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Optimizing *Qui Tam* Litigation and Minimizing Fraud and Abuse: A Comment on Christopher Alexion's *Open the Door, Not the Floodgates*

Timothy Stoltzfus Jost*

Fraud is one of the most serious problems infecting our nation's health care system. The National Health Care Anti-Fraud Association estimates that 3% of health care spending is lost to health care fraud—$68 billion in 2007.[1] The FBI cites estimates that health care fraud accounts for 3%–10% of the nation's health care bill.[2] During 2010, the Medicare fee-for-service program had an estimated payment error rate of 10.1%, while the estimated error rate for the Medicare Advantage managed care program was 14.1% (although not all erroneous payments are attributable to fraud).[3] While private insurers and self-insured employers are subject to fraudulent and abusive billing, just like government programs, fraud against government programs is particularly troublesome because the cost of fraud is borne by taxpayers. Widely publicized fraud against Medicare and Medicaid also undermines public support for these vital programs.

But fraud against government programs also presents an opportunity. One of the most contentious issues in the current debate over the federal budget deficit is how to cut health care

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1. National Health Care Anti-Fraud Association, *The Problem of Health Care Fraud*, http://www.nhcaa.org/eweb/DynamicPage.aspx?webcode=anti_fraud_resource_centr&wpscode=TheProblemOfHCFraud#2 (last visited Jan. 28, 2012) (on file with the Washington and Lee Law Review).

2. Federal Bureau of Investigation, *Financial Crimes Report to the Public, Fiscal Year 2008*, http://www.fbi.gov/stats-services/publications/fcs_report2008 (last visited Jan. 28, 2012) (on file with the Washington and Lee Law Review).

3. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGH-RISK SERIES: AN UPDATE 186 (2011), *available at* http://www.gao.gov/new.items/d11278.pdf.

spending. Medicare, Medicaid, and the Children's Health Insurance Program (CHIP) made up 21% of the federal budget in 2010.[4] Health care expenditures are also one of the largest expenditures in state budgets.[5]

Cutting health care expenditures is always difficult. The cost of health care, like the cost of anything else, is a function of the volume of items and services purchased and the price of each item or service. When a public program tries to restrict the volume of items and services purchased, however, it is met with cries of "rationing." When a program tries to reduce prices, or even to reduce the rate of growth in prices, it is met with stiff resistance from professionals, providers, and suppliers whose income and profit are threatened by cost control.[6]

Everyone, however, supports eliminating health care fraud (even if there is not always consensus as to which billing practices are fraudulent).[7] If we can just eliminate program fraud, we can cut program spending without anyone having to suffer pain. Eliminating fraud has thus become the silver bullet needed to achieve health care spending reduction.

One of the primary weapons in the federal government's health care fraud armamentarium is the civil False Claims Act (FCA).[8] The FCA allows courts to impose damages of three times the amount falsely claimed plus up to $11,000 per claim against providers who file false claims for compensation with the federal government or who make false statements to the federal

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4. Ctr. on Budget and Pol'y Priorities, *Policy Basics: Where do our Federal Tax Dollars Go?* (Apr. 15, 2011), http://www.cbpp.org/cms/index.cfm?fa=view&id=1258 (last visited Jan. 28, 2012) (on file with the Washington and Lee Law Review).

5. *See* VERNON K. SMITH, HOPING FOR ECONOMIC RECOVERY, PREPARING FOR HEALTH REFORM: A LOOK AT MEDICAID SPENDING, COVERAGE AND POLICY TRENDS 11 (2010), *available at* http://www.kff.org/medicaid/upload/8105.pdf (providing data regarding state expenditures).

6. The classic discussion of this is Robert G. Evans, *Tension, Compression and Shear: Directions, Stresses, and Outcomes of Health Care Cost Control*, 15 J. HEALTH POL., POL'Y, & L. 101 (1990).

7. *See* Timothy S. Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 242 (1999) (examining pushback by providers against fraud and abuse enforcement).

8. *See* 31 U.S.C.A. § 3729 (West 2011) (providing for liability for false claims).

government in order to be paid.[9] The sheer magnitude of potential FCA damages, which can amount to millions of dollars per provider, often results in substantial settlements in favor of the federal government and provides a significant deterrence against fraud.[10]

A key feature of the FCA is its *qui tam* provision, the focus of Christopher Alexion's Note.[11] The *qui tam* provision allows a person with special knowledge of a fraud to sue on behalf of the government and to keep part of the recovery.[12] This is true whether or not the *qui tam* plaintiff, or relator, is an innocent observer of the fraud or an active participant. Indeed, Congress intentionally intended to encourage "a rogue to catch a rogue"[13] when it adopted the FCA during the Civil War to combat wartime procurement fraud.

The *qui tam* provisions of the statute, however, raise a central problem: When does a *qui tam* claimant provide sufficiently valuable information that the claimant should be granted a share of the recovery (which, as has been noted, can be very substantial)? On the one hand, a person should not be able to bring a *qui tam* action based on information read in the morning newspaper. On the other hand, a person with special inside knowledge should be allowed to bring a *qui tam* action even though the federal government already had some information about a fraud that was being perpetrated as long as the relator in fact provides useful information not previously available.

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9. *Id.*

10. Between 1987 and 2008, federal false claims settlements and judgments amounted to $21.6 billion. U.S. Dep't of Justice, *Fraud Statistics, Overview, Oct. 1, 1986–September 30, 2008* (Sept. 30, 2008), http://www.justice.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm (last visited Jan. 28, 2012) [hereinafter Fraud Statistics] (on file with the Washington and Lee Law Review).

11. *See* Christopher Alexion, Note, *Open the Door, Not the Floodgates: Controlling* Qui Tam *Litigation Under the False Claims Act*, 69 WASH. & LEE L. REV. 365, 378 (2012) (discussing the "original source" exception to the FCA's "public disclosure" bar).

12. *See* 29 U.S.C. § 3730 (2006) (providing for civil actions for false claims).

13. U.S. *ex rel.* Findley v. FPC-Boron Emps. Club, 105 F.3d 675, 679 (D.C. Cir. 1997) (citing CONG. GLOBE, 37TH CONG., 3D SESS. 955–56 (1863)).

The question of where to draw the line is the topic of Mr. Alexion's excellent Note. It is, as Mr. Alexion notes, a question that Congress has had a difficult time answering. Congress has fluctuated between, on the one hand, defining *qui tam* relator standing broadly to encourage *qui tam* actions and, on the other hand, defining it narrowly to discourage parasitic suits.[14] The courts have tried to apply the test established by Congress but have reached mixed results.[15] In the Affordable Care Act (ACA),[16] Congress has once again tried to answer the question of when an individual has standing to bring a *qui tam* action.[17] The answer is not yet wholly clear, and further court decisions will be needed to sort it out.

Christopher Alexion's Note is a model law review Note. It is clear and concise, adequately but not excessively referenced. It is about law—not philosophy or economics or social theory. It addresses a quintessentially legal issue—the standing of a relator to bring a *qui tam* action. It analyzes judicial opinions that have tried to interpret the prior language of the FCA and then considers how courts should interpret Congress's most recent amendments to the FCA.[18]

Mr. Alexion's Note is also very timely. The courts will soon begin applying the amendments to the FCA.[19] They will have to discern what relevance, if any, decisions in their circuits applying the prior law have to application of the new law. It is even possible that eventually the Supreme Court will have to decide what the new law requires. Mr. Alexion's Note serves as a

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14. *See* Alexion, *supra* note 11, text accompanying notes 34–89 (discussing the history of the FCA).

15. *See id.*, text accompanying notes 90–203 (discussing the circuit split resulting from the 1986 amendments).

16. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter ACA] (codified as amended in scattered sections of the U.S.C. (2010)) (providing for reforms to the U.S. health care system).

17. *See id.* § 10104(j)(2) (codified as amended at 31 U.S.C. § 3730(e)(4)) (amending the definition of "original source").

18. *See* Alexion, *supra* note 11, text accompanying notes 204–59 (discussing the future of the FCA).

19. Although the ACA is already in effect, the *qui tam* provisions do not apply retroactively. *See* Graham Cnty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 130 Sup. Ct. 1396, 1400 at n.1 (2011) ("The legislation makes no mention of retroactivity . . . .").

roadmap for the courts to follow. I expect that it will be often cited by courts attempting to sort this out. They will, no doubt, be grateful to find a law review article that in fact addresses a practical legal problem and that offers them valuable assistance in their work.

I will not attempt in this Comment to retread in any detail the ground covered by Mr. Alexion's paper. The basic question it addresses is when a *qui tam* relator is an "original source" of information concerning fraud such that the relator can proceed even though information about the fraud has been publicly disclosed. The Note discusses the history of this provision, detailing a series of amendments that have tried either to encourage legitimate claims by broadening standing or to discourage parasitic litigation by narrowing standing.[20] The most recent amendments to this provision prior to the ACA, adopted in 1986, tried to strike a balance by prohibiting actions based upon public disclosure of allegations or transactions in certain contexts unless the relator was "an original source of the information."[21]

As Mr. Alexion notes, this standard has confused the courts, with some holding permissively that the relator need merely disclose information to the government before filing suit, others holding more restrictively that the relator must have been the source that provided information to an entity that had publicly disclosed the information, and yet a third group of courts adopting an intermediate position that the relator must have disclosed information to the government before the information was otherwise publicly disclosed.[22]

As part of the ACA, Congress amended the FCA once again to redefine "original source" as follows:

> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily

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20. *See* Alexion, *supra* note 11, at 371–79 (providing the background of the public disclosure bar and its original source provision).

21. 31 U.S.C.A. § 3130(e)(4) (West 2011).

22. Alexion, *supra* note 11, at 379–95.

> provided the information to the Government before filing an action under this section.[23]

The first prong of this test would seem to adopt the "intermediate" approach taken by courts applying the prior law. Mr. Alexion contends, relying on data regarding *qui tam* litigation and on legislative history, that the second prong of the test should be interpreted restrictively so that only relators who provide information that "substantially assists" the government should be allowed to proceed once information regarding an allegation or transaction has been publicly disclosed.[24]

This strikes me as a reasonable approach, discouraging on the one hand parasitic litigation, while on the other encouraging individuals who have genuinely useful information to step forward, even after some information about fraud is already known.

While I do not intend to criticize Mr. Alexion's proposal, I would like to offer two comments to give his Note more context. My first comment is addressed to the question of incentives to bring a *qui tam* action. While restricting standing to bring a *qui tam* lawsuit discourages parasitic lawsuits, it also discourages opportunistic lawsuits; thus one relevant question is whether opportunistic lawsuits are likely.

Superficially, the incentives to bring opportunistic *qui tam* lawsuits would seem to be great. A *qui tam* relator is entitled to 15% to 25% of the total recovery, and up to 30% if the government does not intervene.[25] Because of the treble-damage and penalty provisions of the FCA, potential *qui tam* recoveries can amount to millions of dollars, and in many cases they do.[26] The relator can

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23. 31 U.S.C.A. § 3730(e)(4) (West 2011), as amended by ACA § 10104(j)(2) (emphasis added).

24. Alexion, *supra* note 11, at 398–406.

25. 31 U.S.C.A. § 3730(d) (West 2011).

26. Awards of a million dollars or more are not uncommon. *See* Aaron S. Kesselheim, David M. Studdert & Michellle M. Mello, *Whistle-Blowers' Experience in Fraud Litigation Against Pharmaceutical Companies*, 362 NEW ENG. J. MED. 1832, 1834 (2010) (noting that, in the authors' study, "13 [relators] received between $1 million and $5 million, and 7 [relators] received more than $5 million"). What may have been the largest award was a $96 million award to a *qui tam* relator in a case against GlaxoSmithKline. *See* Gordon Gibb, *Time to Cap Qui Tam Whistleblower Awards?* (Feb. 14, 2011), http://www.lawyersandsettlements.com/articles/qui-tam-whistleblower-government-fraud/qui-tam-whis

recover a bounty even though the relator participated in the fraud, although the court can reduce the recovery under these circumstances and the relator can recover nothing if he or she is criminally convicted.[27] Additionally, *qui tam* relators can recover attorneys' fees, so any recoveries they receive need not be shared with attorneys (although contingent-fee arrangements are in fact possible).[28]

The complaint has often been raised that the FCA encourages opportunistic litigation, a complaint that Mr. Alexion in part endorses.[29] Although the payoff for being a *qui tam* relator can be high, the costs are very high as well. Although the statute prohibits employers from taking retaliatory actions against a *qui tam* relator,[30] the courts have interpreted this protection quite conservatively, and, as a practical matter, an employee who is suing his or her employer is in an untenable position that cannot last long.[31] *Qui tam* actions are therefore often brought by former

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tleblower-lawsuit-government-29-16036.html (noting award in GlaxoSmithKline case) (last visited Jan. 28, 2012) (on file with the Washington and Lee Law Review). One consideration that must be kept in mind is that when there are multiple *qui tam* relators in a single case, the *qui tam* share is divided among the successful relators.

27. 31 U.S.C.A. § 3730(d) (West 2011).

28. *Id.*; *see also* ALICE GOSFIELD, MEDICARE AND MEDICAID FRAUD AND ABUSE 539 (2011 ed.) (noting the availability of contingency-fee arrangements).

29. *See, e.g.*, Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J. L. REF. 281 (2007) (discussing FCA over-enforcement by "zealous 'private attorneys general'"); Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out of Control* Qui Tam *Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233 (2008) (arguing for joint and several liability for attorneys' fees under FCA litigation and proposing that courts require certification of novel legal theories in *qui tam* litigation); Alexion, *supra* note 11, at 40 (quoting Christina Orsini Broderick, Note*, Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 975 (2007)).

30. 31 U.S.C.A. § 3730(h) (West 2011).

31. *See* GOSFIELD, *supra* note 28, at 541–43 (citing cases interpreting whistleblower-protection provisions); Kesselheim et al., *supra* note 26, at 1836 ("The experience of being involved in troubling corporate behavior and a *qui tam* case had substantial and long-lasting effects for nearly all of the insiders . . . ."); *see also* TOM DEVINE, THE WHISTLEBLOWER'S SURVIVAL GUIDE: COURAGE WITHOUT MARTYRDOM 133 (1997) (noting that "there is no comprehensive law that prohibits employers in the private sector from retaliating against whistleblowers").

employees, but any individual who brings a *qui tam* action is unlikely to find future employment in the health care industry.[32] *Qui tam* relators may also face hostility from colleagues and co-workers, who may well view the relator as a traitor, as well as efforts by their employers or former employers to humiliate and discredit them.[33] If the relator in any way participated in the fraud, the relator must proceed with great caution, as it is always possible that the government will indict the relator criminally, and a criminal conviction not only subjects the relator to a possible fine or jail time but also disqualifies the relator from receiving any part of the recovery.[34]

Although *qui tam* complaints are supposed to be unsealed within sixty days of filing, the government routinely requests an extension, and it can often take a year or more before a *qui tam* action becomes public.[35] Prior to that time, the relator is in the very uncomfortable position of not knowing who knows or suspects what information regarding the relator. After the complaint is unsealed, it can take months or even years before the case is resolved through settlement or court judgment. In the interim, the relator receives nothing from the case and may be unable to find employment.[36]

As Mr. Alexion notes, the government declines to intervene in most *qui tam* cases.[37] If this happens, the defendant often redoubles its efforts to get the case dismissed. The relator and his

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32. *See* Myron Glazer, *Ten Whistleblowers and How They Fared*, 13 THE HASTINGS REP. 33, 33 (1983) (noting the "degradation ceremonies" some whistleblowers face); Kesselheim et al., *supra* note 26, at 1836 (noting that "only 2 of the 22 insiders remained employed in the pharmaceutical industry").

33. *See* DEVINE, *supra* note 31, at 27–40 (describing classic responses to whistleblowing); Kesselheim et al., *supra* note 26, at 1838–39 (noting examples of retaliation that was "more subtle than overt harassment").

34. 31 U.S.C.A. § 3730(d) (West 2011).

35. On average, cases remain under seal for thirteen months. Letter from U.S. Dep't of Health and Human Serv. & U.S. Dep't of Justice to Senator Grassley (Jan. 24, 2011), at 14, *available at* www.taf.org/DOJ-HHS-joint-letter-to-Grassley.pdf.

36. *See* Kesselheim et al., *supra* note 26, at 1836 (noting frustration that "the wheels move really slow" and describing "years spent waiting in a state of uncertainty").

37. *See* Letter to Senator Grassley, *supra* note 35, at 15 (noting that the Department of Justice intervened in 22.2% of cases between 2006 and 2011 to date of letter).

or her attorney must proceed without assistance from the government.[38] The court may interpret the government's refusal to intervene as an assessment that the case has little merit, a judgment that may be accurate in many cases. Few cases in which the government declines intervention result in substantial recoveries.[39]

If a case succeeds in a settlement or judgment, the court must then decide the share of the recovery that the relator can claim. At this point, the government, which has actively solicited the help of the relator, often turns on the relator, minimizing the contribution of the relator to the case so as to minimize the amount of the relator's reward.[40] Having won the case against the defrauder, the relator must now win a second case against the government. The relator generally receives the award long after the initial complaint was filed and long after the relator's life was otherwise ruined by the *qui tam* action.[41] Many *qui tam* relators believe that the ultimate recovery is small compared to the disruption and damage to their lives and the time they spent on the litigation.[42]

In sum, although the *qui tam* statute offers significant incentives for relators to bring actions, there are also huge disincentives to doing so, which will in all likelihood cause most whistleblowers to bring *qui tam* lawsuits only as a last resort. It may be that the floodgates are not as much of a threat as is commonly believed. While an original-source rule may be needed to discourage parasitic litigation (the primary claim made by Mr. Alexion), it is less clear that it is needed to discourage opportunistic litigation.

My second comment is intended to put the amendment to the FCA that Mr. Alexion addresses in the broader context of the ACA. The ACA represents one of the most ambitious attempts by

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38. GOSFIELD, *supra* note 28, at 534 ("If the government declines intervention, the entire cost of litigating rests on the plaintiff . . . .").

39. U.S. Dep't of Justice, *Fraud Statistics, supra* note 10.

40. *See* GOSFIELD, *supra* note 28, at 538 (noting that the government usually argues for "the minimum relator's share").

41. *See* Kesselheim et al., *supra* note 26, at 1836 (noting financial difficulties and personal problems).

42. *See id.* (noting one relator's lament that he "should have taken the bribe").

Congress to date to deal with health care fraud and abuse. An entire title of the legislation adds new laws and amends old ones to combat program fraud and abuse.[43] These can only be summarized here.

First, the amendment to the definition of "original source" analyzed by Mr. Alexion is only one of several amendments that the ACA makes to the FCA. Section 1313 of the ACA not only redefines who can be a *qui tam* relator but also amends the provisions of 31 U.S.C. § 3730(e)(4)(B) to allow the government to oppose dismissal of a case based on the public disclosure bar (which was arguably true under the prior law) and removes state and federal court litigation to which the government was not a party from the list of public disclosures that bar *qui tam* litigation.[44] Another amendment to the FCA requires that an overpayment must be returned to the Department of Health and Human Services (HHS), a state, or a contractor no later than sixty days from the date on which it is identified or the date a corresponding cost report is due, whichever is later.[45] The reason for the overpayment must be explained in writing. Any overpayment retained after the date for reporting and returning is an obligation for purposes of the civil FCA, and thus retention can amount to a false claim.[46] Section 1313 further extends the coverage of the FCA to private health plans that will be participating in the new Health Insurance Exchanges. It provides:

> (A) IN GENERAL.—Payments made by, through, or in connection with an Exchange are subject to the False Claims Act (31 U.S.C. § 3729 et seq.) if those payments include any Federal funds. Compliance with the requirements of this Act concerning eligibility for a health insurance issuer to participate in the Exchange shall be a material condition of an issuer's entitlement to receive payments, including payments

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43. ACA tit. VI (providing for transparency and program integrity).

44. *Id.* § 10104(j)(2); GOSFIELD, *supra* note 28, at 528 (discussing state court actions); Graham Cnty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 130 Sup. Ct. 1396, 1400 (2011) (holding that, under prior law, the public disclosure bar applied to information disclosed in state and local as well as federal administrative proceedings).

45. Soc. Sec. Act, 42 U.S.C.A. § 1320a-7k(d)(3) (West 2011), added by ACA § 6402(a).

46. 31 U.S.C.A. § 3729 (West 2011).

> of premium tax credits and cost-sharing reductions, through the Exchange.[47]

This provision results in a dramatic extension of the coverage of the FCA and will open the door to individual enrollees or persons with inside knowledge of private health plan fraud becoming *qui tam* relators.

Section 6402 of the ACA amends the bribe and kickback law[48] to provide that a claim that includes items or services provided because of a bribe or kickback is a false claim under the civil FCA.[49] This resolves a question that has long troubled the courts and commentators. Some courts have held that a FCA case can be brought for a violation of the bribe and kickback statute while others have rejected this claim.[50] The ACA further amends the bribe and kickback statute to provide that a person need not have specific knowledge of the prohibition or specific intent to violate it to be found guilty, resolving another question on which the courts had disagreed.[51]

The ACA also amends other fraud and abuse laws not directly relevant to the FCA's provisions. It amends the Stark Self-Referral Act,[52] which prohibits physicians from ordering or referring patients for certain health care services when the physician receives remuneration for the referral, by prohibiting Medicare payments for new physician-owned hospitals and imposing new requirements on existing physician-owned hospitals.[53] The law also directs HHS to establish a self-disclosure protocol to allow providers to potentially reduce their liability for violations of the Stark law when they promptly

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47. ACA § 1313(a)(6).

48. *See* 42 U.S.C.A. § 1320a-7b(b) (West 2011) (providing for criminal liability for accepting bribes for medical referrals).

49. 42 U.S.C.A. § 1320a-7b(g) (West 2011), added by ACA § 6402(f)(1).

50. *See* BARRY FURROW ET AL., HEALTH LAW 1069–70 (6th ed. 2008) (providing examples of conflicting decisions regarding the bribe and kickback statute).

51. 42 U.S.C.A. § 1320a-7b(h) (West 2011), added by ACA § 6402(f)(2); GOSFIELD, *supra* note 28, at 194–209 (discussing the intent requirements of the anti-kickback statute).

52. *See* 42 U.S.C.A. § 1395nn (West 2011) (providing limitations on certain physician referrals).

53. ACA § 6001.

disclose their own violations of the law of which they become aware.[54]

The ACA does not just penalize fraud but also takes important new steps to prevent it. Section 6401 requires HHS to establish a screening program for providers and suppliers who participate in Medicare, Medicaid, and CHIP.[55] The level of screening applied to different providers will be determined by HHS based on the risk of fraud, waste, and abuse presented by the providers but must include a check on licensure, a criminal background check, fingerprinting, unscheduled and unannounced site visits, database checks, and other screening as HHS determines appropriate.[56] Providers who apply for or are revalidated for enrollment in Medicare, Medicaid, or CHIP must disclose any current or previous affiliation with a provider or supplier that has uncollected debt, has been subject to a payment suspension, or has been excluded from participation in Medicare, Medicaid, or CHIP, or had billing privileges denied or revoked.[57] HHS can also impose a temporary moratorium on the enrollment of new providers or suppliers, or of new categories of providers or suppliers, if HHS determines it is necessary to combat fraud, waste, or abuse.[58] Finally, the ACA authorizes HHS to require compliance programs of particular categories of providers and suppliers as a condition of enrollment.[59]

A number of new requirements are imposed by the ACA on physicians who order items and services under Medicare, particularly durable medical equipment (DME) and home health services. Section 6405 requires that DME, home health services, and other services as specified by HHS be ordered by a physician enrolled in the Medicare program.[60] Section 6407 amends various sections of the Medicare and Medicaid statutes to require a face-to-face encounter (including through telehealth) between a

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54. *Id.* § 6409.

55. *See id.* § 6401 (amending 42 U.S.C. §§ 1395cc(j), 1396a(a), and 1397gg(e)(1)).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.* § 6405 (amending 42 U.S.C. §§ 1395m(a)(11)(B), 1395(a)(2), and 1395n(a)(2)).

physician or other practitioner and a patient within a reasonable time frame before certification for home health services, DME, and other items or services as required by HHS.[61] The ACA also includes extensive provisions to combat fraud and abuse in nursing homes and elder abuse.[62]

The ACA extends the authority of HHS to exclude providers from Medicare and Medicaid and to impose civil money penalties on providers to combat fraud. The ACA provides for a permissive exclusion of providers for knowingly making false statements, omissions, or misrepresentations of a material fact in any application, agreement, bid, or contract to participate as a provider or enroll as a provider of services under a federal health care program.[63] It further amends the law to provide for a civil money penalty for an individual or entity who orders or prescribes an item or service while excluded from a federal health care program; who knowingly making false statements, omissions, or misrepresentations of a material fact in any application, agreement, bid, or contract to participate as a provider or enroll as a provider of services under a federal health care program; or who knows of an overpayment but does not report and return it.[64] The penalty for false statements and misrepresentations will amount to $50,000 for each false statement or misrepresentation of a material fact, plus not more than three times the amount improperly claimed.[65] Finally, the ACA strengthens the health care fraud criminal law by enhancing the penalties for criminal fraud under the Federal Sentencing Guidelines and adding to the list of health care offenses.[66]

In sum, amendments to the civil FCA are just one part of a comprehensive strategy for addressing fraud found in the ACA. Virtually all of the attention that the ACA has received has focused on its health insurance reforms. But the ACA goes much

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61. *See id.* § 6407 (amending Soc. Sec. Act § 1814(a)(2)(C), 1384(a)(11)(B), and 1835(a)(2)(A)).

62. *See id.* §§ 6701–03 (providing provisions to promote elder justice).

63. *See id.* § 6402(d)(1) (creating 42 U.S.C. § 1320a-7b(a)(16)).

64. *See id.* § 6402(d)(2) (creating 42 U.S.C. § 1320a-7a(a)(8)(9) & (10)).

65. *Id.*

66. *Id.* § 10606.

further in reforming our health care system. In addition to providing a valuable roadmap for the courts for the interpretation of the original source amendment, Mr. Alexion's Note also serves a useful purpose in illuminating another aspect of this landmark health care system reform effort.