’s filing back to the date of the relator’s complaint. The problem with failing to apply relation back was obvious: it meant that the relator could proceed because his complaint was timely, but the government was foreclosed from participating. Because the government is the real party in interest in FCA suits, it would be illogical not to allow it to participate. Thus, some courts simply allowed relation back, while others strictly followed the relation back analysis, resulting in a circuit split as to whether relation back applied.<sup>218</sup>

Congress settled the split by amending the FCA in 2009 to specify that the government’s intervention always relates back to the date of the relator’s initial *qui tam* complaint.<sup>219</sup> Thus, in our scenario, even though the case is unsealed nine years after the false claim was submitted, it

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216. FED. R. CIV. P. 15(c)(1)(C).

217. SYLVIA, *supra* note 58, at § 10.67. *See also id.* at § 11.105.

218. *Id.* at § 11.105.

219. 31 U.S.C. § 3731(c) (2012). *See also* SYLVIA, *supra* note 58, at § 10.67.

clearly satisfies the 2009 version of the FCA's statute of limitations. In other words, Congress mooted this issue by expressly amending and effectively lengthening the FCA's statute of limitations for government intervention by mandating that relation back *must* occur.

Although recognizing that Congress had authority to lengthen the statute of limitations, one commentator nevertheless continues to erroneously suggest that a due process balancing approach remains necessary for retaining the seal period in the event that it extends beyond the statute of limitations contained in the pre-2009 version of the FCA.<sup>220</sup> However, courts are not permitted to balance interests when applying a statute of limitations contained in a federal statute against the government.<sup>221</sup>

There are several reasons why the statute of limitations should not be a factor for determining good cause extensions of time to intervene. First, if the relator filed timely, the statute of limitations is indisputably tolled. Allowing the government additional time to investigate merely provides it with what Congress intended—time to make a fully informed decision after conducting informal discovery through the use of subpoenas.

Second, Congress acted appropriately by tolling the statute of limitations and relating the government's intervention back to the filing of a *qui tam* complaint. Indeed, Congress could have gone further, such as by setting the statute of limitations at fifteen years rather than the current six- or ten-year tiered system. It could even have totally eliminated the statute of limitations, which Congress did with respect to filing false or fraudulent tax returns.<sup>222</sup> Absent Congress dictating a statute of limitations upon itself, there is no statute of limitations against the government. "The general rule regarding statutes of limitation and the government is that 'the government is not subject to any time constraints in bringing its actions.' This rule stems from the legal maxim *quod nullum tempus occurrit regi*, which literally means 'no time runs against the King.'"<sup>223</sup> Stated another way:

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220. Hough, *supra* note 213, at 1062, 1073–78, 1089.

221. See *infra* note 227.

222. There is no statute of limitations for tax fraud; the IRS may bring an action to assess taxes anytime a taxpayer submits a "false or fraudulent" return, "willful[ly] attempt[s] . . . to defeat or evade tax," or fails to submit a tax return. 26 U.S.C. § 6501(c)(1)–(3) (2010). See also *Badaracco v. Comm'r*, 464 U.S. 386, 406 n.7 (1984) (Stevens, J., dissenting) (recognizing that "the limitations period will never run [when the transferor committed fraud]"); *Payne v. Comm'r*, 224 F.3d 415, 420 (5th Cir. 2000) (recognizing that § 6501(c) exempts false or fraudulent returns from any statute of limitations).

223. Douglas Edward Pittman, *Is Time Up for Equitable Relief? Examining Whether the Statute of Limitations Contained in 28 U.S.C. § 2462 Applies to Claims for Injunctive Relief*, 70 WASH. & LEE L. REV. 2449, 2461–62 (2013) (internal citations omitted).

When considering whether a statute of limitations defense is viable against the government for your particular facts, it is important to remember that the general rule is that the government, when acting in its sovereign capacity, is not subject to any time limitations for bringing a claim, absent a Congressional enactment to the contrary.<sup>224</sup>

It wasn't until the 1960s that "Congress narrowed the application of this rule by enacting general statutory limitation provisions that apply to government actions."<sup>225</sup> In short, Congress can choose any length of time it desires and may have different statutes of limitations under different statutory schemes.

Third, there is no room for balancing interests when determining the scope or construction of a federal statute of limitations as applied against the government. As the Supreme Court has noted: "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."<sup>226</sup> Moreover, "[the] Court long ago pronounced the [following] standard: 'Statutes of limitation sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government.'"<sup>227</sup> As one scholar has observed, "[t]his rule encourages courts to interpret statutes of limitations in a manner which favors inapplicability to a claim brought by the government."<sup>228</sup> She continues:

The statutory nature of the defense mandates a different analysis than the analysis required for asserting common law defenses against the government. In these cases the court does not engage in a balancing of competing interests because, in enacting the statute, Congress has already struck such a balance. Rather, application of a particular statute of limitation usually depends upon the court's interpretation of the express provisions of the statute.<sup>229</sup>

In sum, the statute of limitations set by Congress in the FCA is controlling and should be given full effect. Courts should avoid the temptation to effectively reduce the FCA's statute of limitations by limiting the amount of time the government has to conduct its investigation during

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224. Mary V. Laitos et al., *Equitable Defenses Against the Government in the Natural Resources and Environmental Law Context*, 17 PACE ENVTL. L. REV. 273, 302 (2000).

225. *Id.*

226. *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (citations omitted).

227. *Badaracco v. Comm'r*, 464 U.S. 386, 391 (1984) (citations omitted). *See also* Laitos, *supra* note 224, at 303 (observing that "all statute of limitations will be strictly construed in favor of the government").

228. Laitos, *supra* note 224, at 303-04.

229. *Id.* at 302.

the seal period. Congress clearly wants the government to be permitted time to fully investigate the relator's fraud allegations because it is the real party in interest. This privilege includes the time needed to issue subpoenas or take depositions utilizing the FCA's CID powers.

## VII. CONCLUSION

False claims against the government have been and continue to be an epidemic. To combat this fraud, Congress amended the False Claims Act several times to improve its reach, such as by adding *qui tam* provisions that pay rewards to whistleblowers for stepping forward, and by strengthening CID investigatory tools that give the government power to issue subpoenas for documents and testimony prior to intervening in a *qui tam* suit. In addition, to ensure that the government has sufficient time to investigate allegations of fraud, the FCA contains a six-year minimum statute of limitations, plus an incentive of an additional four years (up to ten years) if the government completes its investigation within three years. Unfortunately, some courts have artificially restricted the CID provisions and statute of limitations with respect to *qui tam* cases.

Even though the FCA keeps a *qui tam* case under seal for sixty days, it permits the government to request additional extensions upon a showing of good cause. Due to the lack of a uniform interpretation of "good cause," courts vary widely in the amount of time given to the government to investigate fraud claims raised in a *qui tam* suit, ranging from sixty days to longer than nine years. Unfortunately, some courts have restricted the investigative time so severely as to effectively eliminate the CID investigatory provisions in the FCA (which are only available during the seal period) and artificially shorten the statute of limitations. Even though the average length of an FCA fraud investigation exceeds three years, some courts are limiting the seal period in *qui tam* cases to a mere handful of months.

Although good cause is not defined, it is clear from the overall structure and goals of the FCA that the government should be permitted at least the same amount of time that it would be allowed to investigate had a *qui tam* complaint not been filed, and to otherwise utilize the CID tools and statute of limitations. Indeed, Congress recently amended both the CID and statute of limitations provisions to effectively eliminate restrictive time requirements. In short, the government's intervention decision should be made on the merits rather than pursuant to artificial time constraints imposed by courts. Accordingly, for the reasons advanced in this Article, and to allow the FCA to have the full weight intended by Congress, requests by the government for extensions of the *qui tam* seal period should be liberally granted for up to three years, provided that the

investigation remains active and ongoing; up to six years provided that the government can show a need for more time due to the size or complexity of the case or other circumstances requiring more time than an ordinary fraud investigation; and even longer with consent of the defendant.