

FALSE CLAIMS ACT AMENDMENTS OF 1980

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Mr. DECONCINI, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 1981]

The Committee on the Judiciary, to which was referred the bill (S. 1981) to improve judicial machinery by amending the jurisdiction and venue requirements and damage provisions in all suits involving the False Claims Act, and for other purposes, having considered the same, reports favorably on a bill in the nature of a substitute, and recommends that the bill do pass.

PURPOSE OF THE BILL

The False Claims Act is the principal litigative tool employed by the Government to recover losses sustained as a result of fraud and corruption. No one knows the magnitude of fraud against the Government, but the amount of suspected fraud which has appeared recently indicates that the problem is severe. The amount of fraud, furthermore, appears to be increasing, necessitating the modernization of the False Claims Act, which has not been amended in any substantial respect since its enactment by the Congress in 1863. In order to make the statute an effective and useful tool to combat fraud in modern times, the Committee believes that the statute should be amended in several significant respects. The proposed legislation would expand jurisdiction and venue provisions, increase recoverable damages, raise the forfeiture levels and redefine the mental element required for a successful prosecution. The proposed legislation would additionally alter the burden of proof, provide for more serious consequences for *nolo contendere* pleas in subsequent civil actions and provide a mechanism to ensure that evidence crucial to the development of these cases could be obtained.

The proposed legislation is in no sense a "new" false claims act. Many of the original provisions of the False Claims Act, as construed by the courts over the 117 year history of the Act, have continuing vitality. For example, the amendments make no change to the so-called "quiam" or "informer" provisions of the Act which many persons have singled out for special praise.

Because the present bill is carefully structured as amendments to the False Claims Act, it leaves unaltered these and many other provisions of the original statute. In short, the Committee thought it unwise to discard over 100 years of history in the name of reform. Thus many decisions construing various provisions of the original False Claims Act will have continued precedential force. In summary, much of the decisional law will remain viable to guide the courts in their interpretation of the Act as amended.

STATEMENT

The False Claims Act is the primary litigative tool employed by the United States to recover money from those who have defrauded the government.¹ The Act has remained substantially unchanged since it was enacted in 1863 in response to the widespread fraud and profiteering against the government which occurred in connection with military procurements made for the Union Army during the Civil War.²

In its present form, the False Claims Act empowers the United States to recover double damages from those who make, or cause to be made, false claims for money or property upon the United States, or who submit false information in support of claims. In addition, the United States may recover one \$2,000 forfeiture for each false claim submitted or for each false document submitted in support of a claim.³ The imposition of this forfeiture is automatic and mandatory for each claim which is found to be false.⁴ The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages. *Fleming v. United States*, 336 F. 2d 475,480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965). A forfeiture may be recovered from one who submits a false claim even though no payments were made on the claim. *United States*

¹ The civil remedy provided by the False Claims Act does not preclude or otherwise affect the government's right to maintain an action under any other statute such as the Contract Disputes Act of 1978, 41 U.S.C. § 604, or the Federal Property and Administrative Services Act, 40 U.S.C. § 489, or at common law for fraud, unjust enrichment, or recovery of money or property erroneously, mistakenly or illegally paid by government employees. See, e.g., *United States v. Mead*, 426 F.2d 118 (9th Cir. 1970); *United States v. Borin*, 209 F.2d 145 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *Pooler v. United States*, 127 F.519 (1st Cir. 1904).

² The False Claims Act was adopted in 1863, Act of Mar. 2, 1863, c. 67, 12 Stat. 696. It was reenacted as Rev. Stat. §§ 3490, 3494, 5438. The part of the Act dealing with civil prohibitions is now codified in 31 U.S.C. § 231, *et seq.* The language used in Title 31 differs in some important respects from that contained in the Revised Statutes. Since Title 31 has not been enacted into positive law, the official text of the statute is that which appears in the Revised Statutes. See *United States v. Neifert-White Co.*, 390 U.S. 228, 228-229, n. 1; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 539-540, and n. 2. In 1909, section 5438 was repealed. Act of Mar. 4, 1909, c. 321, § 431, 35 Stat. 1153. It has continued vitality only insofar as it specifies the acts giving rise to civil liability under § 3490. See *United States v. Neifert-White Co.*, *supra*.

³ In 1943, section 3493 was repealed. Unlike the repeal of section 5438, this section is no longer operative. The Committee in no way intends to revise section 3493.

⁴ The bill would increase the amount of such forfeitures to \$5,000.

⁵ The Committee does not intend that the amount of forfeiture recovery be left to the discretion of the district court. Rather, for each false claim, a forfeiture shall be imposed. See, e.g., *United States v. Hughes*, 585 F.2d 284 (7th Cir. 1978); *United States v. Jacobson*, 467 F.Supp. 507, 508 (S.D.N.Y. 1979). Accordingly, the Committee disapproves the contrary result reached by the Fifth Circuit in *Peterson v. Weindorfer*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975).

v. *American Precision Products Corp.*, 115 F. Supp. 823 (D. N.J. 1953). The False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broad sense to include partnerships, associations, and corporations [*United States v. Hanger One, Inc.*, 563 F. 2d 1155, 1158 (5th Cir. 1977); *United States v. National Wholesalers, Inc.*, 236 F. 2d 944 (9th Cir. 1956)], as well as states and political subdivisions thereof. Cf. *Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 316 U.S. 153, 161 (1942); *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

The False Claims Act is intended to reach all fraudulent attempts to cause the government to pay out sums of money or to deliver property or services. *United States v. Neifert-White Co.*, 390 U.S. 228 (1968).⁵ Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute or regulation. E.g., *United States v. Bornstein*, 423 U.S. 303 (1976); *United States v. National Wholesalers*, 236 F. 2d 944 (9th Cir. 1956), cert. denied, 353 U.S. 930 (1957); *Henry v. United States*, 424 F. 2d 677 (5th Cir. 1970). A false claim for reimbursement under the Medicare, Medicaid or similar programs is actionable under the Act, *Peterson v. Weinberger*, supra, as is a false application for a loan from a government agency, *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), or a false claim in connection with a sale financed by the Agency for International Development or Export-Import Bank, *United States v. Chew*, No. 26,730 (9th Cir. April 10, 1973), and such claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program, or though payments on the government loan are current, if by means of false statements the government was induced to lend an inflated amount. A false claim may take other forms, such as fraudulently cashing a government check which was wrongfully or mistakenly obtained, *United States v. Silver*, 384 F. Supp. 617 (E.D.N.Y. 1974), aff'd 515 F. 2d 505 (2d Cir. 1976), or a demand for redemption or purchase of a government guaranteed or insured loan if the insurance or guarantee was originally obtained by means of false statements. E.g., *United States v. Venezia*, 268 F. 2d 504 (3rd Cir. 1956). A fraudulent attempt to pay the government less than is owed in connection with any goods, services, concession, or other benefits provided by the government is also a false claim under the Act. E.g., *Smith v. United States*, 287 F. 2d 299 (5th Cir. 1961); *United States v. Gardner*, 73 F. Supp. 644 (N.D. Ala. 1947). For example, the Committee considers a false application for reduced postal rates to be a false claim for postal services, and agrees with the well-reasoned decision in *United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 68 F. Supp. 767, 770 (S.D.N.Y. 1946), that whether such benefits are received by means of a reduction in the amount paid the government or by means of subsequent claims for reimbursement is a matter of bookkeeping rather

⁵ The Committee agrees with the Supreme Court that:

"the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White*, supra, 390 U.S. at 233.

See also, *United States v. Silver*, 384 F. Supp. 617 (E.D.N.Y. 1974), aff'd 515 F. 2d 505 (2d Cir. 1976).

than of substance, and, therefore, rejects the contrary result reached in *United States v. Marple Community Record, Inc.*, 335 F. Supp. 95 (E.D. Pa., 1971); see also, *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963).⁶

Each separate bill, voucher or other "false payment demand" ⁷ constitutes a separate claim for which a forfeiture shall be imposed, e.g., *United States v. Collyer Insulated Wire Co.*, 94 F. Supp. 493 (D.R.I. 1950), and this is true although many such claims may be submitted to the government at one time. For example, a doctor who completes separate Medicare claim forms for each patient treated will be liable for a forfeiture for each such form that contains false entries even though several such forms may be submitted to the fiscal intermediary at one time. Likewise, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a separate false claim. For example, all claims submitted under a contract obtained through collusive bidding are false and actionable under the Act, *Murry & Sorenson, Inc. v. United States*, 207 F.2d 119 (1st Cir. 1953), as are all Medicare claims submitted by or on behalf of a physician who is ineligible to participate in the program. *Peterson v. Weinberger*, *supra*.

A claim upon any government agency or instrumentality, quasi-governmental corporation, or nonappropriated fund activity is a claim upon the United States under the Act. In addition, a false claim is actionable although the claim or false statements were made to a party other than the government, if the payment thereon would ultimately result in a loss to the United States. *United States v. Bornstein*, *supra*; *United States v. Lagerbusch*, 361 F.2d 449 (3rd Cir. 1966); *Murray & Sorenson, Inc. v. United States*, 207 F.2d 119 (1st Cir. 1953). For example, a false claim to the recipient of a grant from the United States or to a state under a program financed in part by the United States, is a false claim to the United States. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States ex rel. Davis v. Long's Drugs*, 411 F. Supp. 1114 (S.D. Cal. 1976).

No single rule can be, or should be, stated for the determination of damages under the Act. The United States is involved in numerous programs and areas, ranging from military procurement to home mortgage insurance to the donation of aid to foreign countries. Fraudulent interference with the government's activities damages the government in numerous ways that vary from case to case. Accordingly, the Committee believes that the courts should remain free to fashion measures of damages on a case-by-case basis. The Committee intends that the courts should be guided only by the principles that the United States' damages should be liberally measured to effectuate the remedial purposes of the Act, and that the United States should be afforded a full and complete recovery of all its damages.

⁶ The Committee, however, does not intend to alter the current law as applied to tax returns. See, *Olsen v. Mellon*, 4 F.Supp 947 (W.D. Pa. 1933), *aff'd* 71 F.2d 1021 (3rd Cir. 1934).

⁷ Quoting the Supreme Court's decision in *United States v. Bornstein*, *supra* at p. 309, n. 4.

SECTION-BY-SECTION ANALYSIS

Section 1 of the bill provides that the bill may be cited as the "False Claims Amendment Act of 1980".

Section 2 of the bill amends Section 3490 of the Revised Statutes in several respects.

First, Section 2 of the bill deletes the last three clauses of present Section 3490. These three clauses were included in the False Claims Act when it was originally adopted in 1863 to deal with particular kinds of fraudulent practices then prevalent in military procurement. These practices have no modern counterpart; there are no reported decisions under the last three clauses of the Act and the Department of Justice advises that it is unaware of any suits having been brought under these clauses in this century.

Second, Section 2 of the bill clarifies the scienter requirements for liability under the Act. Thus, the bill imposes liability upon any person who knowingly presents or causes the presentation of a claim that is either false or fictitious. A claim may be false or fictitious if it is itself false or fictitious or if it is supported by any false or fictitious documents. Similarly, Section 2 of the bill imposes liability upon any person who conspires to engage in any of the interdicted acts.

In keeping with the concept that the Act is civil, not criminal, in nature, Section 2 of this bill requires only that the government prove that the defendant had either actual or constructive knowledge that the claim was false or fictitious. This comports with the more recent and better reasoned view of the Act taken in *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973); *Miller v. United States*, 550 F.2d 17 (Ct. Cl. 1977); and *United States v. Hughes*, 585 F.2d 284 (7th Cir. 1978). The bill thus overrules *United States v. Mead*, 426 F.2d 118 (9th Cir. 1970) and *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972), in which the courts imposed an unduly restrictive scienter requirement.⁸

Section 2 of the bill, which is intended to embody all of the requisite elements for liability under the Act, excludes elements of common law fraud such as intent and reliance from this statutory cause of action. The Committee intends that knowledge of falsity shall constitute the basic element giving rise to liability. Section 2 accordingly embraces situations in which the evidence establishes that the defendant had actual knowledge of the falsity, as well as cases in which the defendant had constructive knowledge of the falsity in that he acted in reckless disregard of the truth. With regard to this constructive knowledge standard, the language of the bill is sufficiently broad in scope so as to encompass the person who seeks payment from the government without regard to his eligibility and with indifference for the requirements of eligibility,⁹ or who certifies information to the government in support of his claim with neither personal knowledge of its accuracy nor reasonable investigative efforts.¹⁰ It also encompasses the in-

⁸ In *United States v. Milton*, 602 F.2d 231 (9th Cir. 1979), the Ninth Circuit cast doubt upon the continuing vitality of *Mead*, when it held that intent to defraud was not a necessary element for conviction under 18 U.S.C. § 287, the criminal false claims statute. The court noted that its prior decision in *Mead* might be inconsistent, and suggested that knowledge of falsity alone might suffice for civil liability under the False Claims Act.

⁹ *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973).

¹⁰ *Miller v. United States*, 550 F.2d 17 (Ct. Cl. 1977).

dividual who would hide behind a shield of self-imposed ignorance. The Committee considers that the individual whose specific or implied encouragement to his subordinates to increase sales or profits at any cost results in a fraud on the United States has evidenced the requisite culpability to subject himself to liability under the Act. Such an individual cannot escape liability on the basis of lack of knowledge of the fraud when he has purposefully turned a blind eye to the conduct of his subordinates. As Chief Judge Forman stated in *United States v. Klein*, Civ. No. 1035-51 (D. N.J. Feb. 2, 1953) in holding the defendant liable under the Act for having supplied substandard milk to the government:

At no time did Mr. Klein take it upon himself to make any investigation as to whether the milk that he was receiving was of the quality which he solemnly promised the United States Government under his contract it would receive. . . . If he did not know that what he was delivering was not the kind of milk that was in the contract, it was the grossest kind of carelessness and negligence upon his part, for which he must assume the responsibility of knowledge.

Third, Section 2 of the bill codifies the Supreme Court's method of calculation of damages set forth in *United States v. Bornstein*, 423 U.S. 303 (1976), and overrules the Third Circuit's recent decision in *United States v. Hibbs*, 568 F.2d 347 (3rd Cir. 1978), as well as an earlier decision in *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972). In *Hibbs*, the evidence conclusively established that, but for the fraudulent misrepresentations, the Department of Housing and Urban Development would not have issued an insurance commitment with respect to mortgages made under Section 235 of the National Housing Act. After the mortgage defaulted and the government brought suit under the False Claims Act, the Court in *Hibbs* held that the government was limited to recovering only the damage proximately related to the false statements made in the application for loan insurance and impliedly overruled its prior decision in *United States v. Veneziale*, 268 F.2d 504 (3rd Cir. 1959).

In *Aerodex*, the evidence established that the defendant, which was required to furnish the Navy with new bearings for airplane engines, had used old bearings simply recoated to appear new. The Court held that the government's False Claims Act recovery was limited to double the amount of the claim, and did not include consequential damages for the costly process of removing the old bearings and installing the new bearings called for by the contract.

The precedent in *Hibbs* has had a considerable adverse effect on the government's efforts in fraud litigation in the programs administered by the Department of Housing and Urban Development, and the Committee perceives that an extension of the principles in *Hibbs* to other cases where the government acts as an insurer or guarantor is foreseeable. Similarly, the Committee believes that the Fifth Circuit's decision in *Aerodex* is at variance with intent of the Congress to provide the government full and complete relief from all damages occasioned by fraudulent conduct.

The Committee realizes that there may be a few cases in which the demands of justice warrant a limitation on the total damages re-

coverable by the government under this bill. These situations may arise when damages, incurred by the government, were not reasonably foreseeable at the time of the misconduct. In those instances, the court, by its own motion, may reduce by not more than 25 per cent, the total damages allowed by subsection (b) (1) (A) of section 3490 of the Revised Statutes.

The proposed subsection (b) of section 3490 of the Revised Statutes, as added by Section 2 of the bill, adopts the "but for" test applied by the Fourth Circuit in *Toepleman v. United States*, 263 F.2d 697 (4th Cir. 1958), *cert. denied sub nom. Cato Bros. v. United States*, 359 U.S. 989 (1959). There, the Court held that the defendants were liable for all damages which the government would not have sustained but for the defendants' initial fraudulent conduct in inducing the government to insure the subject loan. The Committee believes that this "but for" standard will implement the broad remedial purposes of the Act and afford the government recovery for losses sustained by fraud.

Fourth, the bill increases the forfeiture liability under the Act from \$2,000 to \$5,000. The current \$2,000 forfeiture amount has remained unchanged since the Civil War. Given the inflationary increase in the past 117 years, the Committee believes that the amount should be increased to \$5,000.¹¹

Section 3(1) of the bill amends section 3491 of the Revised Statutes to modernize the jurisdiction and venue provisions of the False Claims Act, by recognizing the existence of multi-defendant and multi-district frauds against the government. The bill provides that jurisdiction and venue in suits under the False Claims Act shall be proper in any district in which either: (a) any defendant resides, transacts business, is doing business, or can be found; or (b) in any district in which any of the following acts occurred: (i) the false claim was made or presented, or (ii) any other act constituting a violation of the False Claims Act occurred.

Under existing law, a False Claims Act action must be commenced in the district where the defendant can be "found". This considerably hinders the government's litigative effort in cases involving multiple defendants. Many suits brought under the Act involve several defendants and only infrequently can all defendants be "found" in any one district. Many False Claims Act suits are brought after criminal litigation involving the same or similar conduct. Typically, for a variety of reasons, the individuals involved have moved from the area where the wrongdoing occurred and where they once were "found". This, in turn, forces the Department of Justice to file multiple suits involving the same scheme or pattern of fraudulent conduct against each defendant in the district in which he or she may be found at the time suit is commenced. Multiple suits, of course, increase the cost to the government to pursue these cases.

This expansion of jurisdiction and venue is made with a view to more effective litigation by the government as well as convenience and fairness. However, the Committee is aware of the potential for abuse of this section. Choice of venue could turn more upon which court had previously provided a favorable decision to the government than upon

¹¹ The Bureau of Labor Statistics advises that the current value of \$2,000 in 1863 dollars is \$10,111.34.

other factors of convenience or fairness. The Committee will remain sensitive to these potential abuses.

Section 3(2) of the bill is purely technical changes. The capital letters designating the subsections for section 3491 of the Revised Statutes, have been replaced by lower case letters.

Section 3(3) of the bill amends section 3491 of the Revised Statutes by adding four new provisions to the False Claims Act.

The first new provision, which would add subsection (g), deals with the cause of action created by the False Claims Act. As originally enacted, the False Claims Act was part of a criminal statute.¹² Partly because of the unusual genesis of the Act, many courts have imposed unreasonably difficult standards of proof which are inconsistent with the "preponderance of the evidence standard" applicable to civil cases generally. Thus, at the present time, existing law requires that the government prove its case by clear, unequivocal and convincing evidence. *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962). The Department of Justice advises that its experience has been that this is the functional equivalent of a criminal standard. Indeed, the Supreme Court has recently noted in another context that this standard may even exceed that used in criminal cases because the term "unequivocal", taken by itself, means proof that admits of no doubt. *Addington v. Texas*, 60 L.Ed.2d 323 (1979). Since the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), it is now well settled that an action under the Act is "remedial" and one which imposes a "civil sanction". In the Committee's view, the Supreme Court's decision in *United States ex rel. Marcus v. Hess* necessarily carries with it a repudiation of the concept of a higher burden of proof than that imposed in civil cases and the bill would clarify this confusing area of the law and adopt the opinion of the Court in *United States v. Gardner*, 73 F. Supp. 644 (N.D. Ala. 1947).

The second new provision, which would add new subsection (h), deals with the effect to be given to prior criminal convictions in False

¹² The False Claims Act was originally enacted as the Act of March 2, 1863, 12 Stat. 696, and thereafter became sections 3490-3494 and 5438 of the Revised Statutes (31 U.S.C. 231-235). R.S. 5438 (12 Stat. 696) made the commission of certain acts a crime, while R.S. 3490 (12 Stat. 698) provided that whoever committed any of the acts prohibited by R.S. 5438, should "forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act, together with the costs of the suit; . . ." The False Claims Act as originally enacted (12 Stat. 698) also provided for *qui tam* suits by private persons in which part of the amount recovered was to be received by such private persons. This provision, which was carried into R.S. 3491, was amended December 23, 1943 (31 U.S.C. 232).

While R.S. 5438 was expressly repealed by the Act of March 9, 1909 (35 Stat. 1153), the essential provisions thereof were reenacted in other Acts which are now codified as sections 286, 287 and 1001 of Title 18 (Crimes and Criminal Procedure) of the United States Code. The scope and force of R.S. 3490, in which the provisions of R.S. 5438 were incorporated by reference, remained intact and unaffected by the repeal of R.S. 5438. *United States v. Rainwater*, 244 F.2d 27 (C.A. 8, 1957), *aff'd* 356 U.S. 590 (1958); *United States ex rel. Kessler v. Mercur Corp.*, 83 F.2d 178, 180 (C.A. 2), *cert. denied*, 299 U.S. 576 (1936). Thus the substantive provisions of the False Claims Act respecting the civil remedy for false claims against the United States are the same as they were when the provisions of R.S. 5438 were originally incorporated by reference in R.S. 3490. See *United States v. Rohleder*, 157 F.2d 126 (C.A. 3, 1946); *United States v. Bramblett*, 348 U.S. 503 (1955); *United States v. Toepelman*, 141 F.Supp. 677 (E.D. N.C. 1956), *rev'd on other grounds sub nom., United States v. McNinch*, 242 F.2d 359 (C.A. 4, 1957), *but reinstated in United States v. McNinch*, 356 U.S. 595 (1958); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

Because the statutory provisions relating to criminal prosecutions (18 U.S.C. 286, 287 and 1001) and those referring to civil actions (R.S. 3490-3492, 3494, 5438; 31 U.S.C. 231-233, 235) have a common origin and background, the designation *False Claims Act* has been used in the decisions to refer to either the criminal or civil provisions, i.e., whichever might be the basis of the particular proceedings. *United States v. Strange Bros. Hide Co.*, 123 F.Supp. 177, 180 (N.D. Iowa, 1954).

Claims Act suits. The case law is well settled that a conviction in a criminal case estops the defendant from denying the essential elements of the criminal offense in subsequent civil litigation. *Continental Management, Inc. v. United States*, 527 F.2d 613 (Ct.Cl. 1975); *United States v. Levinson*, 369 F.Supp. 575 (E.D. Mich. 1973). The Committee believes that the civil consequences of any conviction should be identical—an estoppel as to essential elements of the offense charged. Defendants who cheat the government by making false claims should not be able to relitigate the question for civil purposes. The bill would correct this deficiency. This provision is intended to survive any subsequent amendments to the Federal Rules of Procedure or Evidence.

A third new provision, which would add a new subsection (i), would afford the Government a remedy with respect to contracts tainted by bribery or corruption similar to that which is currently provided in limited circumstances under 18 U.S.C. § 218 and 40 U.S.C. § 489. Specifically, subsection (i) would codify the holding of the Court of Claims in *K & R Engineering Co., Inc. v. United States*, _____ Ct. Cl. _____ (Feb. 20, 1980).

It has long been established that the Government can void a contract tainted by bribery, kickbacks or conflict of interest. See e.g., *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) and *United States v. Acme Process Equipment Co.*, 385 U.S. 138 (1966). In *Mississippi Valley* and *Acme Process*, the bribery or other misconduct was discovered by the Government prior to its payment of the contractors' claims. By contrast, in *K & R Engineering*, the bribery of a Government contracting official was not discovered until after payments had been made on the contracts at issue. Chief Judge Friedman, speaking for the Court of Claims, held that the logical extension of the Supreme Court's decision in *Mississippi Valley* and *Acme Process* required that the Government be permitted to void a tainted contract, retain any benefits received, and recover all consideration previously paid. This result is founded on the same strong public policy considerations regarding bribery and conflict of interest as had formed the basis for the identical holdings of numerous state courts. E.g., *S. T. Grand, Inc. v. City of New York*, 32 N.Y. 2d 300, 298 N.E. 2d 105 (1973); *Arthur v. Trindel*, 96 N.W. 2d 208 (Neb. 1959); *Beakley v. City of Bremerton*, 105 P.2d 40 (Wash. 1940); *Town of Boca Raton v. Raullerson*, 146 So. 576 (Fla. 1933). This provision in the Bill is not intended to preclude the Government from exercising its rights at common law as recognized by these cases.

The new subsection (i) also applies to gratuities received by Federal employees. While this subsection is not directed at social encounters that could not reasonably be presumed to have influenced the employee's performance—as in the case of a social luncheon with friends—it focuses on those instances where something of value is directly or indirectly given to a Federal employee. Benefits falling within this subsection are conferred with respect to either past or future acts by such employee in his official capacity and must be otherwise than as provided by law for proper discharge of such official duty.

The bill designates the Attorney General as the official authorized to declare a tainted contract null and void. In the Committee's view, vesting this discretionary authority in the Attorney General will serve

as a safeguard against the utilization of the remedy by contracting officers and other agency personnel as a negotiating tactic in dealing with contractors. It also necessitates a review of the situation by persons less directly involved in the awarding or performance of the contract, and recognizes the law enforcement considerations which obtain where bribery has occurred.

The bill also addresses the critical problem of linkage encountered by the Department of Justice in cases involving bribery. Existing law requires that, in order for the government to void a corrupt contract, it must prove that the bribe or gratuity was directly related to the contract or claim at issue. Given the clandestine nature of many bribery arrangements, this burden is in practice almost impossible to meet. The bill corrects this deficiency by establishing a rebuttable presumption that a bribe or other gratuity is related to any contract in which the corrupted Federal employee performed any substantial function within 180 days preceding or 360 days following the date of receipt of the bribe.

The fourth new provision, which would add new subsection (j), would provide for uniform provisional remedies in False Claims Act suits. Under Rule 64, Federal Rules of Civil Procedure, the government's prejudgment attachment remedies are governed by state law in the district in which the district court is held. A uniform federal standard for the employment of these remedies in cases brought under the False Claims Act would significantly enhance the government's litigating ability in this area, by avoiding the whims and vagaries of the widely varying state procedures for attachment. The bill contains effective remedies to prevent a potential defendant's dissipation of assets pending litigation. These remedies flow from the district court's inherent power to grant injunctions.

The bill is not intended to exclude the government's utilization, where appropriate, of other existing prejudgment remedies. While the bill provides for provisional remedies comparable to those provided for under Rule 65, Federal Rules of Civil Procedure, it is intended that the government shall be required only to show likelihood of success on the merits as a precondition of obtaining relief. Other traditional prerequisites to granting equitable relief, such as adequacy of remedy at law, irreparable harm and the like, shall not be required.

Subsection (a) of section 3494 of the Revised Statutes, as added by Section 4 of the bill would include an explicit tolling provision on the statute of limitations under the False Claims Act. The statute of limitations does not begin to run until the material facts are known by an official within the Department of Justice with the authority to act in the circumstances. The Committee intends that the phrase "the official within the United States Department of Justice charged with responsibility to act in the circumstances" shall mean the official designated in Title 28 of the Code of Federal Regulations as the official empowered to act with respect to the particular category of claim.

Subsections (b) and (c) of section 3494 of the Revised Statutes, as added by Section 4 of the bill, would enhance the government's ability to investigate the full extent of the fraud against the United States by empowering the Justice Department to issue civil investigative de-

mands under certain carefully limited circumstances. Typical cases under the False Claims Act are preceded by criminal investigations conducted by Federal grand juries. Although attorneys from the Justice Department may examine these grand jury materials, *see, e.g., In re Grand Jury*, 583 F.2d 128 (5th Cir. 1978), current law prohibits the use of grand juries for the primary purpose of developing evidence for use in civil proceedings. *United States v. Doe*, 341 F. Supp. 1350 (S.D. N.Y. 1972). As the grand jury seldom develops evidence important to some aspects of a civil case, such as damages and the like, the Committee believes that the government needs some means to develop that evidence, rather than relying on the voluntary cooperation of potential defendants. Accordingly, Section 4 of the bill permits the issuance of civil investigative demands closely patterned after those contained in the Antitrust Improvements Act of 1976, P.L. 94-435. Section 4 also contains safeguards and limitations on the issuance of civil investigative demands to ensure that they are fairly and responsibly used.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Congressional Budget Office has reviewed the bill and does not expect the bill to result in any additional costs to the Government.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., February 26, 1980.

HON. EDWARD M. KENNEDY,
*Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate
Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: At the request of the Committee staff and pursuant to Section 202 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1981, the False Claims Amendments Act of 1980, as reported by the Subcommittee on Judicial Machinery of the Senate Committee on the Judiciary.

The bill aims to facilitate the Justice Department's ability to pursue violations of the False Claims Act by changing jurisdiction and venue requirements, authorizing the issuance of civil investigative demands, and making a number of other revisions to the False Claims Act. It also empowers the United States to recover double the amount of consequential damages (which are not now covered by the act), and increases the forfeiture the government may recover for each false claim from \$2,000 to \$5,000. The bill is not expected to result in any additional cost to the government, and it is not possible to estimate the amount of additional revenues that will be received.

Sincerely,

ROBERT D. REISCHAUER,
(For Alice M. Rivlin, Director).

REGULATORY IMPACT EVALUATION

In compliance with Rule 29.5 of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact as defined by that subsection will result from the enactment of S. 1981.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law by the bill, as reported, are shown as follows: (Existing law in which no changes are proposed is shown in roman, existing law proposed to be repealed is enclosed in black brackets, and new matter is printed in italic.)

REVISED STATUTES OF THE UNITED STATES, SECTION 3490, AS
AMENDED

(31 U.S.C. § 231)

SEC. 3490(a) Any person not in the military or naval forces of the United States, or in the Militia called into or actually employed in the service of the United States, [who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit] *who—*

(1) *makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false or fictitious;*

(2) *for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, computer print-outs or other computer-readable media, including but not limited to, magnetic discs, paper tapes, punch cards and discs, knowing the same to contain any false or fictitious statement or entry; or*

(3) *knowingly enters into any agreement, combination, or conspiracy to present, or cause to be presented, any false or fictitious claim to the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fictitious claim,*

shall be liable to the United States as provided in subsection (b).

(b)(1) *Any person who shall do or commit any of the acts prohibited under subsection (a) shall for each such act, forfeit and pay to the United States the sum of \$5,000, and—*

(A) *double the amount of those damages, including double the amount of the consequential damages, which the United States would not have sustained but for—*

(i) *the doing or commission of any the acts prohibited by subsection (a); or*

(ii) *having entered into or made any contract or grant as a result, in any material part, of any false statement; and*

(B) *the costs of the action.*

(2) Any credits to which the defendant may establish entitlement may be deducted from the amount payable under paragraph (1) only after the damages sustained by the United States have been doubled as set forth in subparagraph (A) of paragraph (1).

(3) If any portion of the damages sustained by the United States under subsection (A) is considered reasonably unforeseeable by the court, the court may reduce by not more than 25 per cent the total amount of damages payable under subsection (A).

(c) For purposes of this section, the term "knowing" and "knowingly" mean the defendant—

(1) had actual knowledge; or

(2) had constructive knowledge in that the defendant acted in reckless disregard of the truth;

and no proof of intent to defraud or proof of any other element of a claim for fraud at common law is required.

JURISDICTION AND VENUE REQUIREMENTS

SEC. 3491 [(A)] [The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.]

(a) (1) The district courts of the United States and for Puerto Rico, the Virgin Islands, Guam, and any territory or possession of the United States, shall have jurisdiction over any action commenced by the United States under this section, or under section 3490, 3492, or 3494, and venue of any such action shall be proper in any district in which any defendant, or in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by such sections is alleged by the United States to have occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the district court and served at any place within the United States, Puerto Rico, the Virgin Islands, Guam, any territory or possession of the United States, or in any foreign country.

(2) The United States Court of Claims shall also have jurisdiction of any such action if the action is asserted by way of counterclaim by the United States. The United States may join as additional parties in such counterclaim all persons who may be jointly and severally liable with such party against whom a counterclaim is asserted by reason of having violated this section, or section 3490, 3492, or 3494, except that no cross-claims or third-party claims shall be asserted among such additional parties unless such claims are otherwise within the jurisdiction of the United States Court of Claims.

[(B)] (b) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

[(C)](c) Whenever any such suit shall be brought by any person under clause [(B)](b) notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: Provided, That if the United States shall fail to carry in such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause [(B)](b) above. The court shall have no jurisdiction to proceed with any such suit brought under clause [(B)](b) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: Provided, however, That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

[(D)](d) In any suit whether or not on appeal pending at the effective date of this Act brought under Revised Statutes, section 3491, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause [(C)](c).

[(E)](e) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause [(B)](b),

out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: Provided, That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

[(F)] (f) A subpoena requiring the attendance of a witness at a trial or hearing conducted under sections 231 through 235 of this title and section 5438 of the Revised Statutes may be served at any place in the United States.

(g) *In any action brought under this section or section 3490, 3492, or 3494, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.*

(h) *Notwithstanding any contrary provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action brought by the United States pursuant to this section or section 3490, 3492, or 3494.*

(i) (1) *Any person, including but not limited to, any partnership, firm, corporation, or other association, State, or political subdivision thereof, who shall pay or give, directly or indirectly, anything of value to any officer or employee of the United States that could reasonably be presumed to have influenced such officer or employee in the performance of his official duty shall be liable in a civil action by the United States for any such amount so paid or given. In addition, any contract made with such person, partnership, firm, corporation, or other association, State or political subdivision thereof, in which such officer or employee has performed any substantial function, and, in connection with such contract such thing of value was paid, given, or promised to be paid or given, shall, at the discretion of the Attorney General, be void, and the United States shall retain all benefits or consideration received by the United States pursuant to such contract and may recover in addition all benefits or consideration conferred or paid by the United States.*

(2) *Any such payment or gift of anything of value, or promise to pay or give anything of value, made within 180 days preceding or 360 days following the making of any contract, shall be presumed to have been made in connection with such contract. Jurisdiction, venue, service of process, trial subpoenas, and burden of proof in such actions shall be the same as in any other action brought pursuant to this section, or section 3490, 3492, or 3494.*

(j) (1) *The Attorney General or his designee may apply for provisional relief to any district court having jurisdiction whenever he has reasonable cause to believe this section or section 3490, 3492, or 3494 may have been violated. If the court finds there is a reasonable likelihood that the United States will prevail after trial on the merits of its claim, the court shall enjoin the defendant from taking any action which the court, in the exercise of its discretion, finds reasonably likely to hinder or delay the United States in the collection of any judgment which may be obtained in such action.*

(2) *In addition, the court may from time to time make such other orders as it deems appropriate, including but not limited to, requiring the defendant to post security for judgment, to seek the prior approval of the court before making any transfer without an adequate and full consideration, paying an antecedent debt which has matured more than thirty days prior to payment, or otherwise engaging in any transaction not in the usual and regular course of the defendant's business. Except as provided in this section, such application and proceedings by the Attorney General shall be governed by Rule 65 of the Federal Rules of Civil Procedure.*

STATUTE OF LIMITATIONS: DEFINITIONS: CIVIL INVESTIGATIVE DEMANDS

[SEC. 3494. Every such suit shall be commenced within six years from the commission of the act and not afterward.]

SEC. 3494. (a) Each action under this section, and sections 3490 through 3492 shall be commenced within six years from the commission of the act, or within three years from the date when facts material to the right of action are known or reasonably should have been known by the official within the Department of Justice charged with responsibility to act in the circumstances, whichever occurs last.

(b) For purposes of this section, the term—

(1) "False Claims Act law" means—

(A) this section and sections 3490 through 3492 of the Revised Statutes, commonly known as the False Claims Act; and

(B) any Act of Congress enacted after this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to any false claim, bribery, or corruption of any officer or employee of the United States;

(2) "False Claims Act investigation" means any inquiry conducted by any False Claims Act investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a False Claims Act law;

(3) "False Claims Act investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any False Claims Act law or any officer or employee of the United States acting under direction and supervision of such attorney or investigator in connection with a False Claims Act investigation;

(4) "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision;

(5) "documentary material" includes the original or any copy of any book, report, memorandum, paper, communication, tabulation, chart, or other document; and

(6) "custodian" means the custodian, or any deputy custodian, designated by the Attorney General.

(c) (1) Whenever the Attorney General or an Assistant Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information relevant to a False Claims Act investigation, he may, prior to the institution of a civil proceeding, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony.

(2) Each such demand shall state the nature of the conduct constituting the alleged violation of a False Claims Act law which is under investigation, and the applicable provision of law.

(3) If such demand is for production of documentary material, the demand shall—

(A) describe each claim of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified.

(B) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection, and copying or reproducing; and

(C) identify the custodian to whom such material shall be made available.

(4) If such demand is for answers to written interrogatories, the demand shall—

(A) set forth with definiteness and certainty the written interrogatories to be answered;

(B) prescribe dates at which time answers to written interrogatories shall be submitted; and

(C) identify the False Claims Act investigator to whom such answers shall be submitted.

(5) If such demand is for the giving of oral testimony, the demand shall—

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify a False Claim Act investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

(d) No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(1) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States in aid of a grand jury investigation; or

(2) *the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section and sections 3490 through 3492.*

(e) (1) *Any such demand may be served by any False Claims Act investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.*

(2) *Any such demand or any petition filed under subsection (1) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedures prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by such person that such court would have if such person were personally within the jurisdiction of such court.*

(f) (1) *Service of any such demand or of any petition filed under subsection (1) may be made upon a partnership, corporation, association, or other legal entity by—*

(A) *delivering an executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;*

(B) *delivering an executed copy thereof to the principal office or place of business of the partnership, corporation, or entity to be served; or*

(C) *depositing such copy in the United States mails, by registered or certified mail, return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.*

(2) *Service of any such demand or of any petition filed under subsection (1) may be made upon any natural person by—*

(A) *delivering an executed copy thereof to the person to be served; or*

(B) *depositing such copy in the United States mails by registered or certified mail, return receipt requested, addressed to such person at his residence or principal office or place of business.*

(g) *A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.*

(h) *The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person having knowledge of the facts and circumstances relating to such production. The certificate shall state that all of the*

documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(i) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath unless it is objected to, in which event the reasons for the objection shall be stated in lieu of any answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

(j) (1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The Officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(2) The False Claims Act investigator conducting the examination shall exclude from the place where the examination is held all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any other stenographer taking such testimony.

(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the False Claims Act investigator conducting the examination and such person.

(4) When the testimony is fully transcribed, the False Claims Act investigator or the officer shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine the transcript and the transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the False Claims Act investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to examine it, the officer or the False Claims Act investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor.

(5) The officer shall certify on the transcript that the witness was sworn by him and that the transcript is a true record of the testimony

given by the witness, and the officer or False Claims Act investigator shall promptly deliver it or send it by registered or certified mail to the custodian.

(6) Upon payment of reasonable charges therefor, the False Claims Act investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of his testimony.

(7) (A) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the False Claims Act investigator conducting the examination may petition the district court of the United States pursuant to subsection (1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18, United States Code.

(8) Any person appearing for oral examination pursuant to a demand served under this section shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

(k) (1) The Attorney General shall designate a False Claims Act investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and such additional False Claims Act investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand under subsection (1) for the production of documentary material has been served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing, or as the court may direct pursuant to subsection (1) on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may, upon written agreement between such person and the custodian, substitute copies for originals of all or any part of such material.

(3) (A) The custodian to whom any documentary material, answers to interrogatories, or transcripts or oral testimony are delivered shall take physical possession thereof, and shall be responsible for the use

made thereof and for the return of documentary material pursuant to this section.

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any authorized official or employee of the Department of Justice or any authorized officer or employee of the United States acting under the direction and supervision of an attorney or investigator of the Department of Justice in connection with any False Claims Act investigation, under regulations promulgated by the Attorney General. Notwithstanding subparagraph (C) of this paragraph, such material, answers, and transcripts may be used by any such person in connection with the taking of oral testimony pursuant to this section.

(C) Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts, by any individual other than an authorized official or employee of the Department of Justice, or an authorized officer or employee of the United States acting under the direction and supervision of an attorney or investigator of the Department of Justice in connection with any False Claims Act investigation. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof, or to any other agency of the United States for use by such agency in furtherance of law enforcement responsibilities within the jurisdiction of such agency.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by an authorized representative of such person; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or his counsel.

(4) Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

(5) If any documentay material has been produced in the course of any False Claims Act investigation by any person pursuant to a demand under this section, and—

(A) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any

Federal administrative or regulatory agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies thereof furnished to the custodian pursuant to paragraph (2) of this subsection or made by the Department of Justice pursuant to paragraph (3) of this subsection) which has not passed into the control of any court, grand jury, or agency through the introduction thereof into the record of such case or proceedings.

(6) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced under any demand issued pursuant to this Act, or of the official relief of such custodian from responsibility for the custody and control of such material, answers or transcripts, the Attorney General shall promptly (A) designate another False Claims Act investigator to serve as custodian of such material, answers, or transcripts, and (B) transmit in writing to the person who produced such material, answers, or testimony notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have, with regard to such material, answers or transcripts, all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred prior to his designation.

(7) (1) Whenever any person fails to comply with any civil investigative demand served upon him under subsection (b) or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section.

(2) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any False Claims Act investigator named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such False Claims Act investigator a petition for an order of such court, modifying or setting aside such demand. The time allowed for compliance with the demand, in whole or in part, as deemed proper and ordered by the court shall not run during the pendency of such petition in the court, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such

petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(3) At any time during which any custodian is in custody or control of any documentary material, answers to interrogatories delivered, or transcripts of oral testimony given by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office or such custodian is situated, and serve upon such custodian, a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(4) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28, United States Code. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

(5) To the extent that such rules may have application and are not inconsistent with the provisions of this section, the Federal Rules of Civil Procedure shall apply to any petition under this subsection.

(6) Any documentary material, answers to written interrogatories, or oral testimony provided pursuant to any demand issued under this section and sections 3490 through 3492 shall be exempt from disclosure under section 552 of title 5, United States Code.

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