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Beverly Cohen

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# Trouble at the Source: The Debates Over the Public Disclosure Provisions of the False Claims Act's Original Source Rule

by Beverly Cohen\*

## INTRODUCTION

The federal False Claims Act (the Act)<sup>1</sup> has long been a major tool in rectifying frauds, including healthcare frauds, perpetrated against the federal government.<sup>2</sup> One of the most useful aspects of the Act is the ability of private citizens to sue on behalf of the government when they detect a fraud for which the government has not yet commenced an enforcement action.<sup>3</sup>

Unfortunately, these private citizen suit provisions of the Act are less effective than they could be due to disagreement over how to interpret and apply them.<sup>4</sup> In particular, the statutory language relating to public disclosure, critical to determining when citizens may sue, is hopelessly vague and has engendered numerous conflicts among courts.<sup>5</sup>

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\* Professor of Law, Albany Law School. Douglass College of Rutgers University (B.A., 1968); Alfred State College (A.A.S., 1979); Albany Law School (J.D., 1987). The Author wishes to thank Theresa Colbert, Evette Tejada, the staff of the Albany Law School Office of Computer Resources for technical assistance, and the research staff at the Albany Law School Shaffer Law Library for research assistance.

1. 31 U.S.C. §§ 3729-3733 (2000).

2. See generally Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 ALA. L. REV. 57, 57 (1999) (stating that the Act is "one of the major tools in the government's arsenal to combat fraud against the federal government, especially health care fraud").

3. See 31 U.S.C. § 3730 (2000).

4. See *infra* Part VI.

5. See *infra* Part VI.

This Article explains the confusion that has resulted from the public disclosure provisions of the Act and suggests logical ways to interpret and apply them.<sup>6</sup> Ultimately, the Article urges a clarification of the statutory language, such as that provided by Senate Bill 2041,<sup>7</sup> considered by Congress in 2007-2008, so that the Act will provide clearer guidance to citizens contemplating suing under the Act.<sup>8</sup> This clarification will encourage citizens to detect frauds against the government and to spearhead collections for violations of the Act, to the benefit of all of us and as the Act was intended.

### I. THE FALSE CLAIMS ACT

The False Claims Act (the Act)<sup>9</sup> provides that anyone who knowingly presents a false claim for payment to the federal government is liable for a civil penalty of \$5,000 to \$10,000 per claim, plus three times the damages suffered by the government.<sup>10</sup> While the Act was initially adopted during the Civil War to combat fraud in war procurement contracts,<sup>11</sup> since that time it has been applied to a wide range of contracts. Most recently, it has become a valuable tool to combat healthcare fraud in federal programs, such as Medicaid and Medicare.<sup>12</sup>

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6. See *infra* Part VII.

7. False Claims Correction Act of 2007, S. 2041, 110th Cong. (2007); see *infra* Part VIII. When the 110th Congress ended on January 4, 2009, the bill had not been enacted. See 2008 Bill Tracking S. 2041 (LEXIS).

8. See *infra* Conclusion.

9. 31 U.S.C. §§ 3729-3733 (2000).

10. 31 U.S.C. § 3729(a) (2000).

11. *E.g.*, U.S. *ex rel.* S. Praver & Co. v. Fleet Bank of Me., 24 F.3d 320, 324 n.8 (1st Cir. 1994) (stating that "[t]he [Act] originally was enacted 'in order to combat rampant fraud in Civil War defense contracts'" (quoting S. REP. NO. 99-345, at 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273)); U.S. *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (stating that the Act was adopted during the Civil War "to combat fraud and price-gouging in war procurement contracts"); U.S. *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (Prudential II), 944 F.2d 1149, 1163 (3d Cir. 1991) (stating that the act was "adopted in 1863 in response to rampant fraud by Civil War defense contractors").

12. See *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing on S.2041 Before the S. Comm. on the Judiciary*, 110th Cong. 2 (2008) [hereinafter *Hearing*] (statement of Michael Hertz, Deputy Assistant Att'y Gen., Civil Div., U.S. Dept. of Justice), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit\\_id=6991](http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit_id=6991) (providing details on recent healthcare recoveries under the Act); HEALTH & LIFE SCIENCES LAW DAILY, Am. Health Lawyers Ass'n, Mar. 13, 2008 (reporting that in 2006, the federal government reportedly recovered over \$2.2 billion in healthcare settlements and judgments under the Act); Brooks E. Kostakis, Note, *Crafting a Hybrid Weapon Against Healthcare Fraud: Reflecting upon the Government's Use of the Civil False Claims Act as an Incentive for*

The qui tam<sup>13</sup> provisions of the Act allow private parties to sue.<sup>14</sup> Individuals (“relators”) with knowledge of false claims submitted to the federal government may file a complaint on behalf of the government against the defendant<sup>15</sup> and share in the financial recovery.<sup>16</sup> The complaint is initially filed under seal to allow the government an opportunity to investigate the allegations and to decide whether it wishes to intervene in the action.<sup>17</sup> Depending upon whether the government intervenes or the relator prosecutes the case on his own, and upon the usefulness of the relator’s knowledge of the lawsuit, the relator may collect up to thirty percent of the recovery.<sup>18</sup> When recoveries in healthcare cases can easily run into tens of millions of dollars,<sup>19</sup> the relator’s share is an important incentive for private citizens to report healthcare fraud.

## II. HISTORIC DEVELOPMENT OF THE QUI TAM PROVISIONS

Since they were enacted, the qui tam provisions of the False Claims Act (the Act)<sup>20</sup> have buttressed the government’s fraud enforcement efforts. The qui tam provisions have been described as encouraging “a

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*Whistleblowers and Advocating a More Aggressive Utilization of Permissive Exclusion as a Deterrent Measure*, 37 U. MEM. L. REV. 395, 410 (2007) (stating that “there has been a significant rise in the amount of healthcare fraud actions” brought under the Act and that the government obtained \$1.4 billion in recoveries in 2005 fiscal year alone); Bucy, *supra* note 2, at 60 (stating that the Act is “a potent and appropriate weapon to use against fraudulent health care providers”); see also Carolyn J. Paschke, Note, *The Qui Tam Provision of the Federal False Claims Act: The Statute in Current Form, Its History and Its Unique Position to Influence the Health Care Industry*, 9 J.L. & HEALTH 163, 179 (1994-95) (noting that complex healthcare schemes involving overutilization or excessive billing “could only be detected by employees or individuals working within a system who have knowledge of its operations”).

13. “‘Qui tam’ is an abbreviation for ‘qui tam pro domino rege quam pro seipso,’ which literally means ‘he who as much for the king as for himself.’” *Prauer*, 24 F.3d at 324 n.7 (misquoted in original) (quoting *Springfield*, 14 F.3d at 647 n.1).

14. 31 U.S.C. § 3730.

15. *Id.* § 3730(b).

16. *Id.* § 3730(d).

17. See *id.* § 3730(b).

18. See *id.* § 3730(d).

19. See *Hearing*, *supra* note 12 (statement of Michael Hertz, Deputy Assistant Att’y Gen., Civil Div., U.S. Dept. of Justice), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit\\_id=6991](http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit_id=6991) (stating that recent payments by healthcare companies for alleged violations of the False Claims Act included, *inter alia*, Merck & Company paying over \$650 million, Bristol-Myers Squibb Company paying over \$515 million, Amerigroup Illinois, Inc. paying \$172 million, and Medco Health Solutions, Inc. paying \$155 million).

20. 31 U.S.C. §§ 3729-3733 (2000).

rogue to catch a rogue' by inducing informers 'to betray [their] coconspirators.'<sup>21</sup> The original Act allowed a successful qui tam relator to collect one-half of the recovery against the defrauding parties.<sup>22</sup>

The Act was underutilized, however, until the 1930s and 1940s, when New Deal and World War II contracting gave more opportunities for dishonest government contractors to defraud the government.<sup>23</sup> But at that time, the Act did not require the relators to allege undiscovered frauds in their qui tam complaints; instead, relators were able to commence a qui tam lawsuit based completely on information already uncovered by government investigators.<sup>24</sup> Without any statutory restrictions on these "parasitic" lawsuits,<sup>25</sup> many private parties sought the qui tam rewards after doing little more than copying existing indictments or basing their complaints upon ongoing congressional investigations.<sup>26</sup>

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21. U.S. *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 679 (D.C. Cir. 1997) (alteration in original) (quoting CONG. GLOBE, 37th Cong., 3d Sess. 955-56 (1863); see also U.S. *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (describing the original qui tam provisions as "passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain." (quoting United States v. Griswold, 24 F. 361, 366 (D.C. Or. 1885))).

22. *E.g.* Findley, 105 F.3d at 679 (citing S. REP. 99-345, at 10 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5275).

23. Findley, 105 F.3d at 679 (stating that in the 1930s and 1940s, "increased government spending opened up numerous opportunities for unscrupulous government contractors to defraud the government"); Springfield, 14 F.3d at 649 (stating that after the decade in which New Deal and World War II government contracts boomed, qui tam lawsuits surged).

24. See U.S. *ex rel.* S. Prawer & Co. v. Fleet Bank of Me., 24 F.3d 320, 324 (1st Cir. 1994) (stating that the "qui tam provisions then in effect were too susceptible to abuse by 'parasitic' relators").

25. The court in *Prawer* declared that to determine if a qui tam action is parasitic, we should "ask whether the qui tam case is receiving 'support, advantage, or the like' from the 'host' case (in which the government is a party) 'without giving any useful or proper return' to the government." *Prawer*, 24 F.3d at 327-28. See also U.S. *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (Prudential II), 944 F.2d 1149, 1154 (3d Cir. 1991) (characterizing parasitic qui tam lawsuits as "copycat" suits).

26. U.S. *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 727 (1st Cir. 2007) (stating that "[t]he qui tam mechanism has historically been susceptible to abuse, however, by 'parasitic' relators who bring FCA damages claims based on information within the public domain" (quoting *Prawer*, 24 F.3d at 324)); Findley, 105 F.3d at 679-80 (stating that "[q]ui tam litigation surged as opportunistic private litigants chased after generous cash bounties and, unhindered by any effective restrictions under the Act, often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations"); Prudential II, 944 F.2d at 1153 (stating that a number of relators commenced qui tam

The height of these parasitic *qui tam* actions was *United States ex rel. Marcus v. Hess*,<sup>27</sup> in which the relator created his *qui tam* complaint by copying a criminal indictment to which the defendants had already pleaded *nolo contendere*.<sup>28</sup> Despite the fact that the relator had not discovered the fraud, and that the fraud was already publicly known, the United States Supreme Court upheld the relator's right to share in the recovery, holding that nothing in the text of the Act or in its legislative history barred the action.<sup>29</sup>

In response to the public criticism of the Act following *Marcus*, President Roosevelt signed a bill in 1943 tightening the *qui tam* provisions.<sup>30</sup> The amendments were a compromise between House and Senate versions of the bill.<sup>31</sup> The House version sought to repeal the *qui tam* provisions altogether, while the Senate bill barred *qui tam* lawsuits "based upon information already in the possession of the government unless the information was 'original with such person.'"<sup>32</sup> The Senate's version was adopted, but the original source provision was dropped.<sup>33</sup> The final version barred lawsuits that were "based upon

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actions when they "learned of the fraud through the inspection of government criminal indictments").

27. 317 U.S. 537 (1943).

28. *Id.* at 545 (noting that the relator filed his *qui tam* complaint after the defendants had been indicted for defrauding the government, had pleaded *nolo contendere*, and had been fined); see also *Prawer*, 24 F.3d at 325 (discussing *Marcus*); *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) (referring to *Marcus* as "the high-water mark for parasitic *qui tam* actions," as the relator's *qui tam* complaint appeared to have been copied from a criminal indictment).

29. *Marcus*, 317 U.S. at 546-47 (concluding that the language of the Act permitted the lawsuit, and that the government's objections to the relator were "directed solely at what the government thinks Congress should have done rather than at what it did"); see also *Springfield*, 14 F.3d at 649-50 (describing the *Marcus* lawsuit); *Prawer*, 24 F.3d at 325 (describing the outcome in *Marcus* and noting that the Court found no bar in the text of the Act, no intent to impose one in the legislative history, and declined to establish one on its own initiative); *Prudential II*, 944 F.2d at 1153 (discussing the *Marcus* holding that "the Act did not require that a *qui tam* plaintiff contribute new information to the discovery of the fraud").

30. *Prawer*, 24 F.3d at 325 (stating that "[i]n response to public outcry over the [*Marcus*] decision, Congress acted quickly to restrict the universe of litigants who could avail themselves of the [Act's] *qui tam* provisions"); *Findley*, 105 F.3d at 680 (noting that *Marcus* spurred Congress to take action to prevent "piggy-back lawsuits").

31. *Springfield*, 14 F.3d at 650 (describing the amendments as "the product of careful compromise").

32. *Id.* (quoting 89 CONG. REC. 510, 744 (daily ed. Dec. 16, 1943)) (noting the "careful compromise" between the House and Senate versions of the bill); see also *Prawer*, 24 F.3d at 325 (describing competing versions of the bill).

33. *Prawer*, 24 F.3d at 325 (noting that the "original source" provisions were dropped in conference); *Springfield*, 14 F.3d at 650 (noting that the Senate's original source

evidence or information in the possession of the United States . . . at the time such suit was brought."<sup>34</sup>

Unfortunately, the amended version of the Act did not preserve the right to bring a *qui tam* action for whistleblowers who had alerted the government to the fraud before filing suit.<sup>35</sup> Therefore, the "government knowledge" standard ultimately frustrated the efforts of legitimate relators who had acquired knowledge of the fraud on their own but were required by law to report the fraud.<sup>36</sup> As a result, use of *qui tam* lawsuits declined.<sup>37</sup>

This problem with the government knowledge standard was dramatically illustrated in 1984 in *United States ex rel. Wisconsin v. Dean*.<sup>38</sup> In *Dean* the United States Court of Appeals for the Seventh Circuit barred a *qui tam* action brought by the State of Wisconsin because before filing its complaint, the State had reported the fraud to the federal government, as it was required to do by law.<sup>39</sup> The court ruled that the plain terms of the Act barred the lawsuit because the federal government possessed knowledge of the fraud prior to the filing of the *qui tam* complaint.<sup>40</sup> Moreover, the court refused to find a legislative intent to preserve "original source" relators like Wisconsin because this provision had been dropped from the final version of the bill.<sup>41</sup>

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provision was dropped in conference without explanation); *Prudential II*, 944 F.2d at 1153 (noting that the final version dropped the original source exception).

34. *Findley*, 105 F.3d at 680 (ellipsis in original) (quoting Act of Dec 23, 1943, Pub. L. No. 213, § 1, 57 Stat. 608, 609 (current version at 31 U.S.C. § 3730(b)(4) (2000))).

35. *Id.* (stating that "the Act contained no protection for those whistleblowers who furnished evidence or information to the government in the first place").

36. *Id.* (stating that the government knowledge standard "killed the goose that laid the golden egg").

37. *Springfield*, 14 F.3d at 650 (stating that "[t]he new statutory barriers substantially decreased the use of *qui tam* provisions to enforce the [Act]").

38. 729 F.2d 1100 (7th Cir. 1984).

39. *Id.* at 1104, 1107. In *Findley* the court discussed how in *Dean* the government knowledge standard "eliminated the financial incentive to expose frauds against the government." *Findley*, 105 F.3d at 680. Similarly, the Seventh Circuit in *United States ex rel. Lamers v. City of Green Bay* noted that *Dean* "highlighted the problems with overly restrictive *qui tam* jurisdiction," stating that the government knowledge standard "created its own perverse set of incentives" because "whistle blowers were afraid to turn over their juiciest evidence of fraud to the government because disclosure would prevent them from using that evidence to get their reward in a *qui tam* action." 168 F.3d 1013, 1016 (7th Cir. 1999).

40. See *Dean*, 729 F.2d at 1104-06.

41. See *id.* at 1104-05 (holding that although Congress's main concern was parasitic suits, "the language and effect of the 1943 amendment in fact is much broader"); see also *Springfield*, 14 F.3d at 650 (noting that because the original source provision had been deleted in conference, "the court found no clear intent to preserve it in the legislative

Ultimately, the Seventh Circuit barred the lawsuit despite the fact that the State of Wisconsin had conducted an extensive and costly investigation to uncover the fraud and notwithstanding that the federal government had learned of the fraud via mandatory disclosure by the relator.<sup>42</sup>

After *Dean* the National Association of Attorneys General adopted a resolution urging Congress “to rectify the unfortunate result” of *Dean*.<sup>43</sup> Congress agreed that the *qui tam* provisions were “out of whack”<sup>44</sup> and sought to “reinvigorate” them.<sup>45</sup> The 1986 amendments<sup>46</sup> attempted once again to adjust the balance between the dual goals of encouraging private fraud detection<sup>47</sup> and discouraging parasitic suits where the relators made no useful contribution to the action.<sup>48</sup> The “principal intent” of the 1986 amendments “was to have

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history”); *Prudential II*, 944 F.2d at 1153-54 (discussing the decision in *Dean*).

42. *Dean*, 729 F.2d at 1104-06. The court in *Prawer* described *Dean* as “the point of greatest retreat from *Hess*.” *Prawer*, 24 F.3d at 325. See also *Findley*, 105 F.3d at 680 (describing how in *Dean*, the state was barred from its own *qui tam* action because it had reported the fraud to the federal government, as required by statute); *Doe*, 960 F.2d at 321 (describing how in *Dean*, “[t]he ‘government knowledge’ standard embodied in the 1943 amendment eventually worked at cross-purposes with the *qui tam* provisions of the [Act]”).

43. *Prawer*, 24 F.3d at 326 (quoting S. REP. NO. 99-345, at 13 (1986), reprinted in 1986 U.S.C.C.A.N. at 5278) (describing the resolution of the National Association of Attorneys General to rectify *Dean*); *Springfield*, 14 F.3d at 650 (discussing the resolution adopted by the National Association of Attorneys General to rectify *Dean*); *Prudential II*, 944 F.2d at 1154 (stating that the decision in *Dean* was “viewed as unnecessary [sic] inhibiting the detection and prosecution of fraud on the government”).

44. *Lamers*, 168 F.3d at 1016.

45. *Doe*, 960 F.2d at 321 (stating that “[i]n 1986, Congress set out to reinvigorate the [Act’s] *qui tam* provisions”); see also *Springfield*, 14 F.3d at 650-51 (quoting S. REP. 99-345, at 1-2 (1986), reprinted in U.S.C.C.A.N. at 5267) (stating the conclusion of the lawmakers that “only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds”).

46. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153.

47. At the time the 1986 amendments were being developed, there were estimates that the United States treasury lost twenty-five to seventy billion dollars a year in contracting fraud. *Springfield*, 14 F.3d at 651 n.4.

48. See *Lamers*, 168 F.3d at 1016-17 (stating that after *Dean*, “Congress hoped to achieve ‘the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute on their own’”) (misquoted in original) (quoting *Springfield*, 14 F.3d at 649); *Springfield*, 14 F.3d at 651 (stating that the 1986 amendments represented “still another congressional effort to reconcile avoidance of parasitism and encouragement of legitimate citizen enforcement actions”); *Doe*, 960 F.2d at 321 (stating that “[t]he 1986 amendments attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud”).



the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision, and the restrictiveness of the post-1943 cases.<sup>49</sup> Thus, the amended version attempted to navigate the "fine line between encouraging whistle-blowing and discouraging opportunistic behavior."<sup>50</sup>

To encourage private fraud detection, Congress repealed the "government knowledge" standard for barring jurisdiction over the relator.<sup>51</sup> To discourage the type of opportunism embodied in cases like *Marcus*, Congress provided that once the fraud had been the subject of a "public disclosure," relators were required to meet fairly stringent circumstances to avoid the jurisdictional bar.<sup>52</sup>

### III. THE 1986 AMENDMENTS: THE CURRENT VERSION OF THE QUI TAM PROVISIONS

Under the current version of the *qui tam* provisions of the False Claims Act (the Act),<sup>53</sup> no court will have jurisdiction over the relator if the complaint is based upon certain public disclosures<sup>54</sup> unless the relator is an original source of the information.<sup>55</sup> The public disclosures

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49. *Doe*, 960 F.2d at 321 (quoting *Prudential II*, 944 F.2d at 1154).

50. *Rost*, 507 F.3d at 727 (quoting *Prawer*, 24 F.3d at 326) (describing Congress's intent in amending the Act); *Springfield*, 14 F.3d at 651; see also *Prudential II*, 944 F.2d at 1154 (quoting from Sen. Grassley that the 1986 amendments "sought to resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits").

51. See *U.S. ex rel. Biddle v. Bd. of Trs. of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 538 (9th Cir. 1998) (noting that the 1986 amendments abandoned the standard for the jurisdictional bar that precluded actions "based upon evidence or information in the possession of the United States") (quoting *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978)).

52. *Doe*, 960 F.2d at 322 (stating that "to avoid the blatant opportunism embodied in cases like *Marcus*, Congress enacted narrowly circumscribed exceptions to *qui tam* jurisdiction").

53. 31 U.S.C. §§ 3729-3733 (2000).

54. 31 U.S.C. § 3730(e)(4) (2000). In addition to suits based upon certain types of public disclosures, three other types of *qui tam* actions are prohibited. First, no action may be brought by a former or present member of the armed forces against a member of the armed forces arising out of service. 31 U.S.C. § 3730(e)(1) (2000). Second, no *qui tam* action may be brought against a member of Congress, a member of the judiciary, or a senior executive branch official if the government already has knowledge of the fraud. 31 U.S.C. § 3730(e)(2) (2000). Third, no person may commence an action based upon a fraud that is already the subject of a civil suit or an administrative civil money-penalty proceeding in which the federal government is already a party. 31 U.S.C. § 3730(e)(3) (2000).

55. 31 U.S.C. § 3730(e)(4)(A). The basis for the "original source" rule is that the relator should be rewarded only when he brings new information to the government, regardless of how he acquired the information. See, e.g., *U.S. ex rel. Aflatooni v. Kitsap Physicians*

that can bar a *qui tam* action are "allegations or transactions<sup>56</sup>] in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media."<sup>57</sup> If a relator bases his *qui tam* action upon public disclosures, he is jurisdictionally barred unless he can show that he is an "original source."<sup>58</sup> The relator can demonstrate that he is an original source if he (1) "has direct and independent knowledge of the information on which the allegations are based,"<sup>59</sup> and (2) "has voluntarily provided the information to the Government before filing [the *qui tam* complaint]."<sup>60</sup> The basis for the original source rule is to ensure that a relator who files a *qui tam* case after a public disclosure has occurred has valuable firsthand knowledge to contribute to the action.<sup>61</sup>

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Servs., 163 F.3d 516, 521 n.8 (9th Cir. 1999) (describing the basis for the original source rule, and noting that "where the allegations of the fraud are already public knowledge, the relator confers no additional benefit upon the government by subsequently repeating the fraud allegations in the complaint" (misquoted in original) (quoting U.S. *ex rel.* Biddle v. Bd. of Trs. of the Leland Stanford Jr. Univ., 147 F.3d 821, 828 (9th Cir. 1998, *amended*, 161 F.3d 533 (9th Cir. 1998)); U.S. *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 688 (D.C. Cir. 1997) (stating that an action is barred when the relator merely echoes public disclosures that already enable the government to adequately investigate and prosecute the case).

56. The term "allegation" has been defined in the *qui tam* context as "a conclusory statement implying the existence of provable supporting facts." *Findley*, 105 F.3d at 687 (quoting U.S. *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 653-54 (D.C. Cir. 1994)). The term "transaction" has been defined as "suggest[ing] an exchange between two parties or things that reciprocally affect or influence one another." *Id.* (quoting *Springfield*, 14 F.3d at 654). In *Springfield* the United States Court of Appeals for the District of Columbia Circuit held that pay vouchers and telephone records were not allegations or transactions because they were mere "information." *Springfield*, 14 F.3d at 655.

57. 31 U.S.C. § 3730(e)(4)(A). The public disclosure provisions are "designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." U.S. *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (*Prudential II*), 944 F.2d 1149, 1155-56 (3d Cir. 1991).

58. 31 U.S.C. § 3730(e)(4)(A).

59. *Id.* § 3730(e)(4)(B).

60. *Id.* Courts have defined "voluntary" as meaning "uncompelled." See also U.S. *ex rel.* Paranich v. Sorgnard, 396 F.3d 326, 340 (3d Cir. 2005) (holding that the disclosure was not voluntary where the government initiated contact via a subpoena demanding information).

61. See *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1049 (8th Cir. 2002) (stating that the requirement that the relator's knowledge be direct "reflects the congressional intent to avoid parasitical suits in which the plaintiff contributed nothing"); U.S. *ex rel.* Devlin v. California (*Devlin I*), 84 F.3d 358, 362 (9th Cir. 1996) (declaring that the relator did not have direct knowledge and therefore "did not make a genuinely valuable contribution to the exposure of the alleged fraud," contrasted to the

The United States Supreme Court recently declared that the jurisdictional analysis required by the *qui tam* provisions must be conducted on a claim by claim basis, assessing each claim separately to determine if the relator is an original source.<sup>62</sup> Courts require the relator to show that he is an original source of every essential element of each fraud claim that was publicly disclosed.<sup>63</sup> Further, the relator must allege specific facts, not merely conclusory statements, showing that his knowledge was direct and independent.<sup>64</sup>

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decision in *Springfield*, in which “the relator’s own personal knowledge was essential to his conclusion that a fraud had been committed”); *Prudential II*, 944 F.2d at 1154 (stating that the intent of the original source rule is “to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud”).

62. See *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397, 1408, 1410 (2007) (stating that “new allegations regarding a fundamentally different fraudulent scheme require reevaluation of the court’s jurisdiction” and that the Act “does not permit jurisdiction in gross just because a relator is an original source with respect to some claim”); see also *U.S. ex rel. Boothe v. Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1176 (10th Cir. 2007) (noting that “courts should assess jurisdiction on a claim-by-claim basis, asking whether the public disclosure bar applies to each reasonably discrete claim of fraud”); *U.S. ex rel. Merena v. Smithkline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000) (stating that in applying the jurisdictional bar provisions of the Act, “each claim in a multi-claim complaint must be treated as if it stood alone”); *Aflatooni*, 163 F.3d at 523-24 (analyzing each claim separately to determine jurisdiction); *U.S. ex rel. Devlin v. County of Merced (Devlin II)*, 1996 U.S. App. LEXIS 17681, at \*18 (9th Cir. May 16, 1996) (remanding a claim to consider the jurisdictional issue where the district court had failed to address it separately).

63. See, e.g., *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 513, 518 (3d Cir. 2007) (noting that a relator must be an original source of all essential elements of the fraud claim to survive jurisdictional challenge). But see *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1050 (stating that “a relator does not have to have personal knowledge of all elements of a cause of action”); *Springfield*, 14 F.3d at 656-57 (stating that the Act “does not require that the *qui tam* relator possess direct and independent knowledge of all of the vital ingredients to a fraudulent transaction”).

64. *Boothe*, 496 F.3d at 1175 (stating that “conclusory and ill-developed arguments are insufficient” to demonstrate original source jurisdiction); *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1052 (10th Cir. 2004) (stating that to show that he is an original source, the relator “must provide more than an ‘unsupported, conclusory allegation’” (quoting *U.S. ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787, 800 (10th Cir. 2002)); *U.S. ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003) (holding that the relator’s conclusory statement that he learned of the fraud “through his own investigation” is insufficient to establish original source jurisdiction); *U.S. ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999) (ruling that the relator’s response to the defendant’s motion to dismiss was deficient because “it presents only generalized and conclusory arguments that [the relator] obtained knowledge of ‘Spectrum’s fraud’ through his ‘employment relationship’ and his ‘involvement in Spectrum’s business operations’”); *United States v. Alcan Elec. & Eng’g, Inc.*, 197 F.3d 1014, 1021 (9th Cir. 1999) (stating that an assertion by the relator that he learned of the fraud “due to his status as a member of the union” is “insufficiently specific” to show firsthand

#### IV. THE STINSON CASES: ILLUSTRATING COURTS' CONFUSION IN APPLYING THE ORIGINAL SOURCE RULE

Virtually every United States Court of Appeals agrees on one aspect of the public disclosure and original source provisions of the False Claims Act (the Act):<sup>65</sup> "the language of the statute is not so plain as to clearly describe which cases Congress intended to bar."<sup>66</sup> A prime example of this confusion is a series of *qui tam* lawsuits commenced in 1989 by the law firm Stinson, Lyons, Gerlin & Bustamante.<sup>67</sup> Despite

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knowledge).

65. 31 U.S.C. §§ 3729-3733 (2000).

66. *U.S. ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir. 1997) (noting that the jurisdictional provisions of the Act "have led to extensive litigation and to circuit splits concerning the meaning of the words 'based upon,' 'public disclosure,' 'allegations or transactions,' 'original source,' 'direct and independent knowledge' and 'information'"). See also *U.S. ex rel. Hays v. Hoffman*, 325 F.3d 982, 987 (8th Cir. 2003) (quoting *Findley*, 105 F.3d at 681); *U.S. ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 352 (5th Cir. 2003) (noting that "[t]he statutory construction of the 'original source' exception is the subject of much disagreement amongst the courts of appeals that have addressed it"); *Minn. Ass'n of Nurse Anesthetists v. Allina Heath Sys. Corp.*, 276 F.3d 1032, 1046 (8th Cir. 2002) (stating that "the words 'based upon' were simply not well chosen to express Congress's meaning"); *U.S. ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 101 (3d Cir. 2000) (commenting that "the draftsmanship of the *qui tam* statute has its quirks"); *U.S. ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 387-88 (3d Cir. 1999) (giving numerous examples of how the Act "does not reflect careful drafting or a precise use of language"); *United States v. Bank of Farmington*, 166 F.3d 853, 866 (7th Cir. 1999) (asking, "Should jurisdiction depend upon such quirks?"); *U.S. ex rel. S. Praver v. Fleet Bank of Me.*, 24 F.3d 320, 327 (1st Cir. 1994) (finding the "allegations" or "transactions" language in the statute to be "facially ambiguous"); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (Prudential II)*, 944 F.2d 1149, 1163 (3d Cir. 1991) (Scirica, J., dissenting) (observing that "[o]ne difficulty in interpreting the 1986 amendments [to the Act] is that Congress was never completely clear about what kind of 'parasitic' suits it was attempting to avoid"); Bucy, *supra* note 2, at 57 (stating that the *qui tam* provisions are "the most complex and heavily litigated aspect of the FCA"); Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237, 260 (1995) (stating that the *qui tam* provisions of the Act are "rife with ambiguity").

67. See *Prudential II*, 944 F.2d 1149; *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (Prudential I)*, 736 F. Supp. 614 (D.N.J. 1990); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247 (S.D. Fla. 1989); see also Troy D. Chandler, Comment, *Lawyer Turned Plaintiff: Law Firms and Lawyers as Relators Under the False Claims Act*, 35 Hous. L. Rev. 541, 550 (1998) (using the *Stinson* cases to illustrate "inconsistent results" under the public disclosure and original source provisions of the Act).

similar facts, courts in different jurisdictions disagreed on virtually every aspect of how to apply the public disclosure and original source rules.

In the *Stinson* cases, the relator law firm learned of the alleged fraud while representing Armlon Leonard after he was injured in an automobile accident. As part of its representation of Leonard, the Stinson firm examined documents related to the health insurance policy Leonard had with Provident Life & Accident Insurance Company. The Stinson firm ultimately concluded that Provident's claims practices violated federal law by paying Medicare claims as a secondary insurer rather than the primary insurer.<sup>68</sup>

Prior to 1980, Medicare generally paid for medical services even when the beneficiary was also covered by another health plan.<sup>69</sup> But in 1980, Congress enacted cost-cutting amendments to the Medicare program, collectively known as the Medicare Secondary Payer statute (MSP).<sup>70</sup> The MSP statute lowers Medicare disbursements by requiring Medicare beneficiaries to exhaust all available insurance coverage before using Medicare coverage.<sup>71</sup> Under the rule, when a Medicare beneficiary is also covered by private insurance, the private health plans have primary responsibility for the beneficiary's medical bills.<sup>72</sup> Thus, the private plan is the "primary" payer under the MSP, and Medicare acts as the "secondary" payer, responsible only for paying amounts not covered by the primary plan.<sup>73</sup>

The Stinson law firm learned of the primary-secondary payment fraud through document discovery in the *Leonard* litigation, by which the firm obtained internal memoranda from Provident.<sup>74</sup> One such memorandum pointed out that Provident's method of processing claims for the working-aged should be changed to comply with Medicare's primary-secondary payment regulations.<sup>75</sup> The Provident memorandum indicated that Medicare was paying first on such employees' claims,

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68. *Prudential I*, 736 F. Supp. at 615.

69. See Social Security Amendments of 1965, Pub. L. No. 89-97, § 1862(b), 79 Stat. 286 (1965); see also *Fanning v. United States*, 346 F.3d 386, 388-89 (3d Cir. 2003) (explaining the Medicare secondary payment statute).

70. The amendments are codified at 42 U.S.C. § 1395y(b) (2000 & Supp. V 2005); see also *Fanning*, 346 F.3d at 388-89 (explaining the Medicare secondary payment statute).

71. See *Fanning*, 346 F.3d at 388-89 (explaining the Medicare secondary payment statute).

72. *Id.* at 389.

73. *Id.*

74. *Prudential I*, 736 F. Supp. at 615-16.

75. *Id.* at 615.

thereby paying the lion's share of the claim reimbursement that should have been paid by Provident.<sup>76</sup>

A second Provident document produced in discovery, entitled "Medicare Reimbursement," recorded the "tabulated results of a telephone survey Provident had conducted of other insurance carriers[]" claims processing procedures" for active employees who were also covered by Medicare.<sup>77</sup> The document included a list of twenty-four carriers supposedly contacted by Provident. Handwritten notations were placed next to the names of some of these carriers.<sup>78</sup> Next to the names of Prudential and Blue Cross Blue Shield of Georgia were the handwritten notations "same as us."<sup>79</sup> Based on this document, the Stinson firm concluded that Prudential and Blue Cross Blue Shield of Georgia, just like Provident, were also violating the Medicare primary-secondary payment rules.<sup>80</sup> The Stinson firm thereupon commenced qui tam actions against Provident, Prudential, and Blue Cross Blue Shield of Georgia, alleging Medicare primary-secondary payment fraud.<sup>81</sup>

Although all three *Stinson* qui tam cases were based on virtually the same fraud claims and the same facts, the courts in the three jurisdictions that heard the claims reached completely different conclusions about applying the public disclosure and original source rules.<sup>82</sup>

#### A. *The Provident Case*

The Stinson firm brought its case against Provident in the United States District Court for the Southern District of Florida.<sup>83</sup> The district court, assuming that the fraud had been publicly disclosed in the underlying *Leonard* lawsuit,<sup>84</sup> found that the Stinson law firm qualified as an original source.<sup>85</sup> The court ruled that the Stinson firm's knowledge was direct because it had been obtained by its direct relationship to the *Leonard* litigation.<sup>86</sup> The knowledge was indepen-

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76. *See id.*

77. *Id.* at 615-16.

78. *Id.* at 616.

79. *See id.*; *Blue Cross Blue Shield of Ga.*, 755 F. Supp. at 1044.

80. *See Prudential I*, 736 F. Supp. at 615-16; *Blue Cross Blue Shield of Ga.*, 755 F. Supp. at 1044.

81. *See Prudential II*, 944 F.2d at 1149; *Blue Cross Blue Shield of Ga.*, 755 F. Supp. at 1040; *Prudential I*, 736 F. Supp. at 614; *Provident*, 721 F. Supp. at 1247.

82. *See Prudential II*, 944 F.2d at 1149; *Blue Cross Blue Shield of Ga.*, 755 F. Supp. at 1040; *Prudential I*, 736 F. Supp. at 614; *Provident*, 721 F. Supp. at 1247.

83. *Provident*, 721 F. Supp. at 1247.

84. *Id.* at 1257.

85. *Id.* at 1258.

86. *Id.*

dent, the court ruled, because it had been learned from a source independent of the *Leonard* litigation: correspondence conducted by the Stinson firm stemming from its representation of Leonard.<sup>87</sup>

*B. The Prudential Lawsuit*

The Stinson firm commenced its lawsuit against Prudential in the United States District Court for the District of New Jersey.<sup>88</sup> This district court also found public disclosure but ruled that it had occurred when the discovery documents had been disclosed to the Stinson firm, as "the information would have been available for public release."<sup>89</sup> Although these disclosures were not made at a "hearing," the court opined that the term "public disclosure" was "a general phrase" that was not limited by the sources of public disclosure set forth in the statute.<sup>90</sup>

The New Jersey district court, however, disagreed with the Florida district court on the original source issue, ruling that the Stinson firm was *not* an original source.<sup>91</sup> The New Jersey district court found that the Stinson firm had failed to show that it was an original source because its knowledge was not direct.<sup>92</sup> It had learned of the fraud, the court declared, by merely "stumbl[ing] across" the incriminating documents, not by firsthand observation of the fraud.<sup>93</sup> Because the Stinson firm did not qualify as an original source, the court found that the firm was barred from acting as a relator.<sup>94</sup>

On appeal, the United States Court of Appeals for the Third Circuit affirmed the findings of the district court.<sup>95</sup> The Third Circuit stated, however, that the discovery was a form of "hearing."<sup>96</sup> The court declared that the term "hearing" was intended to be broadly defined to include all information disclosed in connection with civil, criminal, or administrative litigation, including discovery.<sup>97</sup> Therefore, the Third Circuit held that documents produced in discovery are publicly disclosed unless there is a court-imposed limitation on their use.<sup>98</sup> Finally, the court of appeals affirmed the district court's finding that the Stinson

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87. *Id.*

88. *See Prudential I*, 736 F. Supp. at 614.

89. *Id.* at 619.

90. *See id.* at 621-22.

91. *Id.* at 622-23.

92. *Id.* at 622.

93. *Id.*

94. *Id.* at 623.

95. *Prudential II*, 944 F.2d at 1161.

96. *Id.* at 1157.

97. *Id.* at 1156.

98. *Id.* at 1158.

firm was not an original source because its information came indirectly through two intermediaries: the Provident employee who had performed the telephone survey, and the discovery procedure whereby the memoranda were produced.<sup>99</sup> Therefore, Stinson was barred as a relator.<sup>100</sup>

However, Third Circuit Court of Appeals Judge Scirica dissented, arguing that public disclosure had *not* occurred when the documents were produced in discovery because they had not been filed with a court and therefore were not publicly available.<sup>101</sup> Nevertheless, Judge Scirica determined that public disclosure had occurred when Stinson filed the documents with the Florida district court in the *qui tam* action against Provident.<sup>102</sup> Judge Scirica disagreed, however, with the majority's holding that the law firm was not an original source.<sup>103</sup> To the contrary, Judge Scirica argued that the Stinson firm was an original source because the law firm itself had made the public disclosure.<sup>104</sup> Alternatively, Judge Scirica argued that the Stinson firm's knowledge was direct and independent because it had not learned of the fraud from the public disclosure.<sup>105</sup> Therefore, Judge Scirica concluded that the Stinson firm was an original source and should not have been barred from acting as the relator.<sup>106</sup>

### C. *The Blue Cross Blue Shield of Georgia Lawsuit*

The Stinson firm sued Blue Cross Blue Shield of Georgia in the United States District Court for the Southern District of Georgia.<sup>107</sup> The Georgia district court disagreed with the New Jersey courts on the issue of public disclosure.<sup>108</sup> It found that public disclosure had not occurred when the documents were produced in discovery because they were not disclosed publicly in a "hearing."<sup>109</sup> The district court declared that the list of public disclosure sources in the statute was exclusive and therefore the jurisdictional bar did not apply to any source of information that was not explicitly included in the list, such as documents

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99. *Id.* at 1160-61.

100. *Id.* at 1161.

101. *Id.* at 1168-69 (Scirica, J., dissenting).

102. *Id.* at 1171.

103. *Id.*

104. *Id.*

105. *Id.* at 1172-73.

106. *Id.* at 1175.

107. *See Blue Cross Blue Shield of Ga.*, 755 F. Supp. at 1040.

108. *See id.* at 1050.

109. *Id.*



produced in discovery.<sup>110</sup> Further, the court noted in dicta that if the documents were deemed to have been publicly disclosed via discovery, the Stinson firm would not qualify as an original source because it had learned of the fraud through the public disclosure, "not by virtue of any direct relationship to, or interest in [Blue Cross Blue Shield's] claims procedures."<sup>111</sup>

As the *Stinson* cases aptly illustrate, the qui tam provisions have lent themselves to sharply conflicting rulings based upon precisely the same facts. The various courts that considered the *Stinson* cases opposingly concluded that public disclosure did and did not occur and that the Stinson firm was and was not an original source. The *Stinson* cases, therefore, exemplify the confusion that different courts have experienced in applying the public disclosure and original source rules.

## V. COURTS' INTERPRETATIONS OF THE ORIGINAL SOURCE RULE

The qui tam provisions of the False Claims Act (the Act)<sup>112</sup> require a relator to show that he is an original source whenever his complaint is based upon publicly disclosed allegations.<sup>113</sup> Accordingly, applying the original source rule requires an understanding of (1) what it means to be "based upon" a public disclosure and (2) what a relator must show to demonstrate that he is an original source.

### A. "Based Upon"

While some courts have interpreted the term "based upon" as meaning "derived from," the majority of courts have interpreted the term much more broadly.<sup>114</sup> The latter have held that "based upon" means

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110. *Id.*

111. *Id.* at 1051 (misquote in original) (quoting *Prudential I*, 736 F. Supp. at 622).

112. 31 U.S.C. §§ 3729-3733 (2000).

113. See 31 U.S.C. § 3730(e)(4)(A) (2000).

114. See *U.S. ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 737 (7th Cir. 2007). The court in *Fowler* held that a qui tam action is based upon publicly disclosed information "when it 'both depends essentially upon publicly disclosed information and is actually derived from such information.'" *Id.* (quoting *U.S. ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003)). The court continued by holding that "information which happens to be similar or identical to publicly disclosed allegations or transactions, but which derives from some other source than the public disclosure, is not parasitic, and should not be barred by a provision meant to bar parasitic lawsuits." *Id.* (quoting *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1991)). See *U.S. ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000) (stating that "[w]e have interpreted 'based upon' to be synonymous with 'derived from'"); *Bank of Farmington*, 166 F.3d at 863 (agreeing with the Fourth Circuit that "based upon" is better defined as "derived from" "on the grounds both of plain meaning and public policy"); *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994) (declaring that "reading [

“similar to.”<sup>115</sup> Therefore, these courts have denied jurisdiction to a relator whenever his complaint makes allegations that are substantially similar to the information that was publicly disclosed.<sup>116</sup> Moreover, courts have generally ruled that “based upon” means “based upon in any part,” so that a complaint need not be completely similar to the publicly disclosed information to raise the jurisdictional bar.<sup>117</sup> Accordingly,

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‘based upon’ as meaning ‘derived from’ is the only fair construction of the statutory phrase”). *But see* U.S. *ex rel.* Mistick PBT v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 386 (3d Cir. 1999) (rejecting a definition of “based upon” as “derived from” on the basis that a “derived from” test “swallows the original source exception whole” because it is a repeat of the “independent” inquiry (quoting U.S. *ex rel.* Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 683 (D.C. Cir. 1997)); U.S. *ex rel.* Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 522 (9th Cir. 1998) (rejecting a reading of “based upon” as “derived from,” observing that such an interpretation would render the “‘based upon’ language merely duplicative of the ‘direct and independent’ requirements); U.S. *ex rel.* Biddle v. Bd. of Trs. of the Leland Stanford, Jr. Univ., 161 F.3d 533, 538 (9th Cir. 1998) (rejecting a “derived from” interpretation of “based upon” because such a reading would duplicate the direct and independent knowledge language); *Findley*, 105 F.3d at 683 (rejecting a reading of “based upon” as “derived from” because it renders the inquiry into whether the relator obtained his information independently of the public disclosure “largely superfluous”).

115. *See* U.S. *ex rel.* Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 506, 519 (3d Cir. 2007) (interpreting “based upon” as “supported by” or “substantially similar to” the public disclosure); U.S. *ex rel.* Paranych v. Sorgnord, 396 F.3d 326, 334 (3d Cir. 2005) (holding that based upon means “supported by” or “substantially similar to,” and not “derived from”); *Mistick PBT*, 186 F.3d at 386 (holding that “based upon” means “supported by” or “substantially similar to”); *Biddle*, 161 F.3d at 537 (stating that “based upon” means “repeats”); U.S. *ex rel.* Devlin v. County of Merced (*Devlin II*), 1996 U.S. App. LEXIS 17681, at \*11 (9th Cir. May 16, 1996) (holding that allegations are based upon a public disclosure if “fairly characterized,” they relate to an ‘allegation’ the public already knows” (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992))); *see also* U.S. *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992) (describing the “based upon” inquiry as a “quick trigger for the more exacting original source analysis”).

116. *See* U.S. *ex rel.* Grynberg v. Praxair, Inc., 389 F.3d 1038, 1051 (10th Cir. 2004) (stating that the “based upon” test is “whether ‘substantial identity’ exists between the publicly disclosed allegations or transactions and the *qui tam* complaint”); *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1044 (10th Cir. 2004) (stating that a *qui tam* action is based upon a public disclosure if the allegations are substantially similar); U.S. *ex rel.* Fine v. Advanced Scis., Inc., 99 F.3d 1000, 1006 (10th Cir. 1996) (the relator’s allegations are based upon the public disclosures if there is “substantial identity” between them); *Hagood v. Sonoma County Water Agency (Hagood II)*, 81 F.3d 1465, 1473 (9th Cir. 1996) (stating that a relator’s allegation is based upon a public disclosure if “‘fairly characterized’ the allegation repeats what the public already knows” (quoting *Wang*, 975 F.2d at 1417)); U.S. *ex rel.* Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995) (reading “based upon” broadly to mean that “‘substantial identity’ exists between [the allegations that are publicly disclosed] and the allegations contained in [the relator’s] complaint”).

117. *See* U.S. *ex rel.* Boothe v. Sun Healthcare Group, Inc., 496 F.3d 1169, 1174 (10th Cir. 2007) (noting that “[n]ot a single circuit has held that a *complete* identity of allegations, even as to time, place, and manner is required to implicate the public

courts have ruled that a complaint is based upon a public disclosure even if the complaint gives additional details that were lacking in the public disclosure.<sup>118</sup> Because of this extremely broad interpretation of "based upon," most relators asserting a fraud similar to prior public disclosures have been required to show that they satisfy the original source rule.<sup>119</sup>

### B. "An Original Source"

The statute provides, *inter alia*, that a relator is an original source of publicly disclosed allegations when the relator has "direct and independent knowledge of the information on which the allegations are based."<sup>120</sup> Despite the vagueness of the terms "direct" and "independent," most courts have interpreted the "direct" and "independent" requirements very restrictively,<sup>121</sup> thereby substantially limiting the

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disclosure bar"); U.S. *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 646 (6th Cir. 2003) (stating that "based upon" means "supported by," including "any action based *even partly* upon public disclosures" (quoting U.S. *ex rel.* McKenzie v. BellSouth Telecomms., Inc., 123 F.3d 935, 940 (6th Cir. 1997)); *Bank of Farmington*, 166 F.3d at 863-64 (noting that "'based upon' means 'based upon in any part'" (misquoted in original) (quoting *Precision*, 971 F.2d at 553)); Fed. Recovery Servs., Inc. v. United States, 72 F.3d 447, 451 (5th Cir. 1995) (stating that a qui tam action "*even partly based upon* publicly disclosed allegations or transactions is nonetheless "based upon" such allegations or transaction" (misquoted in original) (quoting *Precision*, 971 F.2d at 552)); U.S. *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1158-59 (2d Cir. 1993) (rejecting the notion that the jurisdictional bar is raised only when the qui tam complaint is based solely upon the public disclosures, but noting that the action is barred when it is "based in any part" upon the public disclosures); *Precision*, 971 F.2d at 551 (concluding that "based upon" means "based in any degree upon").

118. See *Bledsoe*, 342 F.3d at 646 (concluding that the relator's complaint was based upon the public disclosure even though it contained more detailed allegations about the defendant hospital's fraudulent billing practices); U.S. *ex rel.* Settlemire v. Dist. of Columbia, 198 F.3d 913, 919 (D.C. Cir. 1999) (stating that the fact that the relator provided more specific details about the fraud does not render him an original source).

119. See, e.g., *Settlemire*, 198 F.3d at 919.

120. 31 U.S.C. § 3730(e)(4)(B). The United States Supreme Court recently ruled that the term "information" refers to the information on which the relator's allegations are based, not the information on which the publicly disclosed allegations are based. *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1407 (2007) (noting that "[t]hrough the question is hardly free from doubt," the term refers to the allegations made in the relator's complaint). This ruling ends a circuit split, in which the Fourth, Sixth, Eighth, and D.C. Circuits held that the term "information" referred to the publicly disclosed allegations, and the Third, Ninth, and Tenth Circuits held that "information" referred to the qui tam complaint. See U.S. *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 336 F.3d 346, 353 (5th Cir. 2003) (noting the circuit split and joining the circuits holding that "information" refers to the publicly disclosed allegations).

121. See *infra* Parts V.B.1.-2.

potential pool of relators whose complaints are based upon public disclosures.

**1. Direct.** The most significant limitation the original source rule imposes on relators is that they must possess direct information. Most courts have agreed this means that once a public disclosure of the fraud occurs, a subsequent relator must demonstrate that he did not learn of the fraud from any intermediate source, be it another document or another person.<sup>122</sup> Effectively, this limits the pool of relators to those

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122. See *Atkinson*, 473 F.3d at 513 (reasoning that the relator was not an original source because he derived his knowledge of the fraud from a document provided by the Coast Guard); *United States v. Applera Corp.*, 155 Fed. App'x 291, 292-93 (9th Cir. 2005) (ruling that the relator's knowledge was not direct because it was obtained from publicly available patent materials, journal articles, grant applications, or derived secondhand from another individual's research notes and grant files); *Grynberg*, 389 F.3d at 1054 (ruling that the relator's knowledge was not direct because he derived it secondhand from an individual who had firsthand knowledge as a result of his employment); *U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 177 (5th Cir. 2004) (stating that "direct" means "knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others" (quoting *Laird*, 336 F.3d at 355)); *Laird*, 336 F.3d at 355 (interpreting "'direct' by its plain meaning as [] derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others"); *U.S. ex rel. Hays v. Hoffman*, 325 F.3d 982, 990-91 (8th Cir. 2003) (holding that the relator's information was not direct where it was obtained from an individual with direct knowledge who was unwilling to come forward as a whistleblower, and declaring that "[t]o be independent, the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources" (quoting *Advanced Sciences*, 99 F.3d at 1007)); *Aflatooni*, 163 F.3d at 525 (declaring that a relator does not have firsthand knowledge of a fraud when he derives it secondhand from another individual who witnessed it firsthand as a result of his employment with the defendant); *U.S. ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1548 (10th Cir. 1996) (holding that the relator did not have direct knowledge of the fraud where "he was not the [investigator] actually performing the investigations" of the defendant); *Advanced Sciences*, 99 F.3d at 1007 (holding that the relator did not have direct knowledge because he "was not the individual who discovered the facts but he was the supervisor to whom the auditors reported" and that "he learned of [the fraud] through the discoveries of others"); *U.S. ex rel. Devlin v. California (Devlin I)*, 84 F.3d 358, 362 (9th Cir. 1996) (stating that a relator does not have direct knowledge if he learns of it secondhand from a person with firsthand knowledge); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1477 (2d Cir. 1995) (the relator's information was not direct and independent because he obtained it from the media, administrative reports prepared for the Army Corps, and arbitration hearings on cost overruns); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (Prudential II)*, 944 F.2d 1149, 1160-61 (3d Cir. 1991) (holding that the relator's knowledge was not direct when it came through two intermediaries: the Provident employee who prepared the memorandum that the relator received in civil discovery, and the discovery procedure itself by which the memorandum was produced). But see *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1249, 1258 (S.D. Fla. 1989) (finding that the

who have either participated in the fraud or observed it firsthand.<sup>123</sup> A relator with direct knowledge is one who "saw [the fraud] with his own eyes," and his knowledge was "unmediated by anything but [his] own labor."<sup>124</sup> For example, a relator who witnessed healthcare fraud

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relator's knowledge was direct when it was obtained through personal correspondence with the Director of the Health Care Financing Administration's Bureau of Eligibility, Reimbursement, and Coverage, and from personal communications with a subscriber of the defendant whose claims had been unsatisfactorily processed by the defendant).

123. See *Atkinson*, 473 F.3d at 520 (describing persons with firsthand knowledge as those "who are either close observers or otherwise involved in the fraudulent activity" (quoting *U.S. ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995)); *U.S. ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745 (3d Cir. 1997) (noting Congress's statement that "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity" (alteration in original) (quoting S. Rep. No. 99-345 at 4 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269)); *U.S. ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) (noting that "the paradigm *qui tam* case is one in which an insider at a private company brings an action against his own employer"); see also *U.S. ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 336 (3d Cir. 2005) (holding that the relator had direct knowledge because he was involved in the fraudulent billing scheme); *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (holding that the relators had direct knowledge due to their communications with defendants themselves, their participation in the anesthesia procedures that were later fraudulently billed by the defendant, their seeing the defendant anesthesiologist filling out the forms used for billing with misleading information, and their familiarity with the hospital records disclosing the defendant's fraud); *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (7th Cir. 1999) (holding that the relator had direct knowledge of the way that GBT was implementing its tripper service because he observed the GBT buses firsthand); *United States v. Northrop Corp.*, 5 F.3d 407, 411 (9th Cir. 1993) (holding that the relator had direct knowledge "because he acquired it during the course of his employment").

124. *Wang*, 975 F.2d at 1417; see also *Paranich*, 396 F.3d at 335-36 (defining "direct" as "marked by absence of an intervening agency, instrumentality, or influence: immediate," "[seen] with the relator's own eyes," and "[b]y the relator's own efforts, and not by the labors of others, and . . . not derivative of the information of others" (alteration and ellipses in original) (quotation marks omitted)); *Grynberg*, 389 F.3d at 1052-53 (stating that the relator's knowledge must be "marked by the absence of an intervening agency . . . [and] unmediated by anything but [his] own labor" (alterations and ellipsis in original) (quoting *Kennard*, 363 F.3d at 1044)); *McKenzie*, 123 F.3d at 941 (defining "direct" as "marked by absence of intervening agency"); *Devlin II*, 1996 U.S. App. LEXIS 17681, at \*14 (stating "that a relator has 'direct and independent' knowledge if he discovers the information underlying his allegations of wrongdoing through his own labor"). But see *Prudential II*, 944 F.2d at 1173 (Scirica, J., dissenting) (observing that "[m]uch valuable information is obtained through 'intermediaries' of some kind," and that "[e]liminating information that has come through intermediaries would bar a large number of potential relators").

firsthand when providing medical services was deemed to have direct knowledge of the fraud.<sup>125</sup>

As a result of courts' rulings that the "direct" requirement of the original source rule effectively requires the relator to be either a participant in or a firsthand observer of the fraud, this provision in the original source rule has become a virtual graveyard of relators' claims.<sup>126</sup> Qui tam relators have been barred when they learned of the fraud from Freedom of Information Act (FOIA)<sup>127</sup> responses, public filings, or other individuals.<sup>128</sup>

**2. Independent.** Most courts have agreed that the requirement that an original source relator have independent knowledge of the fraud prohibits the relator from using the public disclosure as a source of the allegations in the relator's complaint.<sup>129</sup> The fact that the relator knew

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125. *U.S. ex rel. Barron v. Deloitte & Touche, LLP*, 106 Fed. App'x 284, 285 (5th Cir. 2004) (holding that evidence the relator provided medical services at one of the relevant school districts and observed defendant's presentation on Medicaid billing was sufficient to establish direct knowledge of the fraud); *see also Aflatooni*, 163 F.3d at 525-26 (noting, but ultimately rejecting, an argument by the relator that his knowledge was direct because it was learned firsthand by virtue of his position as a participating physician, by speaking with patients, and by reviewing their medical records).

126. *See U.S. ex rel. Kinney v. Stoltz*, 327 F.3d 671, 675 (8th Cir. 2003) (ruling that the relator was not an original source because there was no evidence that he had direct knowledge of the defendant's wrongdoing, having made no claims against the defendant until after the alleged fraud was revealed through discovery in the underlying litigation); *Hays*, 325 F.3d at 990-91 (rejecting the relator because his information was secondhand, coming from a whistleblower who was unwilling to come forward); *Devlin I*, 84 F.3d at 361 (finding that the relator's knowledge was not direct because he derived it secondhand from another individual); *Devlin II*, 1996 U.S. App. LEXIS 17681, at \*15 (holding that the relators did not have direct knowledge because they had acquired it indirectly through the Department of Social Services (DSS) investigators who had prepared the case study and through the Chief of DSS's Child Welfare Service Division); *Barth*, 44 F.3d at 703-04 (reasoning that when the relator derived his information from visits to the job site, publicly filed payroll records, and interviews with defendant's employees, he was "simply gathering information . . . [and] [a]s such, he was a recipient of information and not a direct source" (alterations and ellipsis in original) (quoting the unpublished district court opinion)).

127. 5 U.S.C. § 552 (2006).

128. *See United States v. N.Y. Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (concluding that the relator did not satisfy the direct and independent knowledge requirement because he relied on the findings of two audits by the New York City Health & Hospitals Corporation rather than on his own suspicions of fraud); *Mistick*, 186 F.3d at 389 (holding that the relator did not have independent information when he learned of the fraud from a FOIA response); *Kreindler & Kreindler*, 985 F.2d at 1159 (holding that the relator had no direct knowledge when it acquired the knowledge from the defendant).

129. *See Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1045 (stating that a relator's knowledge is not independent of the public disclosure "if it was derived from the public disclosure"); *U.S. ex rel. Branhan v. Mercy Health Sys. of Sw. Ohio*, 1999 U.S. App. LEXIS

of the fraud prior to the public disclosure establishes independence,<sup>130</sup> as does the relator's ignorance of the public disclosure.<sup>131</sup> Generally, courts have not required every allegation made by the relator to be independent.<sup>132</sup> But courts largely agree that "*qui tam* suits are limited to those in which the relator has contributed significant independent information."<sup>133</sup>

Consequently, courts have rejected relators when it can be established that they relied upon public disclosures in drafting their claims.<sup>134</sup>

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18509, at \*7 (6th Cir. 1999) (defining "independent" as meaning that the relator "does not depend or rely upon the public disclosures" (citing *McKenzie*, 123 F.3d at 943)); *Mistick*, 186 F.3d at 389 (noting that "a relator who would not have learned of the information absent public disclosure [does] not have 'independent' information within the statutory definition of ['original source']" (second alteration in original) (quoting *Prudential II*, 944 F.2d at 1160)); *McKenzie*, 123 F.3d at 941 (defining "independent knowledge" as knowledge that "is not 'dependent on public disclosure'" (misquoted in original) (quoting *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989)). See also *U.S. ex rel. Battle v. Bd. of Regents for the State of Ga.*, 468 F.3d 755, 762 (11th Cir. 2006) (holding that the plaintiff's allegations were not independent because they were based chiefly on state audits); *Bank of Farmington*, 166 F.3d at 864 (holding that the relator's claims were not independent because they were based upon the defendant bank's disclosure to the federal Farmers' Home Administration); *Hagood II*, 81 F.3d at 1476 (holding that the relator learned of the fraud independently of the public disclosure when, as an attorney for the United States Army Corps of Engineers, he worked a great deal on the project and was in a position to know its specifications and costs); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (Prudential I)*, 736 F. Supp. 614, 623 (D.N.J. 1990) (finding that the relator's knowledge was not direct because it was acquired from the public disclosure).

130. *Paranich*, 396 F.3d at 337 (holding the relators' knowledge to be independent because it predated the public disclosures); *Aflatooni*, 163 F.3d at 525 (concluding that the relator's knowledge was independent because it preceded the public disclosure); *McKenzie*, 123 F.3d at 941-42 (stating that a relator will be able to maintain a *qui tam* action "so long as he had some of the information in advance of the public disclosure" (quoting *Cooper v. Blue Cross Blue Shield of Fla.*, 19 F.3d 562, 568 (11th Cir. 1994))); *Barth*, 44 F.3d at 703 (accepting the district court's conclusion that the relators' information was independent because it was acquired prior to the public disclosures).

131. *E.g.*, *Paranich*, 396 F.3d at 337 (declaring that "the relator would have to know of a disclosure in order for his information to be deemed *dependent* on it").

132. See *Settlemire*, 198 F.3d at 919; *Findley*, 105 F.3d at 686 (both stating that "Congress did not prescribe by mathematical formulae the quantum or centrality of nonpublic information that must be in the hands of the *qui tam* relator in order for suits to proceed" (quoting *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 653 (D.C. Cir. 1994))).

133. *Findley*, 105 F.3d at 686 (quoting *Springfield*, 14 F.3d at 653).

134. See *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1254 (11th Cir. 2007) (ruling that the relators did not qualify as original sources because they conceded that they based their complaint on publicly disclosed documents); *Reagan*, 384 F.3d at 179 (holding that the relator's knowledge was not independent when he researched the same reports the federal government had already researched but came to

Even when a relator has specialized knowledge or expertise that enables him to recognize a fraud from a public disclosure that others would not have detected, courts have ruled that such expertise is insufficient to show independent knowledge to satisfy the original source rule.<sup>135</sup>

**3. The Investigation Exception to the Direct and Independent Requirement.** The only significant exception to the requirement that the original source relator must possess direct and independent information occurs when the relator performs substantial private investigation, using obscure sources of information and ferreting out a

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a different conclusion); *N.Y. Med. Coll.*, 252 F.3d at 121 (dismissing the complaint because the “core information” underlying the relators’ fraud allegations was two publicly disclosed audits); *Mistick*, 186 F.3d at 389 (rejecting the relator as an original source when it based its complaint on an administrative report and investigation and on a civil hearing); *MK-Ferguson*, 99 F.3d at 1548 (holding that the relator’s information was not independent because “his own investigations are only a continuation of the audit conducted by [an independent firm]”); *Fed. Recovery Servs.*, 72 F.3d at 451 (declaring that the relator “cannot avoid the jurisdictional bar simply by adding other claims that are substantively identical to those previously disclosed in the state court litigation”); *Precision*, 971 F.2d at 554 (ruling that the relator’s information was not direct and independent when it merely continued other individuals’ investigations and was strikingly redundant to them); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1050-51 (S.D. Ga. 1990) (opining that the relator did not have direct and independent knowledge because it derived its information from the public disclosure); see also *Findley*, 105 F.3d at 687 (holding that a relator’s information is not independent if the relator merely identifies several particular perpetrators of the fraud that the government could have easily identified on its own based upon the publicly disclosed information).

135. See *McElmurray*, 501 F.3d at 1254 (ruling that “[t]he fact that this background knowledge of Augusta’s environmental violations enabled [the relators] to understand the significance of the information they acquired . . . does not mean that they had knowledge independent of the publicly disclosed information”); *Atkinson*, 473 F.3d at 526 n.27 (holding that the relator’s unique knowledge of the site of the fraud and his special ability to “understand” the significance of facts allowing him to infer the fraud did not grant him original source status); *Findley*, 105 F.3d at 688 (stating that a relator’s “background information” is insufficient to establish an independent investigation, and that “[i]f a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a *qui tam* action cannot proceed”); *Springfield*, 14 F.3d at 655 (holding that if all of the critical elements of the fraud are publicly disclosed, but not readily understandable by most people, such as engineering blueprints, expertise in engineering would not render the relator an original source); *Kreindler & Kreindler*, 985 F.2d at 1159 (stating that “[n]or does the fact that [the relator’s] background knowledge enabled it to understand the significance of the information acquired in the *Bryant* action make its knowledge independent of the publicly disclosed information”); *Prudential II*, 944 F.2d at 1160 (rejecting relator’s argument that it had independent knowledge because “its interest in and knowledge of the insurance industry gave it the background necessary to understand the complex scheme by which Prudential allegedly defrauded the government”).



complex fraud that the government could not have discovered on its own.<sup>136</sup> Within this exception, the fact that the relator reviewed some public documents does not necessarily foreclose jurisdiction:

"[A] complete and thorough investigation of a fraud . . . will likely necessarily involve some review of contracts, documents, or other information in the public domain. *It is the character of the relator's discovery and investigation that controls this inquiry.*"

We conclude that the extent of reliance on information already in the public domain should be a consideration during the original source inquiry, even if that information is not a public disclosure within the meaning of [the Act] . . . courts should consider both "the availability of the information and the amount of labor and deduction required to construct the claim."<sup>137</sup> The more obscure the records and the more significant the investigative input of the relator, the more likely it is that granting original source status will fulfill the [Act's] "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own."<sup>138</sup>

We decline to adopt a rigid rule that consultation with public documents automatically disqualifies a relator from being an original source. . . . That said, courts must be mindful of suits based only on "secondhand information, speculation, background information or collateral research . . ." [A relator should not be deemed an original source when] the availability of the information was high and the amount of deduction was minimal . . . . [This did] not require much interpretive rigor.<sup>139</sup>

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136. See *United States v. Catholic Healthcare W.*, 445 F.3d 1147, 1155 (9th Cir. 2006) (stating that the relator was an original source because he "put in substantial time and effort into uncovering the allegations"); *Lamers*, 168 F.3d at 1017-18 (holding that the relator was an original source because he acquired knowledge of actual bus route operations through personal observation by walking the streets and declaring that "Congress wanted to encourage busybodies who, through independent efforts, assist the government in ferreting out fraud"); *Cooper*, 19 F.3d at 568 (holding that the relator was an original source because he acquired his knowledge of a Medicare fraud through three years of his own claims processing, research, and correspondence with members of Congress and the [Health Care Financing Administration]). But see *Bank of Farmington*, 166 F.3d at 864-65 (ruling that the relator was not an original source because "[t]he fraud alleged is a simple affair," and "[i]t would not take Sherlock Holmes to figure it out," so that the difficulty involved in unveiling the fraud "falls well short of the mark").

137. *Atkinson*, 473 F.3d at 522 (quoting *Kennard*, 363 F.3d at 1045, 1046).

138. *Id.* (quoting *Springfield*, 14 F.3d at 651).

139. *Id.* at 522-23 (quoting *U.S. ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999)).

Courts have imposed an extremely high standard before finding a private investigation equivalent to direct and independent knowledge.<sup>140</sup> Thus, relatively rarely does a relator qualify as an original source due to his or her own investigation.<sup>141</sup> The fact that a relator conducted some collateral research and investigation is insufficient to establish direct and independent knowledge.<sup>142</sup> As one court noted, the

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140. See *Reagan*, 384 F.3d at 179 (stating that the investigation by the relator must unearth "some additional compelling fact, or must demonstrate a new and undisclosed relationship between disclosed facts, that puts a government agency 'on the trail' of fraud, where that fraud might otherwise go unnoticed"); *Bank of Farmington*, 166 F.3d at 867 (Wood, J., concurring) (stating that a whistleblower piecing together a fraud from his own investigation must "reveal a pattern of fraud sufficiently complex as to meet the direct and independent knowledge requirements").

141. See *Catholic Healthcare*, 445 F.3d at 1155-56 (characterizing the relator's investigation as "precisely the sort of investigative work that the *qui tam* provisions of the [Act] encourage in order to promote detection of fraud against the government," after the relator filed a FOIA request, requested meeting records and minutes, requested other documents from Arizona State University, toured two facilities, contacted and interviewed at least nine people who had knowledge about the project, corresponded with a scientist overseas who was listed as a consultant in the research, and combed through the documents that she received); *Kennard*, 363 F.3d at 1046 (holding there was sufficient personal investigation when the relator relied exclusively on his own personal, private royalty records and statements from the defendant and other oil companies, when he did not merely compile statistics but did his own research and investigation, and when he did not rely on any government report dealing with the allegations because no report existed, and declaring that "[t]his case would not exist but for Relators sniffing it out"); *Lamers*, 168 F.3d at 1017-18 (concluding that the relator had independent knowledge when he investigated the actual bus route operations on his own, thereby providing a service to the Federal Transit Authority, in keeping with Congress's goal of "encourag[ing] busybodies who, through independent efforts, assist the government in ferreting out fraud"); *Cooper*, 19 F.3d at 568 (concluding that the relator qualified as an original source when he acquired his knowledge of the defendant's wrongdoing from three years of his own claims processing, research, and correspondence with members of Congress and [the Health Care Financing Administration]). But see *Devlin II*, 1996 U.S. App. LEXIS 17681, at \*15 (holding that the relators did not have direct knowledge when they "simply pieced together information" they acquired from others); *MK-Ferguson*, 99 F.3d at 1548 (rejecting the relator as an original source when "his independent investigations consisted solely of placing ads in newspapers soliciting information from those with knowledge of fraud"); *Barth*, 44 F.3d at 703-04 (holding that a relator's derivation of information from visits to the project job site, his observations of employees, his examination of copies of payroll records, and his interviews with employees constituted a gathering of secondhand information and not firsthand knowledge); *Springfield*, 14 F.3d at 657 (holding that the relator "bridged the gap by its own efforts and experience," including "personal knowledge of the arbitration proceedings and interviews with individuals and businesses identified in the telephone records," and observing that the relator started with "innocuous public information" and "completed the equation" with information that was independent of the public disclosures).

142. See *Reagan*, 384 F.3d at 179 (denying that "second-hand information may be converted into 'direct and independent knowledge' simply because the plaintiff discovered

investigation must be "marked by an absence of an intervening agency, instrumentality, or influence."<sup>143</sup> Not surprisingly, in most cases relators' investigations were ruled to be derivative of the public disclosures and not independent of them.<sup>144</sup>

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through investigation or experience what the public already knew" and declaring that "the investigation or experience of the relator must translate into some additional compelling fact, or must demonstrate a new and undisclosed relationship between disclosed facts, that puts a government agency 'on the trail' of fraud, where that fraud might otherwise go unnoticed"); *Grayson*, 221 F.3d at 583 (the relator's mere verification of information received from other individuals is insufficient to render the relator an original source); *Aflatooni*, 163 F.3d at 525 (declaring that a relator's verification of secondhand information does not qualify as direct and independent information, as such information "[does] not make a genuinely valuable contribution to the exposure of the alleged fraud" (quoting *Devlin I*, 84 F.3d at 362)); *Advanced Sciences*, 99 F.3d at 1007 (holding that the relator's independent investigation consisted of little more than some information provided by an anonymous source, and constituted a mere continuation of the public disclosures); *Devlin I*, 84 F.3d at 361 (concluding that the relator's knowledge was not direct merely because he verified the accuracy of the information that was publicly disclosed); *Fed. Recovery Servs.*, 72 F.3d at 452 (stating that information that is a continuation of or derived from the investigations of others is insufficient); *Barth*, 44 F.3d at 703 (declaring that "collateral research and investigations . . . [do] not establish 'direct and independent knowledge'" (alteration and ellipsis in original) (quoting *Kreindler & Kreindler*, 985 F.2d at 1159); *Kreindler*, 985 F.2d at 1159 (stating that "[t]he fact that [the relator] conducted some collateral research and investigations . . . does not establish 'direct and independent knowledge of the information on which the allegations are based'" (quoting 31 U.S.C. § 3730(e)(4)(B) (2000))).

143. *N.Y. Med. Coll.*, 252 F.3d at 121 (quoting *Prudential II*, 944 F.2d at 1160).

144. See *Applera*, 155 Fed. App'x at 292-93 (rejecting the relator as an original source, despite extensive investigative efforts, when his knowledge was obtained from publicly available patent materials, journal articles, grant applications, or derived secondhand from another individual's research notes and grant files.); *Grynberg*, 389 F.3d at 1054 (holding that the relator's investigation insufficient to establish direct and independent knowledge when the investigation entailed telephone calls to gather common information, photographs taken from a public road, and a review of easily obtainable records); *Seal 1 v. Seal A*, 255 F.3d 1154, 1163 (9th Cir. 2001) (rejecting the relator as an original source when even though he started the government on the investigation, at least two government agencies and others assisting the government did the bulk of the investigation); *MK-Ferguson*, 99 F.3d at 1548 (reasoning that the relator's knowledge was not direct and independent when, as a governmental employee, his allegations were "derivative of the facts uncovered by the field auditors," and "his own investigations [were] only a continuation of the audit conducted by [his agency] and cannot be considered independent"); *Advanced Sciences*, 99 F.3d at 1007 (ruling that the relator's independent investigation was insufficient when it "appear[ed] to consist of little more than some information provided to him by an anonymous source"); *Kreindler & Kreindler*, 985 F.2d at 1159 (stating that the fact that the relator conducted some collateral research and investigation does not establish direct and independent knowledge).

## VI. COURTS' INABILITY TO AGREE ON THE MEANING OF "PUBLIC DISCLOSURE"

While courts have generally reached a consensus in interpreting the terms "based upon" and "direct and independent" of the original source rule,<sup>145</sup> they remain unable to agree upon what constitutes the requisite public disclosure that triggers the rule.<sup>146</sup> It is largely the confusion over "public disclosure" that has resulted in inconsistent application of the original source rule.

### A. Disagreement over Whether the Statutory List of Sources of Public Disclosure is Exclusive or Exemplary

The False Claims Act (the Act)<sup>147</sup> requires a relator to establish that he is an original source whenever there is public disclosure of "allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media."<sup>148</sup> Most courts have found the above list of statutory sources of public disclosure to be exhaustive<sup>149</sup> because it is fairly extensive

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145. See *supra* Part V. (discussing courts' interpretations of these terms).

146. See *Seal 1 v. Seal A*, 255 F.3d 1154, 1161 (9th Cir. 2001) (declaring that "[w]e find the language of [the public disclosure provisions] somewhat ambiguous"); *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994) (recognizing that "the task of determining whether 'allegations or transactions' have been 'publicly] disclosed]' will never be cut-and-dried").

147. 31 U.S.C. §§ 3729-3733 (2000).

148. 31 U.S.C. § 3730(e)(4) (2000).

149. See *United States v. Catholic Healthcare W.*, 445 F.3d 1147, 1151 (9th Cir. 2006) (stating that "to constitute a public disclosure, the fraud must have been disclosed in one or more of the sources specified under the statute" (internal citation omitted)); *U.S. ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 333 (3d Cir. 2005) (subscribing to the "prevailing view that this list is 'an exhaustive rendition of the possible sources'" (quoting *U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 744 (3d Cir. 1997)); *Seal 1*, 255 F.3d at 1159 (noting that most courts hold that the statutory list of sources of public disclosure is exhaustive); *U.S. ex rel. Biddle v. Bd. of Trs. of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 539 (9th Cir. 1998) (noting legislative history supporting the proposition that public disclosure must occur through one of the sources referred to in the Act); *Dunleavy*, 123 F.3d at 744 (agreeing with the "prevailing view" that "this list [of sources of public disclosure in the Act] constitutes an exhaustive rendition of the possible sources"); *U.S. ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996) (stating that suits are barred only when they are in one of the forms enumerated in the statute); *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (stating that the Act "furnishes an exclusive list of the ways in which a public disclosure must occur for the jurisdictional bar to apply"); *U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 (11th Cir. 1991) (holding that a report issued by an Air Force attorney was not publicly disclosed

and detailed.<sup>150</sup> At least one district court, however, held that the statutory list of sources provides mere examples, meaning that public disclosure could occur in other forms.<sup>151</sup>

### *B. Disagreement Over the Definitions of the Statutory Sources*

Many of the terms in the statutory list of public disclosure sources are vague,<sup>152</sup> and none are defined in the Act. Not surprisingly, courts are unable to agree upon what they mean.

1. **"Hearing."** Some courts contend that the term "hearing" as used in the phrase "criminal, civil, or administrative hearing" need not necessarily take the form of a live formal proceeding but "should be interpreted broadly to include allegations and information disclosed in connection with civil, criminal, or administrative litigation."<sup>153</sup> Therefore, for these courts, all discovery constitutes a hearing that is a potential source of public disclosure.<sup>154</sup>

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because it was not issued by one of the sources on the statutory list); *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1051 (S.D. Ga. 1990) (disagreeing with courts that have held that public disclosure is not specifically limited by the enumerated examples in the statute).

150. See *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co. (Prudential II)*, 944 F.2d 1149, 1172 (3d Cir. 1991) (Scirica, J., dissenting) (questioning the district court's finding that the statutory list of sources of public disclosures was merely exemplary, as "Congress was specific in the types of disclosures enumerated in that subsection"); *Williams*, 931 F.2d at 1499 (observing that "[t]he list of methods of 'public disclosure' is specific and is not qualified by words that would indicate that they are only examples . . . . Congress could easily have used 'such as' or 'for example' to indicate that its list was not exhaustive").

151. *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (Prudential I)*, 736 F. Supp. 614, 621 (D.N.J. 1990) (declaring that it is "reasonable to read 'public disclosure' as a general phrase not specifically limited by the enumerated examples in the remainder of the statute").

152. See, e.g., *U.S. ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir. 1997) (commenting on the ambiguity of the Act's terms "based upon," "public disclosure," "allegations or transactions," "original source," "direct and independent knowledge," and "information").

153. *Prudential II*, 944 F.2d at 1156; see also *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994) (holding that a "hearing" includes "an entire civil proceeding" and is not limited to an oral hearing or a live, formal judgment).

154. See *Prudential II*, 944 F.2d at 1157 (stating that "defining 'hearing' narrowly would lead to arbitrary results" because "a court would have jurisdiction over a suit based on information first learned by a lawyer at a deposition over which a judge presided . . . but jurisdiction would be barred if the disclosure occurred when the judge was not present"); see also *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (stating that "[d]isclosures made in the context of litigation may be publicly disclosed . . . even if they are not the subject of a hearing"); *United States v. Bank of Farmington*,

Other courts disagree with such a broad reading of the term "hearing," contending that discovery does not constitute a hearing because it is not formalized.<sup>155</sup> These courts limit the definition of hearing to a "live, relatively formal proceeding before a decisionmaking body, with questions of law or fact to be tried."<sup>156</sup> For these courts, discovery is not publicly disclosed because it is not part of a "criminal, civil, or administrative hearing."<sup>157</sup>

**2. "Investigation."** A similar question exists with regard to the term "investigation." One court held that under the Act, an investigation need not be formal but may include "casual inquiries so long as they are undertaken by authorized officials with official purposes."<sup>158</sup> Based on this reasoning, the court held that an informal conversation between the government and a relator was part of an investigation.<sup>159</sup>

Courts have not agreed, however, on whether a Freedom of Information Act (FOIA)<sup>160</sup> search is an investigation for public disclosure purposes. While some courts contend that locating documents responsive to a FOIA request is an investigation,<sup>161</sup> other courts assert that interpreting the term investigation to include any response to a FOIA

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166 F.3d 853, 862 (7th Cir. 1999) (noting that several circuit courts have treated discovery as being encompassed in the statutory term "hearing"); *Springfield*, 14 F.3d at 652 (rejecting a formal reading of "hearing," noting that "courts frequently employ the term to connote informal, 'paper' proceedings").

155. See, e.g., *Blue Cross Blue Shield of Ga.*, 755 F. Supp. at 1050.

156. *Id.*; see also *Bank of Farmington*, 166 F.3d at 862 (stating that a "hearing" may be "informal or casual inquiries so long as they are undertaken by authorized officials with official purposes").

157. 31 U.S.C. § 3730(e)(4).

158. *Bank of Farmington*, 166 F.3d at 862.

159. *Id.* (characterizing a phone conversation between a potential witness and a government agent about a deposition subpoena as an administrative investigation); see also *U.S. ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 524 (9th Cir. 1998) (holding that an investigation of the defendants conducted by their own lawyer was not an administrative investigation because it was a "closely held inquiry" that "lacked the institutionalized nature" of an administrative hearing).

160. 5 U.S.C. § 552 (2006).

161. See *U.S. ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 384 (3d Cir. 1999) (holding that an agency's FOIA search that is "reasonably calculated to uncover all relevant documents" is an investigation). Other courts contend that a FOIA response is an administrative "report." See *U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004) (holding that the response to the relator's FOIA request is an administrative report constituting public disclosure); *Mistick*, 186 F.3d at 383 (holding that a response to a FOIA request is a report, consistent with definitions of the term as "something that gives information" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1925 (3d ed. 2002)) or "'an official or formal statement of facts or proceeding'" (misquoted in original) (quoting BLACK'S LAW DICTIONARY 1300 (6th ed. 1990)).

request would be stretching its meaning too far.<sup>162</sup> These courts point out that responding to a FOIA request entails little more than copying,<sup>163</sup> which is typically carried out by clerks, not by government investigators.

**3. "Administrative."** Some courts contend that the term "administrative," when used to describe a "report, hearing, audit, or investigation," refers only to federal administrative agencies.<sup>164</sup> As a result, information emanating from state and local administrative agencies is not publicly disclosed<sup>165</sup> unless reported in the news media.<sup>166</sup> Other courts interpret the term administrative more broadly to include state and local agencies as well, so that fraud allegations in reports, hearings, audits, and investigations emanating from state and local agencies qualify as public disclosure.<sup>167</sup>

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162. See, e.g., *Catholic Healthcare*, 445 F.3d at 1153 (declaring that "[i]nterpreting 'report' or 'investigation' as listed in the jurisdictional bar to include any document obtained in response to a FOIA request would stretch the meaning of those terms too broadly").

163. See, e.g., *id.* (stating that "responding to a FOIA request requires little more than duplication").

164. See, e.g., *Dunleavy*, 123 F.3d at 745 (concluding that "Congress was not referring to administrative reports produced by non-federal government sources").

165. See *U.S. ex rel. Battle v. Bd. of Regents for the State of Ga.*, 468 F.3d 755, 762 (11th Cir. 2006) (concluding that audits performed by the Georgia Department of Audits and Accounts constituted public disclosures); *Dunleavy*, 123 F.3d at 745-46 (holding that an administrative report prepared by a county was not publicly disclosed because Congress was not referring to administrative reports produced by nonfederal governments and stating that "expansion of the FCA's definition of 'administrative report' to state and local government reports would in effect return us to the unduly restrictive 'government knowledge' standard"). But see *U.S. ex rel. Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) (concluding that a state Medicaid report is a federal report because the federal government delegated administration of the federal program to the state).

There is even some disagreement over whether documents emanating from the branches of the armed services are publicly disclosed. Compare *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 521 (3d Cir. 2007) (holding that the Navy's response to a FOIA request constituted an administrative report), with *Williams*, 931 F.2d at 1500 (holding that a report prepared by an Air Force attorney was not publicly disclosed because it was not issued by Congress, an administrative agency, or the Government Accounting Office).

166. 31 U.S.C. § 3730(e)(4) (listing allegations and transactions "from the news media" as potential sources of public disclosures).

167. See *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1252 (11th Cir. 2007) (concluding that reports prepared by the Environmental Protection Division of the Georgia Department of Natural Resources are public disclosures under the Act); *Battle*, 468 F.3d at 762 (holding audits conducted by the State of Georgia Department of Audits and Accounting to be public disclosures); *U.S. ex rel. Devlin v. County of Merced (Devlin II)*, 1996 U.S. App. LEXIS 17681, at \*6-7 (9th Cir. July 11, 1996) (holding that a

*C. Disagreement Over Whether the Disclosure must be Actual or Merely Potential*

While most courts contend that responses to a FOIA request constitute public disclosure,<sup>168</sup> courts disagree over whether a fraud is publicly disclosed when the information is merely potentially accessible to the public via the FOIA. Some courts hold that actual disclosure to the public is necessary, insisting that information cannot be characterized as publicly disclosed when it is not in fact disclosed to the public.<sup>169</sup> Other courts disagree, contending that any document potentially producible under the FOIA is publicly disclosed.<sup>170</sup>

A similar dispute over actual versus potential disclosure exists regarding discovery material produced in the course of litigation. While virtually all courts agree that discovery material filed with a court is publicly disclosed,<sup>171</sup> some courts hold that unfiled discovery docu-

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report of the audit and study of the Los Angeles County Child Welfare Services issued by the Adult and Family Services Division of the California Department of Social Services was publicly disclosed when it was disseminated to a number of parties).

168. See *Atkinson*, 473 F.3d at 521 (holding that the Navy's response to a relator's FOIA request constituted a public disclosure); *Paranich*, 396 F.3d at 333 (declaring that a FOIA report "undoubtedly qualified as [a] public disclosure[]"); *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004) (stating that "[i]t is generally accepted that a response to a request under the FOIA is a public disclosure"); *Mistick*, 186 F.3d at 383 (stating that "the disclosure of information in response to a FOIA request is a 'public disclosure'").

169. See *Ramseyer*, 90 F.3d at 1519 (declaring that "a report which is merely *potentially* discoverable—such as through a Freedom of Information Act request—but not actually 'made known' to the public, does not come within the ambit of public disclosure" (citation omitted)); *U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995) (holding that three unclassified government audits which were merely potentially available to the public via the FOIA were not publicly disclosed, and declaring that "[i]n the FOIA context, information cannot be deemed disclosed until a member of the public requests the information and receives it from the government"); see also *Bank of Farmington*, 166 F.3d at 860 (denying that unfiled discovery is publicly disclosed because "[t]o say that something is publicly disclosed even if it is not in fact open to general observation or actually opened up to view, but is only potentially so, . . . is to distort the ordinary meaning of the words").

170. See *U.S. ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000) (stating that a document was publicly disclosed when its "filing was not under seal and the document was available upon request to the [Federal Aviation Administration]"); *U.S. ex rel. Branhan v. Mercy Health Sys. of Sw. Ohio*, 1999 U.S. App. LEXIS 18509, at \*5 (6th Cir. Aug. 5, 1999) (contending that billing transactions were publicly disclosed because they were available to anyone who requested them).

171. See *Paranich*, 396 F.3d at 334 (noting that other courts concede that filed discovery constitutes public disclosures); *Springfield*, 14 F.3d at 652 (declaring that "discovery material, when filed with the court (and not subject to protective order), is 'public[ly] disclos[ed]'" (alterations in original); *U.S. ex rel. Kreindler & Kreindler v. United*



ments are publicly disclosed, as well, because they are available for public release.<sup>172</sup> Many local rules do not preclude access by interested persons, and courts in these jurisdictions argue that unfiled discovery should be presumed public absent a protective order.<sup>173</sup>

In contrast, other courts hold that discovery documents are not publicly disclosed until filed with a court or produced at a hearing, arguing that unfiled documents produced during discovery are not available to the general public because pretrial discovery is not a public event.<sup>174</sup> Therefore, the general public has no real access until the discovery is filed with a court.<sup>175</sup>

#### D. *Disagreement over Governmental Disclosures*

Courts have generally agreed that a fraud is publicly disclosed when it is communicated by the government to any member of the public previously unconnected to the fraud and unaware of the fraud.<sup>176</sup>

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Techs. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993) (holding that filed discovery "was publicly disclosed because it was available to anyone who wished to consult the court file").

172. See, e.g., *McElmurray*, 501 F.3d at 1253 (declaring that all documents disclosed to the parties during the discovery phase of their lawsuits are public disclosures under the Act).

173. See, e.g., *Prudential II*, 944 F.2d at 1158-59 (holding that "disclosure of discovery material to a party who is not under any court imposed limitation as to its use is a public disclosure under the [Act]" and that "it is [not] significant, for purposes of interpreting the 'public disclosure' provision of the [Act], whether the discovery has in fact been filed," noting that "local rules do not generally preclude access by interested persons to nonfiled material," and "declin[ing] to base an interpretation of the statute on the happenstance of the manner of discovery or the local rule pursuant to which discovery is made").

174. See, e.g., *Bank of Farmington*, 166 F.3d at 860 (rejecting the position that information disclosed in discovery, whether or not it is filed, is potentially accessible to the public and therefore publicly disclosed, stating that:

To say that something is publicly disclosed even if it is not in fact open to general observation or actually opened up to view, but is only potentially so, and that it is not publicly disclosed only if a court has forbidden its disclosure, is to distort the ordinary meaning of the words . . . .

Accordingly, we follow the D.C. Circuit, which held that "discovery material which has not been filed with the court and is only theoretically available upon the public's request" is not "publicly disclosed" within the meaning of [the Act] (quoting *Springfield*, 14 F.3d at 652)).

175. See, e.g., *Prudential II*, 944 F.2d at 1168 (Scirica, J., dissenting) (opining that documents produced in civil discovery were not publicly disclosed because they "were not publicly available when they were disclosed to [the relator]").

176. See *U.S. ex rel. Fine v. Advanced Scis., Inc.*, 99 F.3d 1000, 1005-06 (10th Cir. 1996) (stating that "public disclosure occurs when the allegations of fraud or fraudulent transactions upon which the *qui tam* suit is based are affirmatively disclosed to members of the public who are otherwise strangers to the fraud" and that disclosure to one member of the public is sufficient); *Ramseyer*, 90 F.3d at 1520 (noting that some courts hold that

Conversely, when the government discloses a fraud to participants in the fraud, the disclosures are not deemed to be public disclosures under the Act.<sup>177</sup> Further, courts have refused to characterize disclosures as public when they are from one governmental employee to another and no member of the public is involved.<sup>178</sup> Similarly, when a disclosure is between two private parties and does not involve a governmental entity, most courts have characterized these communications as nonpublic and therefore precluded as public disclosures.<sup>179</sup>

**1. Disclosures by the Government to the Defendant's Employees.** Courts have been unable to agree on whether the government's disclosures to a defendant's employees constitute public disclosure. Some courts contend that when the government discloses a fraud to

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public disclosure occurs when allegations of fraud are communicated to anyone who is a "stranger to the fraud"; *Doe*, 960 F.2d at 322-23 (stating that qui tam actions are precluded when they are "based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator," (quoting *Prudential II*, 14 F.3d at 1155-56) and that "[o]nce allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations; they are irretrievably released into the public domain"); see also *Atkinson*, 473 F.3d at 530 (holding that the Coast Guard's providing an abstract of title to the relator constituted a public disclosure); *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004) (stating that the filing of a civil action, thereby disclosing the fraud to a single filing clerk, constituted public disclosure); *Seal 1*, 255 F.3d at 1161-62 (holding that the government's disclosures to the relator, a member of the public and an outsider to the investigation, constituted public disclosure); *U.S. ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1542, 1544-45 (10th Cir. 1996) (holding that public disclosure occurred when the Department of Energy sent a report and audit to the State of Oregon and the defendant company, imposing no special restrictions on the public availability of the reports nor their dissemination).

177. *E.g.*, *U.S. ex rel. Holmes v. Consumer Ins. Group (Holmes I)*, 279 F.3d 1245, 1248 (10th Cir. 2002) (holding that the government's disclosures to current and former employees of the defendant who had prior knowledge of the fraud did not constitute public disclosures).

178. *Schumer*, 63 F.3d at 1518 (stating that a disclosure by one government employee to another is not a public disclosure); *U.S. ex rel. Hagood v. Sonoma County Water Agency (Hagood I)*, 929 F.2d 1416, 1419 (9th Cir. 1991) (declaring that "one government employee telling another government employee is not public disclosure"). At least one court, however, has regarded the state government as a member of the public. See *MK-Ferguson*, 99 F.3d at 1545 (holding that an Office of Inspector General report of fraud sent to the State of Oregon without any restrictions on its release was a public disclosure).

179. See *Bank of Farmington*, 166 F.3d at 860 (noting that a communication between two private parties is not a public disclosure); *Aflatooni*, 163 F.3d at 523 (holding that when the relator derived his knowledge of the fraud from a private letter and a private conversation, the knowledge was not based upon a public disclosure); *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992) (stating that a "squabble between two FMC engineers" was not a public disclosure).

multiple employees of the defendant as part of an investigation, public disclosure has occurred.<sup>180</sup> Other courts, however, contend that these disclosures are not public.<sup>181</sup> They assert that the defendant's employees should not be characterized as members of the public because they have an economic incentive to protect the information from outsiders.<sup>182</sup>

**2. Disclosures by the Public to the Government.** Several courts have ruled that disclosures to the government are not public disclosures because the Act differentiates between the government and the public,<sup>183</sup> and, therefore, disclosures to the government cannot constitute disclosures to the public.<sup>184</sup> Several courts, however, contend that such disclosures can constitute public disclosures, but only when the communications are made to a competent government official,

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180. See, e.g., *Doe*, 960 F.2d at 322 (holding that public disclosure occurred when government investigators spoke to "numerous" employees of the defendant and rejecting the relator's argument that public disclosure requires that "any member of the public must have a legal right to compel disclosure of the information").

181. E.g., *Ramseyer*, 90 F.3d at 1521 n.4 (stating that "[w]e do not believe that allegations or transactions which are 'disclosed in private' to the employees of a potential relator are thereby publicly disclosed"); see also *Doe*, 960 F.2d at 325 (Walker, J., dissenting) (opining that treating disclosures to the defendant's employees as public disclosures "treat[s] matters 'disclosed in private' as if they were presumptively available for general use").

182. See *Schumer*, 63 F.3d at 1518 (holding that disclosures by the government to the defendant's employees are not public disclosures because "the employee has a strong economic incentive to protect the information from outsiders, [so that] revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure"); *Doe*, 960 F.2d at 325 (Walker, J., dissenting) (opining that the defendant's employees are not "members of the public" because they have "no incentive to further reveal what they have learned"). But see *U.S. ex rel. Holmes v. Consumer Ins. Group (Holmes II)*, 318 F.3d 1199, 1208 (10th Cir. 2003) (stating that "[a]lthough . . . people may have varying incentives to publicize information, that factor, in our view, is not relevant in determining whether a 'public disclosure' has occurred within the meaning of the [Act]").

183. See, e.g., *U.S. ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 729 (1st Cir. 2007) (observing that "[t]he statute itself uses the term 'Government' numerous times and does not once equate the government with the public," and stating further that "[i]f Congress had wished to equate self-disclosure to the government with disclosure to the public, it easily could have done so").

184. See *id.* at 728 (declaring that "'public disclosure' requires that there be some act of disclosure to the public outside of the government" and concluding that Pfizer's confidential disclosures to the government did not constitute public disclosure); *Kennard*, 363 F.3d at 1043 (stating that the "[public disclosure] requirement clearly contemplates that the information be in the public domain in some capacity and the Government is not the equivalent of the public domain").

for instance, one whose duties encompass fraud enforcement related to the reported claim.<sup>185</sup>

*E. Disagreement over Special Public Disclosure Rules Adopted by Certain Courts*

Finally, some courts have imposed their own unique rules regarding public disclosure, erecting jurisdictional bars even where the text of the Act does not.

**1. The Relator Must Cause the Public Disclosure.** Some courts require the relator to have had a hand in the public disclosure.<sup>186</sup> Most courts, however, decline to hold that the relator must be a source

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185. *E.g., Bank of Farmington*, 166 F.3d at 861 (declaring that “[d]isclosure of information to a competent public official about an alleged false claim against the government we hold to be public disclosure within the meaning of [the Act] when the disclosure is made to one who has managerial responsibility for the very claims being made”); *see also* U.S. *ex rel.* Fowler v. Caremark RX, LLC, 496 F.3d 730, 736 (7th Cir. 2007) (holding that the defendant’s own disclosures to the United States Attorney’s Office during the government’s investigations of the defendant’s business practices qualified as public disclosures).

186. *See Alcan*, 197 F.3d at 1020 (stating that a requirement of original source status is that the relator “had a hand in the public disclosure of allegations that are a part of [his] suit” (alteration in original) (quoting U.S. *ex rel.* Devlin v. California (*Devlin I*), 84 F.3d 358, 360 n.3 (9th Cir. 1996)); *Wang*, 975 F.2d at 1418-19 (holding that the legislative history of the Act makes clear that “one must have had a hand in the public disclosure of allegations that are a part of one’s suit,” and declaring that “[a] ‘whistleblower’ sounds the alarm; he does not echo it”); U.S. *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 17 (2d Cir. 1990) (stating that the Act “make[s] much sense” if the relator “must have been a source to the entity that first publicly disclosed the information on which a suit is based”). Other courts, while not requiring the relator to have caused the public disclosure, are in favor of an exemption from the jurisdictional bar for relators who were responsible for the public disclosure. *See* United States v. Hughes Aircraft Co., 162 F.3d 1027, 1033 (9th Cir. 1998) (concluding that the relator qualified as an original source because she disclosed her allegations to the government before they were publicly disclosed, thereby “indirectly” publicly disclosing the allegations of fraud); U.S. *ex rel.* Hagood v. Sonoma County Water Agency (*Hagood II*), 81 F.3d 1465, 1476 (9th Cir. 1996) (holding that the jurisdictional bar did not apply because the public disclosure “was at least partially based on records resulting from Hagood’s complaints,” and thus he indirectly helped to publicly disclose the fraud); United States v. Northrop Corp., 5 F.3d 407, 411 (9th Cir. 1993) (holding that the relator is an original source if “he played some part, whether direct or indirect, in the public disclosure of the allegations,” including if information supplied by the relator triggered the criminal investigation); *see also* *Prudential II*, 944 F.2d at 1171 (Scirica, J., dissenting) (opining that “because [the relator] made the public disclosure, I believe it qualifies as an original source”).

to the disclosing entity because the Act does not expressly impose this requirement.<sup>187</sup>

**2. The Relator Must Know of the Fraud Prior to the Public Disclosure.** Some courts require the relator to have the information upon which the allegations of fraud are based prior to the public disclosure,<sup>188</sup> despite the fact that the Act itself does not impose this requirement.

**3. The Relator Must Inform the Government of the Fraud Prior to the Public Disclosure.** Finally, some courts require the relator to inform the government of the allegations of fraud prior to the public disclosure.<sup>189</sup> Other courts have expressly rejected this ap-

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187. See *Hays*, 325 F.3d at 990 (refusing to hold that the relator was an original source on the basis that his letters to Medicaid were the reason the field audits were conducted and public disclosure occurred, and declaring that "a catalyst theory may not be adopted for policy reasons if it is contrary to the plain meaning of the statute"); *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 n.11 (8th Cir. 2002) (rejecting the view that only a relator who caused the public disclosure can be an original source, stating "[t]hat rule would perhaps be an improvement in the operation of the original source provision, but it has no basis in the statutory language and we therefore decline to adopt it"); *Bank of Farmington*, 166 F.3d at 865 (stating that imposing a requirement that the relator must have had a hand in the public disclosure "[has] no basis in the text or legislative history"); *Siller*, 21 F.3d at 1351 (declaring that the Second Circuit's position that a relator must also be a source to the disclosing entity is "unpersuasive" and "implausible" because it "impos[es] an additional extra-textual requirement that was not intended by Congress"); see also *Prudential II*, 944 F.2d at 1173 (Scirica, J., dissenting) (finding it "inconsistent to bar the . . . suit merely because the person publicly disclosed the information himself, or gave the information to an entity that later disclosed it").

188. See, e.g., *Dick*, 912 F.2d at 17 (noting that a person is an original source if he "had some of the information related to the claim which he made available to the government or the news media in advance of the false claims being publicly disclosed" (quoting 132 CONG. REC. 29849) (1986) (statement of Rep. Bermon)).

189. See *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 646 (6th Cir. 2003) (rejecting the relator as an original source because, *inter alia*, he did not inform the government of the fraud before the public disclosure occurred); *U.S. ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 334 (6th Cir. 1998) (holding that a relator must provide the government with the information upon which the qui tam complaint is based prior to any public disclosure of the fraud, as "one is not a true whistleblower unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain"); *U.S. ex rel. McKenzie v. Bellsouth Telecomms., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997) (declaring that "[w]e find it difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain," and concluding that "a relator must inform the government of the alleged fraud before the information has been publicly disclosed"); *Findley*, 105 F.3d at 690 (holding that "an 'original source' must provide the

proach, pointing out that the Act requires only that the relator inform the government prior to filing the complaint.<sup>190</sup>

## VII. RESOLVING THE DISPUTES OVER PUBLIC DISCLOSURE

Under the current version of the False Claims Act (the Act),<sup>191</sup> the “based upon” and “direct and independent” requirements are interpreted to drastically limit the potential pool of relators.<sup>192</sup> As a result, the issue of public disclosure is of paramount importance because if a fraud is not publicly disclosed, then the relator need not show that he is an original source.<sup>193</sup> This allows any member of the public to commence a *qui tam* action based on information derived from any source as long as public disclosure has not occurred.<sup>194</sup> This outcome is logically consistent with the twin goals of the Act,<sup>195</sup> as the government presum-

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government with the information prior to any public disclosure”).

190. See *United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1014, 1019 (9th Cir. 2006) (noting the disagreement among the circuit courts on this issue and holding that “the [Act] does not require individuals to inform the government prior to the public disclosure at issue to qualify as ‘original sources’”); *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1050 (refusing to require that the relator disclose his allegations to the government before the public disclosure, declaring that “[t]his additional requirement has no textual basis in the statute”).

191. 31 U.S.C. §§ 3729-3733 (2000).

192. See *supra* Part V. (discussing the stringent requirements of the original source rule).

193. See *U.S. ex rel. Holmes v. Consumer Ins. Group (Holmes II)*, 318 F.3d 1199, 1208 (10th Cir. 2003) (stating that “[h]aving concluded that no ‘public disclosure’ occurred within the meaning of [the Act], we need not determine whether [the relator] was an ‘original source’ of the information underlying her complaint”); *U.S. ex rel. Biddle v. Bd. of Trs. of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 538 (9th Cir. 1998) (reasoning that a relator should be rewarded only if he is an original source because when he brings new information to the government, his contribution is valuable regardless of how he came into possession of the information); *U.S. ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 681 (D.C. Cir. 1997) (stating that the court will proceed to the original source inquiry only if the *qui tam* suit is based upon public disclosures); *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992) (declaring that “[w]here there has been no ‘public disclosure’ within the meaning of [the Act], there is no need for a *qui tam* plaintiff to show that he is the ‘original source’ of the information”).

194. But see 31 U.S.C. §§ 3730(e)(1)-(3) (2000) (barring actions against members of the armed forces relating to military service; actions against members of Congress, the judiciary, or senior executive officials if the government is aware of the alleged fraud; and actions that are already subject to a civil suit or administrative civil money penalty in which the government is already a party).

195. See *U.S. ex rel. Prawer v. Fleet Bank of Me.*, 24 F.3d 320, 326 (1st Cir. 1994)

The history of the [Act’s] *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior. The 1986 amendments inevitably reflect the

ably would be less likely to have knowledge of a fraud that has not been publicly disclosed, and public citizens would be incentivized to use any means available to ferret out frauds that are otherwise undiscovered.

Conversely, once public disclosure occurs, the potential pool of relators is limited to a very small group who qualify as an original source—either participants in the fraud; firsthand observers of the fraud; or private persons who have performed an extensive investigation of the fraud from private documents, interviews, or obscure public sources.<sup>196</sup> Because so few relators qualify as an original source, it is public disclosure that largely determines whether a *qui tam* relator will be jurisdictionally barred.

Unfortunately, determining whether there has been public disclosure has become so muddled by inconsistent court rulings<sup>197</sup> that the answer is both difficult to predict in advance and dramatically different depending upon the jurisdiction in which the *qui tam* action is brought. Therefore, without question, the current *qui tam* provisions would benefit enormously from a clearer and more consistent approach to determining public disclosure.<sup>198</sup>

Five debates predominate in the judicial disagreements over public disclosure: (A) whether state and local administrative reports, hearings, audits, and investigations can be sources of public disclosure under the Act; (B) whether documents accessible by the Freedom of Information Act (FOIA)<sup>199</sup> are publicly disclosed; (C) whether documents produced in discovery, but not filed with a court, are publicly disclosed; (D) whether disclosures by the government to the defendant's employees

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long process of trial and error that engendered them. They must be analyzed in the context of these twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own (quoting *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994)).

See also *U.S. ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (stating that “[t]he [Act’s] jurisdictional scheme seeks ‘the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own’”) (quoting *Springfield*, 14 F.3d at 649).

196. See *supra* Part V. (discussing how courts’ interpretations of these terms bars jurisdiction in many cases).

197. See *supra* Part VI. (discussing disagreements among courts over the interpretation of “public disclosure”).

198. See Chandler, *supra* note 67, at 563 (stating that “[t]he variance with which the federal courts treat claims under the [Act] has resulted and will continue to result in needless litigation and reduced recoveries and will also contravene the legislative purpose of the [Act]”).

199. 5 U.S.C. § 552 (2006).

constitute public disclosure; and (E) whether disclosures by members of the public to the government constitute public disclosure. Resolution of these issues would substantially impact the way the qui tam provisions operate.

*A. Whether State and Local Administrative Reports, Hearings, Audits, and Investigations are Sources of Public Disclosure*

The Act provides, in relevant part, that jurisdiction is barred over actions based upon public disclosure of allegations or transactions in a "congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation."<sup>200</sup> Most courts agree that the source of the public disclosure must be one of the sources listed in the Act.<sup>201</sup> But courts disagree on whether the term "administrative" refers only to federal agencies or whether Congress intended to include public disclosures emanating from state and local administrative agencies as well.<sup>202</sup>

There is no clarification of the meaning of "administrative" in the Act other than the placement of the term. At least one court has observed that the placement of the term between two distinctly federal entities—Congress and the Government Accounting Office—makes it more likely that Congress was referring to federal administrative agencies.<sup>203</sup> Moreover, it is clear that Congress intended to exclude disclosures from state legislatures, as the statute expressly provides that only congressional information potentially constitutes public disclosure.<sup>204</sup> Because state legislative information is excluded, Congress also likely intended to exclude state and local administrative information.

However, if the term "administrative" is intended to refer to federal administrative agencies only, then it follows that there is a wealth of information publicly available in state and local administrative reports, hearings, audits, and investigations that will not constitute public

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200. 31 U.S.C. § 3730(e)(4)(A) (2000).

201. See *supra* Part VI.A. (stating the majority holding that public disclosure must be in one of the forms set forth at 31 U.S.C. § 3730(e)(4)(A)).

202. See *supra* Part VI.B.3. (pointing out this disagreement among courts).

203. See, e.g., *U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997) (stating that "[w]e find it hard to believe that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character"); see also *U.S. ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (stating that "[t]he starting point for interpreting a statute is the language of the statute itself" (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

204. See 31 U.S.C. § 3730(e)(4)(A).



disclosures under the Act (unless they are reported by the news media). This means that information disclosing frauds in public documents issued by state and local administrative agencies could be copied verbatim into a qui tam complaint by any person, and the relator would not have to establish that he is an original source. State and local government employees could be in a privileged position to become aware of these documents before they are reported in the media and thereby benefit from asserting the fraud in a prompt qui tam filing.

Such an outcome might appear to be contrary to the Act's goal of foreclosing parasitic lawsuits. But as a practical matter, it is probably unrealistic to expect the federal government to be on notice of all information disclosed by the myriad of state and local administrative agencies,<sup>205</sup> unless they are reported in the news media, in which case they would qualify as public disclosures under the Act.<sup>206</sup> Therefore, allowing relators to base their qui tam actions upon state and local administrative materials may well be necessary to alert the federal government to frauds disclosed in state and local administrative forums.

#### *B. Whether Unfiled Litigation Discovery is Publicly Disclosed*

Because discovery documents filed with a court are available for public inspection if they are not filed under seal,<sup>207</sup> most courts agree that these documents are publicly disclosed.<sup>208</sup> But there is a significant question whether discovery that is not filed should be considered publicly disclosed.<sup>209</sup>

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205. See *Dunleavy*, 123 F.3d at 745-46 (noting that there was no suggestion that the Department of Housing and Urban Development had any knowledge of misrepresentations by the defendant County other than what the County had submitted in its Grantee Performance Report, and noting that "[i]f state and local government reports were treated as administrative reports under the Act, the jurisdictional bar might be invoked through information submitted by those bent on convincing a federal agency that no fraud, in fact, was occurring").

206. 31 U.S.C. § 3730(e)(4)(A) (stating that public disclosures include allegations and transactions "from the news media").

207. See, e.g., *Springfield*, 14 F.3d at 652 (declaring that "discovery material, when filed with the court (and not subject to protective order), is 'publicly disclosed'").

208. See, e.g., *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994) (declaring that "any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure").

209. See *supra* Part VI.C. (discussing the issue of unfiled discovery); see also *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co. (Prudential II)*, 944 F.2d 1149, 1161 (3d Cir. 1991) (arguing in favor of a public disclosure rule that includes unfiled discovery, contending that "a practical, commonsense interpretation to 'public disclosure,' [is] one that distinguishes between information hidden in files or disclosed in private and information produced pursuant to the discovery process which is presumptively, absent a

Here, the weight of the evidence is against public disclosure. Neither the government nor any member of the public who is not a party to the litigation can possibly know what information has surfaced in discovery. Pretrial discovery occurs between private parties, and thus a strong argument can be made that there is no legitimate public access to the information.<sup>210</sup> Even if local rules allow access, this could be characterized as a “hollow” right because there is no realistic way for the public to know what information has been produced.<sup>211</sup> Thus, it is possible to argue that unfiled production in discovery is tantamount to a disclosure from one private party to another, which courts have agreed is not public disclosure.<sup>212</sup> Consequently, until filing occurs, or until the information is revealed at a hearing, discovery should not be considered to have been publicly disclosed.<sup>213</sup> It would be inconsistent with the statutory requirement that the disclosure be “public” to hold that information not genuinely accessible to the public is publicly disclosed.<sup>214</sup>

This view fulfills the Act’s important goal of encouraging qui tam actions to reveal undiscovered frauds. Because the federal government is unlikely to know of frauds revealed in discovery that has not been filed with a court, allowing relators to commence qui tam actions based upon unfiled discovery assists the government’s fraud recovery efforts. If such information is deemed publicly disclosed, a qui tam action is effectively foreclosed because a relator learning of the fraud from unfiled discovery would have neither direct nor independent knowledge, thereby

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court order, available for filing and general use”).

210. See, e.g., *U.S. ex rel. Hagood v. Sonoma County Water Agency (Hagood I)*, 929 F.2d 1416, 1419 (9th Cir. 1991) (ruling that because the relator, a government attorney who allegedly discovered fraud when preparing a government contract, did not “base his suit on any public disclosure made to him or to anyone else[,] . . . the information was not publicly disclosed”); *Prudential II*, 944 F.2d at 1169 (Scirica, J., dissenting) (agreeing with *Hagood I*).

211. See *Prudential II*, 944 F.2d at 1170 (Scirica, J., dissenting) (declaring that “the general public has no real access to the [unfiled discovery] information until it is publicly filed”).

212. See *supra* Part VI.D. (noting courts’ holdings that private communications are not public disclosures); see also, e.g., *United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999) (noting that a communication between two private parties is not a public disclosure).

213. See *Springfield*, 14 F.3d at 652 (holding that unfiled discovery does not constitute public disclosure because it is not “actually made public through filing”).

214. See, e.g., *Bank of Farmington*, 166 F.3d at 860 (arguing that unfiled discovery is not publicly disclosed because “it is not in fact open to general observation or actually opened up to view, but is only potentially so”).

failing to satisfy the original source rule.<sup>215</sup> As one court has observed, discovery could be an exceedingly "fertile source" for detection of frauds.<sup>216</sup> Discovery results in the production of enormous amounts of information, and it is probable that the vast majority of it is not filed with a court. Therefore, precluding discovery as a source for qui tam actions hampers the government's fraud recovery efforts.<sup>217</sup>

One significant effect of contending that unfiled discovery is not publicly disclosed, however, is that it creates a distinct advantage for attorneys to act as qui tam relators. Attorneys see discovery first, and attorneys are far more likely than other members of the public to recognize the significance of the information produced in terms of fraud and false claims. Therefore, excluding unfiled discovery from public disclosure in effect creates a class of lawyers whose litigation specialties present unique opportunities to be the first discoverers of frauds and to act as qui tam relators. Considering the vast army of attorneys who would be unleashed to act as qui tam relators, and the enormous mass of undisclosed discovery information at their disposal, this outcome could produce huge benefits to the government in terms of fraud recoveries.

### *C. Whether Government Documents Accessible by the FOIA are Publicly Disclosed*

Another substantial issue in public disclosure is the extent to which documents that are accessible by the FOIA are publicly disclosed. The initial question is whether documents that are actually produced via the FOIA are publicly disclosed when the documents are not in the form of congressional, administrative or GAO reports, hearings, audits, or investigations.<sup>218</sup>

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215. See *supra* Part V.B. (discussing the "direct and independent" requirements).

216. *Prudential II*, 944 F.2d at 1171 (Scirica, J., dissenting) (arguing against deeming unfiled discovery to constitute public disclosures and observing that "civil discovery is a fertile source of information relating to government fraud, and this source should not be sealed off without Congressional intent to do so").

217. See *id.* (stating that allowing qui tam actions to be premised upon unfiled discovery comports with congressional intent, because "[i]n passing the [1986] Amendments, Congress clearly intended to increase the range of permissible relators").

218. See *supra* Part VI.B.2. (discussing whether all FOIA searches constitute investigations); see also 31 U.S.C. § 3730(e)(4)(A) (barring qui tam actions based upon "allegations or transactions . . . in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation").

The intersection of the FOIA and public disclosure is a critical issue, because if any FOIA response is deemed to be publicly disclosed, then jurisdiction over the relator will likely be foreclosed because the relator probably will not qualify as an original source. Any relator who bases his information upon a FOIA document will fail the "direct and independent" requirements of the original source rule.<sup>219</sup> As a result, the only way that the court would have jurisdiction over such a relator is if the FOIA production does not constitute public disclosure.

While FOIA production appears to satisfy the requirement that the disclosure be public, it is problematic when the documents produced are not in the form of any of the statutory sources of public disclosure. Characterizing any FOIA search as an investigation or a report is a "stretch."<sup>220</sup> To give effect to the language of the Act, FOIA responses would not appear to constitute public disclosures unless they are in the form of a congressional, administrative or GAO report, hearing, audit, or investigation.<sup>221</sup>

When the production potentially qualifies as a public disclosure because it is in the form of one of the sources enumerated in the Act, the next FOIA question is whether public disclosure occurs when the federal government merely declares the availability of the document but has not yet supplied it to any FOIA requester. Arguably, public disclosure can be deemed to have taken place because the announcement that the document is available is a public disclosure of sorts. Therefore, if the government announces the availability of a document that is in the form of one of the statutory sources of public disclosure, and the document

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219. *U.S. ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 389 (3d Cir. 1999) (rejecting the relator as an original source because he learned of the fraud through a FOIA response); *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (7th Cir. 1999) (holding that the relator was not an original source because he learned of the alleged fraud following his request under the FOIA).

220. *See, e.g., United States v. Catholic Healthcare W.*, 445 F.3d 1147, 1153 (9th Cir. 2006) (declaring that characterizing a FOIA response as a report or investigation "would stretch the meaning of those terms too broadly").

221. *See* 31 U.S.C. § 3730(e)(4)(A).

sufficiently alleges the facts of the fraud,<sup>222</sup> that could be sufficient to constitute public disclosure of the fraud.

The final issue regarding the FOIA is whether reports, hearings, audits, and investigations that have been produced by the federal

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222. Courts have held that a public disclosure of a fraud must reveal at least the essential elements of the fraud to enable the public to conclude that the fraud has been committed. See *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004) (holding that the jurisdictional bar was raised because “[a]ll of the material elements of the fraudulent transaction were already in the public domain”); *Sandia*, 70 F.3d at 572 (stating that “the public disclosure of the material elements of the fraudulent transaction bars *qui tam* actions”); see also *Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1044 (8th Cir. 2002) (holding that an audit was not a public disclosure because it did not reveal what the relator contended was the true state of the facts: that the anesthesiologists were not performing the services that they billed to the government); *U.S. ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 523 (9th Cir. 1998) (noting that public disclosures in which the defendant was not specifically named are insufficient to raise the jurisdictional bar); *U.S. ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1514 (8th Cir. 1994) (concluding that a public disclosure of the fraud did not occur because “the information put in the public domain . . . did not present so clear or substantial an indication of foul play as to qualify as either an allegation of fraud or a fraudulent transaction” (ellipsis in original) (quoting *Springfield*, 14 F.3d at 656)); *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) (likewise noting that public disclosures in which the defendant was not specifically named are insufficient to raise the jurisdictional bar). But see *United States v. Alcan Elec. & Eng’g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999) (public disclosure of the fraud occurred even though the disclosures did not identify the contractors at issue when it was “highly likely” that the government could identify the contractors from the “narrow class of suspected wrongdoers” described in the public disclosure); *Findley*, 105 F.3d at 686 (denying jurisdiction over the relator when the *qui tam* complaint substantially repeated the public disclosures asserting fraud by federal employees, adding only the identity of particular employees’ clubs engaged in the questionable conduct).

As long as fraud can be deduced from the public disclosure, it is not necessary that the public disclosure explicitly allege that a fraud occurred. *Alcan*, 197 F.3d at 1020 (stating that “fraud need not be explicitly alleged to constitute public disclosure”); *Hagood v. Sonoma County Water Agency (Hagood II)*, 81 F.3d 1465, 1473 (9th Cir. 1996) (stating that “the jurisdictional bar may be raised by public disclosure unaccompanied by an explicit allegation of fraud”).

Thus, when *x* and *y* are designated as the essential elements of the fraud, and *z* is designated as the allegation of fraud, the public disclosure must minimally reveal *x* and *y* so that the public may infer *z*. *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 519 (3d Cir. 2007) (discussing the above “algebraic representation of the nature and extent of disclosure required to raise the jurisdictional bar”); *Springfield*, 14 F.3d at 654 (using the equation  $x + y = z$  to assert that either the allegation of the fraud (*z*) or the essential elements of the fraud (*x* and *y*) must be made public for there to be a public disclosure of the fraud). But see *Grynberg*, 389 F.3d at 1050 (declining to adopt the mathematical formula described above but declaring that public disclosure occurs when “the public domain contained *all* the elemental aspects of the allegedly fraudulent transaction”).

government, but which have neither been announced nor disseminated, should be deemed to be publicly disclosed merely because they are potentially available via the FOIA.<sup>223</sup> Here, a strong argument can be made against asserting the jurisdictional bar because no public communication has occurred.<sup>224</sup> Moreover, it is certain that the relator did not derive knowledge of the fraud from the unreported document, and thus the *qui tam* action could not possibly be characterized as parasitic.<sup>225</sup> Even further, Congress rejected the government knowledge standard when it adopted the original source rule.<sup>226</sup> Therefore, the mere fact that the government possesses the information should not foreclose jurisdiction.

*D. Whether Disclosures by the Government to the Defendant's Employees Constitute Public Disclosure*

Generally, courts agree that a disclosure by the federal government to any member of the public who is at liberty to redisclose it is a public disclosure.<sup>227</sup> Accordingly, many courts contend that fraud information disclosed by the government to employees of the defendant who were not

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223. See *supra* Part VI.C. (discussing courts' disagreement over whether a public disclosure must be actual or merely potential).

224. See, e.g., *U.S. ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1521 (10th Cir. 1996) (holding that an administrative report was not publicly disclosed when "[the Oklahoma Department of Human Services] simply placed the report in its investigative file and restricted access to those persons clairvoyant enough to specifically ask for it," so that the report was effectively "hidden in files").

225. See *id.* at 1520. The court in *Ramseyer* stated,

[W]e do not believe that an actual disclosure rule will encourage parasitic lawsuits. Information to which the public has potential access, but which has not actually been released to the public, cannot be the basis of a parasitic lawsuit because the relator must base the *qui tam* suit on information gathered from his or her own investigation. If a specific report detailing instances of fraud is not affirmatively disclosed, but rather is simply ensconced in an obscure government file, an opportunist *qui tam* plaintiff first would have to know of the report's existence in order to request access to it. With regard to such materials, which are at best "only potentially in the public eye, . . . no rational purpose is served—and no 'parasitism' deterred—by preventing a *qui tam* plaintiff from bringing suit based on their contents."

*Id.* (quoting *Springfield*, 14 F.3d at 693).

226. See *supra* Part II. (discussing abandonment of the "government knowledge" standard).

227. See, e.g., *U.S. ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996) (holding that the Department of Energy's disclosure of a report to the State of Oregon and to MK-Ferguson officials, with no limitations on public availability of the report or any restrictions on its dissemination, constituted public disclosure).

involved in the fraud and were unaware of it should be deemed to be a public disclosure.<sup>228</sup>

There are many reasons supporting such a conclusion. If the federal government makes the disclosures while interviewing or questioning the defendant's employees, then the disclosure is part of a federal administrative investigation, which is one of the enumerated sources of public disclosure under the Act.<sup>229</sup> The disclosure can be characterized as public because the employees are under no prohibition against redisclosing the information. Further, this result effectuates the goals of the Act. If such interviews constitute public disclosure, the defendant would be more encouraged to cooperate in the investigation because the employees learning of the fraud by virtue of being interviewed by the government would not qualify as original sources because they lack firsthand information. This would decrease the chances that the defendant would become the subject of a *qui tam* action due to the government's investigation. Because the only relators who could commence a post-investigation *qui tam* action would be those with direct and independent knowledge of the fraud, these original source relators would have concrete evidence of the fraud to legitimately assist the government.<sup>230</sup>

Nevertheless, some courts have refused to equate defendants' employees with the public, contending that the employees have little incentive to damage their employer and their own employment status by commencing a *qui tam* action.<sup>231</sup> Such a position, however, risks that any employee learning of the fraud from the government can simply draft a *qui tam* complaint based upon the same information the government disclosed. Because these employees will not need to establish that they are an original source, they need not have any direct and independent information to contribute to the action. They will be able to share in the recovery simply by parroting back to the government

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228. See *supra* Part VI.D.1. (discussing the issue of disclosures by the government to the defendant's employees); see also, e.g., *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992) (holding that public disclosure occurred when government investigators spoke to numerous employees of the defendant).

229. See 31 U.S.C. § 3730 (e)(4)(A).

230. But see *U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995) (contending that deeming the government's disclosures to the defendant's employees to be public disclosure would "foreclose[] many insiders from bringing *qui tam* actions, as contrary to the intent of the statute").

231. See *supra* Part VI.D.1. (discussing the issue of disclosures to the defendant's employees); see also *Schumer*, 63 F.3d at 1518 (holding that the defendant's employees have a "strong economic incentive to protect the information from outsiders"); *Doe*, 960 F.2d at 325 (Walker, J., dissenting) (stating that the defendant's employees have "no incentive to further reveal what they have learned").

the information the government already knows.<sup>232</sup> Permitting these parasitic lawsuits would appear to be contrary to the goals of the original source rule.<sup>233</sup> Moreover, defendants would hardly be encouraged to cooperate in the government's investigation because the investigation itself would increase the defendant's exposure to qui tam liability. Therefore, deeming disclosures to the defendant's employees to be public disclosures better effectuates the goals of the Act.<sup>234</sup>

*E. Whether Disclosures to the Government Constitute Public Disclosure*

The final major issue in public disclosure is whether disclosures by a private party to the government are considered publicly disclosed.<sup>235</sup> One could argue that these disclosures are made in a public forum, as the government represents the public. Several courts have so held, at least when the disclosures are made to officials with authority to investigate the fraud.<sup>236</sup> Moreover, because the government has acquired knowledge of the fraud, there is little need for assistance by a qui tam relator unless the relator is an original source. Finally, holding that information given to government officials is publicly disclosed might disqualify the officials from acting as qui tam relators themselves, as presumably their information would be neither direct nor independent.<sup>237</sup>

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232. The incentive for such an employee to commence a qui tam action might be decreased, however, by 31 U.S.C. § 3730(d)(1) (2000), which grants the court discretion to decrease the award to a qui tam relator if the action was based primarily on public disclosures; see *id.*

233. See *supra* Part II. (discussing *Marcus v. Hess*, 317 U.S. 537 (1943), in which a relator commenced a qui tam complaint by copying a public filing, resulting in a tightening of the qui tam provisions to prevent parasitic lawsuits).

234. But see *Doe*, 960 F.2d at 326 (Walker, J., dissenting) (arguing against characterizing disclosures to the defendant's employees as public disclosures because this would "effectively shift] the standard from 'public disclosure' back to 'government investigation'").

235. See *supra* Part VI.D.2. (discussing courts' disagreement over whether disclosures by the public to the government constitute public disclosures).

236. See *U.S. ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 736 (7th Cir. 2007) (holding that disclosure to a "competent public official" of an alleged fraud against the government is a public disclosure); *Bank of Farmington*, 166 F.3d at 861 (holding that "the public official to whom the information is disclosed must be one whose duties extend to the claim in question in some significant way" to constitute a public disclosure).

237. See *supra* Parts V.B.1. and V.B.2. (discussing the "direct and independent" requirements). The issue of whether government employees should be permitted to act as qui tam relators has been the subject of heated debate. Some courts take the position that government employees are not appropriate relators when they learn of the fraud through their employment and their job duties require them to detect and report fraud. See, e.g., *U.S. ex rel. Holmes v. Consumer Ins. Group (Holmes I)*, 279 F.3d 1245, 1248 (10th Cir. 2002) (holding that "[a] person who, pursuant to duties as a government employee, is part



However, the stronger arguments are against public disclosure in this instance. Perhaps the best reason against holding a disclosure to the government to be a public disclosure is that it would signal a return to the government knowledge standard that was abandoned when Congress adopted the original source rule.<sup>238</sup> The current version of the Act

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of an ongoing government investigation of fraud allegations may not pursue a *qui tam* suit based on those allegations"). Courts have ruled that when the employee disclosed the fraud to his superiors, as required by the original source rule, *see* 31 U.S.C. § 3730(e)(4)(B) (requiring an original source relator to "voluntarily provide[] the information to the Government before filing an action"), the disclosure was not voluntary because the employee was compelled to report the fraud as part of his job duties. *Biddle*, 161 F.3d at 542 (holding that the relator did not voluntarily disclose the fraud to the government when he had a duty as an Administrative Contracting Officer for the Office of Naval Research to report the fraud). *See* U.S. *ex rel.* *Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743 (9th Cir. 1995) (disqualifying the relator, Assistant Manager of the Western Region Audit Office for the Office of Audits of the Office of the Inspector General at the United States Department of Energy, from acting as a relator regarding a fraud he learned about from his employment, on the ground that he did not voluntarily disclose the fraud to the government because he was "compelled to disclose fraud by the very terms of his employment"). In *Fine* the United States Court of Appeals for the Ninth Circuit stated that allowing government employees to commence *qui tam* suits based on frauds they discovered while on duty would create "perverse incentives," such as "spend[ing] work time looking for personally remunerative cases . . . rather than doing their assigned work" and "conceal[ing] information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain." *Fine*, 72 F.3d at 745 (ellipsis in original) (internal quotation marks omitted).

Other courts, however, have permitted government employees to serve as *qui tam* relators in certain circumstances, and several courts have observed that government employees are not *per se* excluded from acting as relators by the terms of the Act. *See, e.g., Holmes II*, 318 F.3d at 1209, 1212 (stating that "nothing in the [Act] expressly precludes federal employees from filing *qui tam* suits," and observing that holding otherwise would "render superfluous the specific exclusions adopted by Congress"). Accordingly, these courts permit government employees to bring *qui tam* actions if there is no overt conflict of interest between the subject matter of the suit and the employee's job duties. *See, e.g., id.* at 1210 (permitting a postmaster to bring an action charging the defendants with mail fraud when she "was not acting within the scope of her employment" because she was not hired to detect fraud). In *Holmes II* the United States Court of Appeals for the Tenth Circuit stated that while there may be "sound public policy reasons for limiting government employees' ability to file *qui tam* actions," *id.* at 1214, it declined to make a "blanket characterization" of all such actions as "opportunistic," *id.* at 1207; *see also* U.S. *ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1495, 1501 (11th Cir. 1991) (declining "to preclude every government employee from bringing a *qui tam* action based upon information acquired in the course of his government employment," and permitting an attorney for the United States Air Force to bring a *qui tam* action charging bidrigging, which he had discovered in his position as Chief of the Contracts Law Division).

238. *See supra* Part II. (discussing abandonment of the government knowledge standard); *see also* U.S. *ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 729 (1st Cir. 2007) (noting that when enacting the 1986 amendments to the Act, "Congress deliberately removed a

expressly permits *qui tam* actions despite the government's prior knowledge.<sup>239</sup> Each of the sources of public disclosure enumerated in the Act presupposes either that the government has knowledge of the fraud or that it is able to discover the fraud. When the source of the fraud allegations is a congressional, administrative or GAO report, hearing, audit, or investigation, the government already possesses the information.<sup>240</sup> And when the source of the allegations of fraud is a civil, criminal, or administrative hearing, or the news media, the government is just as able to obtain the information as any member of the public. Therefore, a strong argument can be made that disclosure to the government does not constitute public disclosure.

Also, it is difficult to see how disclosure to the government falls within the statutory list of sources of public disclosure. The disclosure is not in the form of a report, hearing, or audit. Strictly speaking, it is not an investigation, as a communication from a member of the public to the government does not necessarily signal the commencement of an investigation. In addition, the disclosure is not occurring in a public setting, where the public at large has access to the information, by the FOIA or otherwise.<sup>241</sup> Finally, refusing to characterize such information as publicly disclosed might encourage the prompt reporting of frauds to the government, because the individuals reporting the fraud might be wary of jeopardizing their ability to commence a subsequent *qui tam* action.

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previous provision that barred jurisdiction whenever the government had knowledge of the allegations or transactions in the relator's complaint"); *Prawer*, 24 F.3d at 329 (noting that Congress abandoned a "notice" regime in enacting the 1986 amendments, and that if Congress wants to reestablish this standard, it knows how to do so).

239. See 31 U.S.C. § 3730.

240. See, e.g., *U.S. ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 496 (7th Cir. 2003) (observing that administrative reports "by their very nature . . . establish the relevant agency's awareness of the information in those reports").

241. See *Rost*, 507 F.3d at 730 (noting that when a member of the public makes confidential disclosures to the government, and the information is known only to a limited number of governmental officials, "there is no real danger that a private citizen . . . will bring an opportunistic *qui tam* suit based upon the information in the government's possession"); *Bank of Farmington*, 166 F.3d at 861 (stating that disclosures made to government officials whose duties do not extend to the fraud in question are not public disclosures if the disclosure is not public, "in the commonsense meaning of the term as 'open' or 'manifest' to all").

### VIII. SENATE BILL 2041—AN ATTEMPT TO ADJUST PUBLIC DISCLOSURE

In September 2007, in a fresh attempt to balance the twin goals of the False Claims Act (the Act)<sup>242</sup>—encouraging private fraud detection while discouraging parasitic lawsuits—Senator Grassley sponsored Senate Bill 2041 titled, “The False Claims Correction Act of 2007.”<sup>243</sup> While the impetus for the bill was apparently to make an adjustment to the “presentment” provisions of the Act,<sup>244</sup> the initial version indicated that the lawmakers were proposing substantial changes to the public disclosure provisions as well.<sup>245</sup>

The original version of the bill took the bold step of deleting the original source rule and replacing it with the ability of the attorney general to seek dismissal of a relator’s claims if all the elements of the

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242. 31 U.S.C. §§ 3729-3733 (2000); *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) (noting the twin goals).

243. S. 2041, 110th Cong. (2007). The text of the original September 12, 2007 version of the bill is available at 2007 S. 2041 (LEXIS).

244. 31 U.S.C. § 3729(a)(1)-(2) (2000). Reportedly, the bill was introduced to supercede a judicial decision, *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). See Mary Williams Walsh, *Senate Panel Seeks to Alter Law for Whistle-Blowers*, N.Y. TIMES, Feb. 28, 2008, at C3 (reporting on reasons why Senate members sought to amend the Act). In *Totten* the United States Court of Appeals for the District of Columbia held that under both § 3729(a)(1) and § 3729(a)(2) of the Act, presentment of a claim to the federal government is required before a false claim is actionable. See *Totten*, 380 F.3d at 492-93, 498-99; see also 31 U.S.C. § 3729(a)(1) (attaching liability to any person who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval”); 31 U.S.C. § 3729(a)(2) (attaching liability to any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government”). In *Totten* the court reasoned that submission of a false claim to Amtrak was not actionable under the Act because there had been no presentment of the claim to the federal government, even though Amtrak had paid the claim with federal grant money. *Totten*, 380 F.3d at 491-92. Subsequently, the United States Court of Appeals for Sixth Circuit in *U.S. ex rel. Sanders v. Allison Engine Co. (Allison I)*, 471 F.3d 610 (6th Cir. 2006), disagreed with the court in *Totten*, holding that presentment is not always required. *Id.* at 614-17. The United States Supreme Court resolved the circuit split on the presentment issue, holding that while presentment is neither expressly nor implicitly required by § 3729(a)(2), the defendant must at least make a false record with the intent of getting a false claim paid by the government. *Allison Engine Co. v. U.S. ex rel. Sanders (Allison II)*, 128 S. Ct. 2123, 2126, 2129 (2008). Because the Sixth Circuit decided the case based on an incorrect interpretation of § 3729(a)(2), the Supreme Court remanded the case for reconsideration consistent with its holding. *Allison II*, 128 S. Ct. at 2131.

245. See S. 2041, 110th Cong. § 4(b), available at 2007 S. 2041 (LEXIS).

claims were based exclusively upon certain public disclosures.<sup>246</sup> The public disclosures potentially subjecting a relator to dismissal were allegations or transactions in a “Federal criminal, civil, or administrative hearing, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit or investigation, or from the news media.”<sup>247</sup> The bill defined public disclosures as “disclosures made on the public record or that have otherwise been disseminated broadly to the general public.”<sup>248</sup> Finally, the original text specifically excluded two particular forms of disclosures from public disclosures: a relator’s “obtaining information from a Freedom of Information Act [(FOIA)]<sup>249</sup> request or from information exchanges with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed.”<sup>250</sup>

The approach taken in the initial version of Senate Bill 2041 dispensed with the time consuming task of determining original source status and provided some much needed clarification of public disclosure. First, the bill clarified that all the sources of governmental public disclosures—litigation, reports, hearings, audits, and investigations—must be exclusively federal.<sup>251</sup> This clarification settled the debate over whether state and local information may be publicly disclosed under the *qui tam* provisions of the Act. The bill thus opened up state and local litigation and administrative disclosures as viable sources for *qui tam* claims.

Second, the original bill clarified that FOIA responses obtained by the relator and communications between the relator and the government did not constitute public disclosures<sup>252</sup> unless they were “made on the public record” or “disseminated broadly to the general public.”<sup>253</sup> The exclusion of FOIA responses meant that relators could openly base their

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246. *Id.* (stating that “a court shall dismiss an action or claim brought under [the *qui tam* provisions of the Act] if the allegations relating to all essential elements of liability of the action or claim are based exclusively on the public disclosure of [the listed types of allegations or transactions]”).

247. *Id.*

248. *Id.*

249. 5 U.S.C. § 552 (2006).

250. S. 2041, 110th Cong. § 4(b).

251. *Id.* (stating that sources of public disclosure include “a congressional, Federal administrative, or Government Accountability Office report, hearing, audit or investigation”).

252. *Id.* (stating that “[t]he person bringing the action does not create a public disclosure by obtaining information from a Freedom of Information Act request or from information exchanges with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed”).

253. *Id.*

claims on FOIA documents they had obtained without risking dismissal. Also, the exclusion of "information exchanges" with the government meant that the relator could freely communicate with the government about the fraud if the communications were neither "made on the public record" nor "disseminated broadly to the public."<sup>254</sup> While the relator could commence a qui tam action based upon private disclosures to him by the government, the bill gave the court discretion to reduce the relator's award under those circumstances.<sup>255</sup> Therefore, the original text of the bill answered some of the key questions about public disclosure.

The chief defect with the original bill's public disclosure provisions, however, was its failure to define the two key terms describing public disclosures, "made on the public record" and "disseminated broadly to the general public."<sup>256</sup> Certainly these terms could be subject to competing interpretations.<sup>257</sup> For example, with regard to unfiled discovery, an argument could be made that such information is neither made on the public record nor disseminated broadly to the public. However, some individuals might contend that if unfiled discovery is available to the general public under the procedural rules of the particular jurisdiction where the litigation commences, then information is "made on the public record" and publicly disclosed whenever produced. Similarly, when the government questions a substantial number of the defendant's employees, there might be disagreement over whether these disclosures are "broadly disseminated" and whether the defendant's employees are members of "the general public."

Another problem with the original bill is that it failed to balance the twin goals of the Act—encouraging private fraud detection while discouraging parasitic lawsuits.<sup>258</sup> In revising the "based upon" requirement, the bill tipped the balance much too far in favor of the

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254. *Id.*

255. *Id.* (stating that "the court may . . . reduce the share of the proceeds of the action which a person would otherwise receive . . . if the court finds that person . . . derived the knowledge of the claims in the action primarily from specific information . . . that the Government disclosed privately to the person").

256. *See id.*

257. *See Hearing, supra* note 12 (statement of Pamela H. Bucy, Bainbridge Professor of Law, Univ. of Ala. School of Law), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit\\_id=6995](http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit_id=6995) (stating that "[p]ublic record" and "disseminated broadly to the general public" are unclear terms. No one: not relators, defense counsel, [the Department of Justice], or the courts, will have a clear sense of what these terms mean"); *id.* (statement of John T. Boese, Fried Frank Harris Shriver & Jacobson LLP), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit\\_id=6994](http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit_id=6994) (stating that "the very term 'disseminated broadly to the general public' defies clear definition").

258. *Springfield*, 14 F.3d at 651.

relator. The bill required dismissal only if *all* the elements of liability were *derived from* the public disclosure *exclusively*.<sup>259</sup> Under this version of the “based upon” rule, it would have been too easy for a relator to avoid dismissal merely by asserting that a single element of his claim was not publicly disclosed or that a single element of the fraud was not derived from the public disclosure.<sup>260</sup> Thus, the “based upon” test of the original text of Senate Bill 2041 would likely have preserved jurisdiction for virtually all relators challenged with dismissal, and it would have had too great a tendency to allow parasitic actions that were substantially based upon public disclosures.<sup>261</sup>

On July 29, 2008, the bill was reported out of the Senate Committee on the Judiciary with vastly revised *qui tam* provisions.<sup>262</sup> Rather than authorizing dismissal when the *qui tam* action was based upon certain public disclosures, the amended bill authorized dismissal only when the government had taken action to investigate or prosecute the fraud.<sup>263</sup> Specifically, the bill mandated dismissal if the government had already filed an indictment or was actively investigating or auditing the matter.<sup>264</sup> If the fraud had been the subject of a news media report or a public congressional hearing, report, or investigation, then dismissal was mandated only if the government, within ninety days of

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259. S. 2041, 110th Cong. § 4(b) (providing that “a court shall dismiss an action or claim brought under section 3730(b) if the allegations relating to all essential elements of liability of the action or claim are based exclusively on the public disclosure”).

260. See *Hearing, supra* note 12 (statement of John T. Boese, Fried Frank Harris Shriver & Jacobson LLP), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit\\_id=6994](http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit_id=6994) (stating that the bill “erects such a high threshold for obtaining such a dismissal that there would be very few motions, if any, that could succeed”); see also *U.S. ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (reasoning that requiring a *qui tam* complaint to be solely based upon a public disclosure “would impermissibly expand federal jurisdiction by allowing *qui tam* plaintiffs to avoid the more exacting ‘original source’ requirement simply by asserting an additional count. In other words, with a little artful pleading, all *qui tam* plaintiffs could pass the jurisdictional threshold by fashioning complaints only ‘partly based’ upon publicly disclosed allegations or transactions”).

261. But see S. 2041, 110th Cong. § 4(c) (permitting the court to reduce a relator’s award if the relator derived knowledge of the claims primarily from information that the government publicly disclosed or that the government disclosed privately to the relator during an investigation of the fraud).

262. See S. Rep. No. 110-507 (2008), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_reports&docid=f:sr507.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr507.110.pdf).

263. See *id.* at 40-41.

264. *Id.* (providing that the court shall dismiss the action when the relator’s claims are the subject of “a filed criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit”).

the disclosure, commenced an investigation of the fraud.<sup>265</sup> Even when the government acted to prosecute, investigate, or audit the fraud, dismissal was mandated only if the relator's complaint did not provide grounds for additional financial recovery.<sup>266</sup> Further, dismissal could not occur if the government's activity or the news report were initiated after the relator had voluntarily disclosed the fraud to the government.<sup>267</sup>

This new approach taken by the revised version of the bill greatly improved the *qui tam* provisions of the Act. First, it obviated the need to engage in the confusing and time consuming public disclosure and original source analyses and instead mandated dismissal only when the government acted, either by filing an indictment or by commencing an investigation or audit.<sup>268</sup> This approach dispensed with the need to assess whether particular disclosures constituted public disclosures because the source of the relator's information was no longer relevant.<sup>269</sup> If the government had not commenced a prosecution, investigation, or audit, then the relator could learn of the fraud from a FOIA response, from civil litigation, from the defendant's employees, from the news media, from Congress, or from the government itself.<sup>270</sup> This simplified approach to *qui tam* jurisdiction thereby avoided many of the

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265. *Id.* at 41 (providing that the court shall dismiss the action when the relator's claims are the subject of "a news media report, or public congressional hearing, report, or investigation, if within 90 days after the issuance or completion of such news media report or congressional hearing, report, or investigation, the Department of Justice or an Office of Inspector General opened a fraud investigation or audit of the facts contained in such news media report or congressional hearing, report, or investigation").

266. *Id.* (providing that dismissal is available only when "any new information provided by the person does not add substantial grounds for additional recovery beyond those encompassed within the Government's existing criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit").

267. *Id.* (providing that dismissal is available only when "the Government's existing criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit, or the news media report, or congressional hearing, report, or investigation was not initiated or published after the Government's receipt of information about substantially the same matters voluntarily brought by the person to the Government").

268. *Id.* at 40-41.

269. *But see id.* at 39-40 (stating "the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which a person would otherwise receive . . . if the court finds that person . . . derived the knowledge of the claims in the action primarily from specific information relating to allegations or transactions . . . that the Government publicly disclosed [term not defined in the bill] or that the Government disclosed privately to the person bringing the action in the course of its investigation").

270. *But see id.* (providing that the court has discretion to decrease the relator's award if the relator primarily learned of the fraud from the government).

historical problems of applying the public disclosure and original source rules.

Second, the amended bill achieved a better balance between encouraging private fraud detection and discouraging *qui tam* suits that do not assist the government's recovery efforts. Once the relator voluntarily disclosed the fraud to the government, subsequent action by the government or the news media would not result in dismissal of the *qui tam* action.<sup>271</sup> Even if the government did investigate or prosecute the fraud, the relator would be rewarded for his efforts if his information increased the ultimate financial recovery.<sup>272</sup> However, the government would not be required to share with the relator any part of the recovery that resulted from the government's own investigative efforts.<sup>273</sup> Moreover, the bill provided that if the relator learned of the fraud from the government itself, then the court had discretion to decrease the relator's award.<sup>274</sup> These provisions adequately rewarded the relator and adequately protected the government from parasitism.<sup>275</sup>

Unfortunately, the bill was not enacted by the time the 110th Congress ended on January 4, 2009, likely eclipsed by more pressing issues of the national economy and the presidential election.<sup>276</sup> It may well be resubmitted in the current Congress, in view of its goals to increase fraud recoveries and replenish government coffers.

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271. See *id.* at 41 (providing that the action may not be dismissed when the government's prosecution, investigation, or audit, or the news media report was initiated after the relator voluntarily disclosed the fraud to the government).

272. The bill provided, however, that the relator would be entitled to share only in the portion of the recovery that was based on the relator's information. *Id.* at 38-39 (stating that "[i]f the person bringing the action is not dismissed under subsection (e)(4) because the person provided new information that adds substantial grounds for additional recovery . . . , then such person shall be entitled to receive a share only of proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person").

273. See *id.*

274. *Id.* at 39-40.

275. The revised bill's language, however, still needed some clarification. The bill did not state whether a filed criminal indictment or a criminal, civil, or administrative investigation or audit is exclusively federal or may emanate from state and local governments as well. Moreover, the terms themselves would have benefitted from definition. For example, it was not entirely clear what the lawmakers meant by the term "civil investigation" or how to determine when an investigation or audit is "open and active." *Id.* at 40-41. Finally, although the bill utilized the term "public disclosure," see *id.* at 41, it failed to incorporate the definition of the term from the prior version of the bill, a definition that itself required clarification.

276. See 110 Bill Tracking S. 2041 (LEXIS).



## CONCLUSION

There is hardly any component of the original source rule for which all courts agree on a single interpretation. Generally, however, most courts agree that once public disclosure occurs, application of the original source rule dramatically limits the pool of potential *qui tam* relators.<sup>277</sup> The requirement that the relator possess direct and independent knowledge effectively requires the relator to be an insider who participated in the fraud or observed it firsthand.<sup>278</sup> Moreover, most courts interpret the "based upon" requirement very broadly, holding that the relator's complaint is based upon the public disclosure whenever it is similar, even if only in part, to the content of the public disclosure.<sup>279</sup> The only way that a relator can avoid these stringent restrictions is to show that public disclosure did not occur. Therefore, how a court determines whether public disclosure occurred is critical to a determination of jurisdiction over the relator.

Unfortunately, there is little consensus by courts on what it means to be publicly disclosed. In fact, courts disagree on virtually every aspect of public disclosure.<sup>280</sup> These disagreements mean that whether a relator will need to show that he is an original source largely depends upon the particular interpretations of public disclosure prevalent in the jurisdiction where the *qui tam* action is commenced. These differences in interpretation of the public disclosure provisions severely undercut the uniformity and effectiveness of the *qui tam* provisions of the False

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277. See *supra* Part V.B. (discussing the limitations of the original source rule).

278. See *supra* Part V.B. (discussing the "direct and independent" requirements); see also, e.g., *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991) (declaring that "[t]he paradigmatic 'original source' is a whistleblowing insider[,] . . . 'individuals who are close observers or otherwise involved in the fraudulent activity'" (misquoted in original) (quoting S. REP. at No. 99-345, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269)).

279. See *supra* Part V.A. (discussing the "based upon" requirement).

280. See *supra* Part VI. (pointing out inconsistencies in courts' interpretations of "public disclosure"); see also, e.g., *Hearing, supra* note 12 (statement of John E. Clark), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit\\_id=6992](http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit_id=6992) (stating that "[t]he United States Code Annotated currently reports nearly 200 published and unpublished rulings in 103 separate cases on questions relating to the proper interpretation of the 'public disclosure' bar and its 'original source' exception").

Claims Act (the Act).<sup>281</sup> There is no question that the statute would benefit from clarification of public disclosure.<sup>282</sup>

In five areas in particular, clarification would reshape the Act in critical ways.<sup>283</sup> Probably the most important clarification would be to determine whether administrative reports, hearings, audits, and investigations are intended to include state and local administrative agencies.<sup>284</sup> State and local governments constitute a huge potential source of fraud information, and clarification on whether they are included in or excluded from the statutory list of sources of public disclosure would impact qui tam jurisdiction substantially.

Second, unfiled discovery constitutes another huge potential source of information on fraud. This information could remain unknown to the government unless the litigants and their counsel are permitted to commence qui tam actions based on unfiled discovery.<sup>285</sup> A clarification that unfiled discovery is not publicly disclosed could dramatically expand use of the qui tam provisions of the Act.

Third, clarification is needed on the extent to which documents that are potentially available through the Freedom of Information Act (FOIA)<sup>286</sup> are publicly disclosed.<sup>287</sup> Questions exist regarding (1) whether all documents provided through the FOIA are publicly disclosed; (2) whether documents that are announced as being available but not yet produced to requesters are publicly disclosed; and (3) whether documents that are unannounced and merely reside in governmental files, but which are potentially available by the FOIA, are publicly disclosed.<sup>288</sup> In view of the magnitude of information that is stored in government files, as well as the enormous use of the FOIA by the public, it is

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281. 31 U.S.C. §§ 3729-3733 (2000); *Hearing, supra* note 12 (statement of John E. Clark), available at [http://judiciary.senate.gov/testimony.cfm?id=3161&wit\\_id=6992](http://judiciary.senate.gov/testimony.cfm?id=3161&wit_id=6992) (stating that the inconsistent interpretations of the public disclosure provisions have "seriously handicapped the fight against fraud"); Chandler, *supra* note 67, at 569 (stating that "[t]he federal courts have created an unpredictable result that fails to adhere to the intent of the [Act], and it is time for Congress to clarify the issue").

282. See *Hearing, supra* note 12 (statement of John E. Clark), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit\\_id=6992](http://judiciary.senate.gov/hearings/testimony.cfm?id=3161&wit_id=6992) (stating that the inconsistent case law "demonstrate[s] the need for legislative action").

283. *Supra* Part VII.

284. See *supra* Part VII.A. (discussing whether state and local administrative information should serve as a source of public disclosure).

285. See *supra* Part VII.B. (discussing whether unfiled discovery should serve as a source of public disclosure).

286. 5 U.S.C. § 552 (2006).

287. See *supra* Part VII.C. (discussing the circumstances under which FOIA documents should serve as a source of public disclosure).

288. See *supra* Part VII.C. (discussing the issue of FOIA documents).

extremely important to clarify how the public disclosure rule interacts with the FOIA.

Fourth, it is critical to resolve the issue of whether information disclosed by the government to a defendant's employees during fraud investigations is publicly disclosed.<sup>289</sup> These investigations are commonplace, and thus clarifying whether they constitute public disclosures substantially impacts the manner in which the investigations are conducted and the extent to which the defendants are willing to cooperate in the inquiries.

Fifth, clarification is needed on whether disclosures to the federal government constitute public disclosures.<sup>290</sup> A determination would impact whether members of the public opt to make prompt reports of fraud to the government, as well as the extent to which government officials themselves can act as *qui tam* relators.

The original version of Senate Bill 2041,<sup>291</sup> considered but not passed by the 110th Congress,<sup>292</sup> clarified some but not all of these questions about public disclosure. Moreover, the bill did not achieve a satisfactory balance between encouraging private fraud detection and discouraging parasitic lawsuits.<sup>293</sup>

A later version of the bill reported by the Senate Judiciary Committee achieved much greater success in clarifying the *qui tam* provisions of the Act.<sup>294</sup> By basing dismissal upon whether the government had taken action to prosecute or investigate the fraud,<sup>295</sup> not upon the source of the relator's knowledge, the revised bill avoided the confusing public disclosure and original source analyses. Further, the revised bill achieved a much better balance between encouraging private fraud detection and discouraging *qui tam* actions that merely "piggybacked" on the government's own investigative efforts.<sup>296</sup>

While the debate over public disclosure continues, a simple and immediate way to clarify the issue would be to abandon the special public disclosure rules that certain courts have devised to effectuate

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289. See *supra* Part VII.D. (discussing whether governmental disclosures to a defendant's employees should serve as a source of public disclosure).

290. See *supra* Part VII.E. (discussing whether disclosures by the public to the government should serve as a source of public disclosure).

291. S. 2041, 110th Cong. (2007). The text of the original version of the bill is available at 110 Bill Tracking S. 2041 (LEXIS).

292. See 110 Bill Tracking S. 2041 (LEXIS).

293. See *supra* Part VIII. (discussing Senate Bill 2041).

294. See S. Rep. No. 110-507 (2008), available at [http://frwebgate.access.gov/cgi-bin/getdoc.cgi?dbname=110\\_Cong\\_reports&docid=f:sr507.110.pdf](http://frwebgate.access.gov/cgi-bin/getdoc.cgi?dbname=110_Cong_reports&docid=f:sr507.110.pdf).

295. *Id.* at 40-41.

296. See *supra* Part VIII.

statutory intent.<sup>297</sup> These special rules are plainly inconsistent with the current statutory language. The Act presently requires the relator to disclose the fraud to the government before filing the qui tam complaint, not before the public disclosure, as some courts have held.<sup>298</sup> Nor does the statute require the relator to have had a role in the public disclosure<sup>299</sup> or to possess knowledge of the fraud prior to the public disclosure.<sup>300</sup> While some of the current statutory language is concededly vague and susceptible to competing interpretations, no purpose is served by manufacturing additional requirements for public disclosure that have no basis in the language of the Act.

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297. *See supra* Part VI.E. (discussing special rules on public disclosure adopted by certain courts).

298. *See supra* Part VI.E.3. (discussing this requirement imposed by certain courts).

299. *See supra* Part VI.E.1. (discussing this requirement imposed by certain courts).

300. *See supra* Part VI.E.2. (discussing this requirement imposed by certain courts). However, whether the relator learned of the fraud prior to the public disclosure is relevant to determining whether the relator's knowledge is independent of the public disclosure, and it is therefore relevant to establishing whether he is an original source. *See supra* Part V.B.2. (discussing the "independent" requirement).

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