

RESTATING THE “ORIGINAL SOURCE EXCEPTION” TO THE FALSE CLAIMS ACT’S “PUBLIC DISCLOSURE BAR” IN LIGHT OF THE 2010 AMENDMENTS

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INTRODUCTION

Government spending is at an all-time high, and with it so is fraud against the government. As much as 10 percent of every dollar spent on government programs is lost to fraud, which amounts to over \$350 billion a year.¹ Because the government is ill-equipped to detect fraud, Congress employs a unique *qui tam* enforcement provision within the False Claims Act (the “FCA”) to recover such ill-gotten gains.² Under the FCA, a whistleblower, known as a “relator,” is eligible for a reward by filing a *qui tam* civil suit on behalf of the government against a company or person that has defrauded the government.³ If the case is successful,

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1. Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under the False Claims Act*, 38 SEATTLE L. REV. 901, 904 (2015) [hereinafter Hesch, *It Takes Time*].

2. See generally 31 U.S.C. § 3730(d) (2012). “*Qui tam* is short for ‘*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,’ which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’” *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 463 n.2 (2007), *superseded by statute*, Patient Protection and Affordable Care Act, Pub. L. No. 111–48, § 10104(j)(2), 124 Stat. 119, 901–02 (2010), *as recognized in* *United States ex rel Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 435 (6th Cir. 2016).

3. 31 U.S.C. § 3730(d) (2012); see also Mark Kleiman, *Qui Tam and Whistleblower Litigation and Protections From Retaliation*, A.B.A.: LABOR & EMP. LAW CONF. 2 (2011), www.americanbar.org/content/dam/aba/administrative/labor_law/meeting/2011/ac2011/04_3.authcheckdam.pdf.

a relator is awarded a portion of the recovery, which is typically between 15 percent and 30 percent of any recovery.⁴

The *qui tam* provisions have become the most effective method of combatting fraud against the government.⁵ As of 2016, the government had collected \$53 billion under the FCA since 1987, of which over \$37 billion was the result of *qui tam* suits by whistleblowers.⁶ In short, 70 percent of all fraud cases pursued by the government are the result of *qui tam* cases.⁷ Stated another way, without whistleblowers, the government would not have detected the fraud, let alone recovered money, in 70 percent of its fraud cases.⁸

To avoid needlessly paying awards when the government is already hot on the trail of fraud, Congress inserted a “public disclosure bar” into the *qui tam* provisions.⁹ The public disclosure bar prevents a private individual from pursuing a case and obtaining an award when fraud allegations have already been publicly disclosed in certain ways specified in the FCA before a relator files a *qui tam* suit.¹⁰ At the same time, Congress recognized that there remains valid reasons for enlisting a relator in certain circumstances even when the public disclosure bar is triggered.¹¹ Thus, as of 1986, the FCA contains an “original source” exception to the public disclosure bar.¹² If a relator can satisfy the original source exception, she remains eligible for a reward even if the heart of the allegations have been publicly disclosed.¹³

4. *Id.*

5. See Joel D. Hesch, *The False Claims Act Creates a “Zone of Protection” That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361, 363–64 & nn. 3–7 (2014).

6. See DEP’T OF JUSTICE, FRAUD STATISTICS—OVERVIEW: OCT. 1, 1987—SEPT. 30, 2016 (2016), <https://www.justice.gov/opa/press-release/file/918361/download> [hereinafter FRAUD STATISTICS—OVERVIEW].

7. *See id.*

8. *See id.*

9. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (1986) (current version at 31 U.S.C. § 3730(e)(4)(A)–(B) (2012)).

10. *See id.*

11. *See id.*; Erin Campbell et al., *The False Claims Act: Protecting Your Client When Amending a Sealed Complaint*, A.B.A. (Mar. 3, 2014), <http://apps.americanbar.org/litigation/committees/businessstorts/articles/winter2014-0227-false-claims-act-protecting-your-client-when-amending-sealed-complaint.html>.

12. See False Claims Amendments Act of 1986, § 3, 100 Stat. at 3157.

13. *See id.*

Tension exists between the public disclosure bar and original source exception. On the one hand, paying rewards is the single most effective way to enlist whistleblowers and dramatically increases the total fraud recoveries. On the other hand, every dollar paid to a relator reduces the amount of the government's recovery. Congress has tried several times to find the perfect balance between these competing interests.¹⁴ In 1943, Congress actually killed the golden goose by barring *qui tam* cases when the government had any knowledge of the fraud allegations.¹⁵ As a result, very few *qui tam* cases were filed.¹⁶ In response to escalating fraud, in 1986, Congress scrapped the so-called "government knowledge bar" and replaced it with the "public disclosure bar," which focused not on what the government might have known but on what was publicly disclosed prior to the filing of a *qui tam*.¹⁷ Importantly, to avoid a similar paucity of *qui tams*, Congress simultaneously created the "original source exception" to the public disclosure bar.¹⁸ The 1986 version permitted a relator to proceed if she had "direct and independent knowledge" of the fraud, rather than simply learning about the fraud from certain public disclosures, such as disclosures in the news media.¹⁹ This new paradigm opened the floodgates and marked a turning point in the war against fraud. The 1986 *qui tam* provisions quickly became the most powerful tool²⁰ in the government's arsenal and accounts for 70 percent of all fraud recoveries.²¹ Consequently, the

14. See United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) ("Seeking the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own, Congress has frequently altered its course in drafting and amending the *qui tam* provisions since initial passage of the FCA over a century ago.").

15. See Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 THOMAS M. COOLEY L. REV. 217, 231 (2012) [hereinafter Hesch, *Breaking the Siege*].

16. *Id.*

17. See Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 LIBERTY U. L. REV. 111, 116–18, 120 (2006) [hereinafter Hesch, *Restating the "Original Source Exception"*].

18. False Claims Amendments Act of 1986, § 3, 100 Stat. at 3157; see Hesch, *Restating the "Original Source Exception,"* *supra* note 17, at 117.

19. See False Claims Amendments Act of 1986, § 3, 100 Stat. at 3157.

20. See, e.g., United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010). "The FCA is the Government's 'primary litigation tool' for recovering losses resulting from fraud." *Id.* at 267 (quoting United States *ex rel.* Marcy v. Rowan Cos., 520 F.3d 384, 388 (5th Cir. 2008)).

21. See FRAUD STATISTICS—OVERVIEW, *supra* note 6.

qui tam provisions, and in particular the original source exception, also became a hotly contested and litigated issue.

Congress acted again in 2010 because some courts too narrowly interpreted the public disclosure bar and original source exception. In addition to allowing the government to waive the public disclosure bar altogether, the 2010 amendment rewrote the original source exception.²² The 2010 original source exception can be met in one of two ways: either (1) a relator told the government about the fraud before a qualifying public disclosure, or (2) a relator's information is "independent of and materially adds" to the public disclosure.²³ Although the first standard seems fairly straightforward, there remain a few nuances that need clarification. The second standard has an element of subjectivity that requires deeper assessment. Because *qui tam* cases remain the most important anti-fraud tool, assuring that the original source exception is properly interpreted and applied is critical.

Since 2010, a handful of courts have ruled on certain aspects of the new original source exception; however, there remains considerable uncertainty and a need for a full and uniform set of standards. This article addresses the boundaries and application of the 2010 version of the original source exception. It begins by discussing the history of the public disclosure bar and original source exception. Next, it outlines the statutory framework for meeting the 2010 original source exception, including a discussion of how the courts have interpreted these provisions. The last part proposes tests and a uniform standard to aid the courts and practitioners in applying the 2010 amendments to the original source exception.

22. Compare Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901-02 (2010) (codified at 31 U.S.C. § 3730(e)(4)(a) (2012)), with 31 U.S.C. § 3730(e)(4)(A)–(B) (1982 & Supp. V 1988).

23. See 31 U.S.C. § 3730(e)(4)(B) (2012).

I. THE FALSE CLAIMS ACT: BACKGROUND AND HISTORY OF THE ORIGINAL SOURCE EXCEPTION

A. *The False Claims Act Background*²⁴

Throughout history, government programs have been plagued by fraud. Even today, “[n]early 10% of all federal government spending is lost due to fraud.”²⁵ In 1863, Congress first tackled this problem by enacting the False Claims Act²⁶ due to rampant fraud during the Civil War, such as the military receiving sand instead of sugar.²⁷ The FCA not only imposed multiple damages and penalties for defrauding the government,²⁸ but also took the extraordinary step of paying rewards to whistleblowers that file *qui tam* complaints to report fraud against the government.²⁹ Essentially, a private person, known as a “relator,” files a *qui tam* lawsuit on behalf of the government.³⁰ If the case is successful, a relator is entitled to a share of the proceeds, which today ranges from 15 percent to 30 percent.³¹ *Qui tam* cases have become a vital aspect of the government’s civil fraud recovery, accounting for 70 percent of all government recoveries.³²

1. The 1863 FCA and Early Abuses

As first enacted in 1863, the *qui tam* provisions had a gaping hole that the Executive Branch argued was being exploited by

24. See Hesch, *Restating the “Original Source Exception,”* *supra* note 17, at 116–18, for a more detailed discussion of the history of the FCA.

25. Hesch, *It Takes Time*, *supra* note 1, at 904; *see also* H.R. REP. NO. 104-496, at 69 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1865, 1869 (“According to the General Accounting Office (GAO), as much as 10 percent of total health care costs are lost to fraudulent or abusive practices by unscrupulous health care providers.”); S. REP. NO. 99-345, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268 (“The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget.”).

26. See Hesch, *Breaking the Siege*, *supra* note 15, at 230–33, for a discussion of the history of the FCA.

27. See 132 CONG. REC. 29,321 (1986) (statement of Rep. Glickman); Hesch, *Breaking the Siege*, *supra* note 15, at 224; *see generally* False Claims Act, 31 U.S.C. §§ 3729–3733 (2012).

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

29. See *id.* § 3730(b). Hesch, *Restating the “Original Source Exception,”* *supra* note 17, at 118–19 (detailing the function and purpose of the *qui tam* provisions).

30. Hesch, *Restating the “Original Source Exception,”* *supra* note 17, at 112 n.6.

31. 31 U.S.C. § 3730(d) (2012); *see also* Hesch, *Restating the “Original Source Exception,”* *supra* note 17, at 112–13.

32. See Hesch, *Restating the “Original Source Exception,”* *supra* note 17, at 112.

some relators in the 1940s. The relators found that they could obtain an award based simply upon filing a civil *qui tam* case that mirrored a criminal complaint in the public domain. The Supreme Court, in *United States ex rel. Marcus v. Hess*, ruled that this practice was not barred by the FCA. The Court determined that the statute did not contain any restrictions on filing based upon publicly available information. In reaction, Congress rushed to amend the FCA.³³

2. The 1943 Amendments and the “Government Knowledge Bar”

In 1943, Congress amended the FCA to include a “government knowledge bar.”³⁴ The FCA was amended “to provide that there would be no jurisdiction over *qui tam* suits ‘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.’”³⁵ “According to the courts, this new provision created a complete bar to all *qui tam* suits where any information about the fraud was already somewhere in the possession of the government.”³⁶

Unfortunately, the measure was too drastic and “killed the goose that laid the golden egg.”³⁷ In practice, the government knowledge bar prevented any *qui tam* suit in which the government already possessed at least some of the information alleged in the *qui tam* case.³⁸ The 1943 amendments certainly put an end

33. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545 (1943).

34. Hesch, *Restating the “Original Source Exception,” supra* note 17, at 116.

35. *Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1041 (8th Cir. 2002) (citing 31 U.S.C. § 232(C) (1946); S. Rep. No. 99-345, at 12 (1986)).

36. Hesch, *Restating the “Original Source Exception,” supra* note 17, at 117; *see also* *Minn. Ass’n of Nurse Anesthetists*, 276 F.3d at 1041. The Seventh Circuit decision in *Wisconsin v. Dean*, where the State of Wisconsin was barred from bringing a *qui tam* suit based on Medicaid fraud which it had disclosed to the federal government, ruled that the 1943 amendments to the FCA barred the *qui tam* suit, notwithstanding that it was the State who reported the matter to the federal government. 276 F.3d at 1041. The relator was barred because it filed suit after the federal government was told of the fraud allegations. *Id.*

37. *See* *United States ex rel. Findley v. FPC-Boron Emps’ Club*, 105 F.3d 675, 680 (D.C. Cir. 1997) (“But it soon became apparent that by restricting *qui tam* suits by individuals who brought fraudulent activity to the government’s attention, Congress had killed the goose that laid the golden egg and eliminated the financial incentive to expose frauds against the government. The use of *qui tam* suits as a weapon for fighting fraud against the government dramatically declined.”).

38. *Id.*

to filing *qui tam* suits based upon publicly available criminal complaints. However, it also put an end to the *qui tam* practice because good cases were swept up with the abuses.³⁹ Relators were unwilling to face the risks of whistleblowing when the government could simply turn the case away by claiming that some government employee or document in its files contained some hint of the fraud.⁴⁰ Therefore, there were only a handful of *qui tam* cases from 1943 until Congress amended the FCA in 1986.⁴¹

3. The 1986 Amendments Creating the “Public Disclosure Bar” and “Original Source Exception”

In the 1980s, Congress once again realized the great need for relators. Fraud was rampant and reminiscent of the days of the Civil War when contractors provided the military with sand instead of sugar.⁴² For instance, the military was now being bilked by being charged “\$600 for toilet seats and \$748 for pliers.”⁴³ Thus, in 1986, Congress amended the FCA as an appeal for help by providing greater incentives for and protections of whistleblowers.⁴⁴ The solution was two-fold. First, Congress replaced the “government knowledge bar”⁴⁵ with the “public disclosure bar.”⁴⁶ The new approach was to bar *qui tams* only when the information already had been publicly disclosed in certain situations, rather than focusing upon what the government might have known.⁴⁷ Second, the 1986 amendments also created the “original source

39. *See id.*

40. James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1270 (2013). Prior to filing a *qui tam*, the relator simply had no way of knowing if or what the government knew.

41. Hesch, *Breaking the Siege*, *supra* note 15, at 232 (“[F]rom 1943 to 1986, ‘there were fewer than six FCA suits brought per year[.]’”).

42. *See id.* at 231.

43. *Id.*

44. *See id.* at 232.

45. *See* Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1041 (8th Cir. 2002) (citing 31 U.S.C. § 232(C) (1946); S. REP. NO. 99-345, at 12 (1986)) (explaining that Congress barred jurisdiction for suits based on information known by government employees).

46. *See* False Claims Amendments Act of 1986, § 3, Pub. L. No. 99-562, 100 Stat. 3153, 3157 (1986) (current version at 31 U.S.C. § 3730(e)(4)(A) (2012)).

47. *Id.* § 3, 100 Stat. at 3157; *see also* Hesch, *Restating the “Original Source Exception,” supra* note 17, at 117–18.

exception”⁴⁸ to the public disclosure bar, which was intended to ensure that individuals with valuable information would still be enlisted and enticed to file a *qui tam* and help the government pursue fraud cases.⁴⁹

a. The 1986 Public Disclosure Bar

The 1986 public disclosure bar, which replaced the 1943 government knowledge bar, reads:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.⁵⁰

In short, the bar was triggered only by a qualifying public disclosure; namely, the fraud⁵¹ had to be disclosed in one of the specifically enumerated manners identified in this provision. If there was no qualifying public disclosure prior to the filing of a *qui tam* complaint, the bar did not apply and a relator need not have met the original source exception.

b. The 1986 Original Source Exception

The 1986 amendments also created the “original source exception”⁵² to the public disclosure bar, which was intended to ensure that individuals with valuable information would still file and

48. False Claims Amendments Act of 1986, § 3, 100 Stat. at 3157.

49. See Hesch, *Restating the “Original Source Exception,”* *supra* note 17, at 117–18.

50. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (1986) (current version at 31 U.S.C. § 3730(e)(4)(A)–(B) (2012)).

51. See *id.* In addition, to be considered “substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed,” the critical or material elements of the allegations or transactions of the *qui tam* complaint must appear in the public disclosure. See 31 U.S.C. § 3730(e)(4)(A) (2012). That means that the public disclosure must have alleged fraud either with respect to the same allegations or transaction in the *qui tam* complaint or contained information essential about the same transactions or allegations to reach the conclusion that a fraud had occurred. See, e.g., *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (“Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.”).

52. False Claims Amendments Act of 1986, § 3, 100 Stat. at 3157 (current version at 31 U.S.C. § 3730(e)(4)(A)–(B)).

proceed in *qui tam* cases.⁵³ This provision reads: “For purposes of this paragraph, ‘original source’ means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.”⁵⁴

Assuming that a qualifying public disclosure occurred prior to the filing of a *qui tam* complaint, the FCA’s 1986 original source exception expressly permitted a relator to pursue the suit if she had “direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action[.]”⁵⁵ In theory, the “public disclosure bar” and “original source exception” are designed to work together to allow whistleblowers who contribute valuable information despite fraud allegations having been publicly disclosed.⁵⁶ However, courts varied widely in interpreting the 1986 original source exception, creating various circuit splits.⁵⁷ For instance, some apply “either a two- or three- part test for measuring the original source prong,”⁵⁸ but even more problemat-

53. See *Quinn*, 14 F.3d at 649 (explaining that the 1986 amendments aimed for “the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own”).

54. False Claims Amendments Act of 1986, § 3, 100 Stat at 3157.

55. *Id.*

56. Cf. Hesch, *Restating the “Original Source Exception,” supra* note 17, at 121 (“[T]here is danger in summarizing the statute as containing ‘dual goals of encouraging whistle-blowers while discouraging parasitic suit[s].’ There are many problems with such broad statements. First, the *qui tam* statute is not limited to ‘whistleblowers’ and there is no requirement that a relator be an ‘insider’ or ever have even worked for the wrongdoer. In addition, outside of the parameters of the public disclosure bar setting, the FCA does not limit a *qui tam* complaint unless a FCA suit has already been filed by the government or another relator. Moreover, the statute does not address ‘parasitic’ behavior in most instances, and it has no place under the statute unless the ‘public disclosure bar’ has been triggered.”).

57. *Id.* at 122–28 (discussing the various approaches used by the circuits and restating how the original source exception should be applied); Joel D. Hesch, *Understanding the “Original Source Exception” to the False Claims Act’s “Public Disclosure Bar” in Light of the Supreme Court’s Ruling in Rockwell v. United States*, 7 DEPAUL BUS. & COM. L.J. 1, 1–4 (2008) (discussing the Supreme Court’s resolution of one circuit split, but also identifying additional areas of dispute) [hereinafter Hesch, *Understanding the “Original Source Exception”*].

58. Hesch, *Restating the “Original Source Exception,” supra* note 17, at 125. The Supreme Court, while not addressing the original source split, did, however, outline a three-prong test for the 1986 Public Disclosure bar: (1) whether there was a “public disclosure” of allegations or transactions, (2) whether the *qui tam* action was “based upon” such pub-

ic was that the courts differed greatly in defining the terms “direct” and “independent.”⁵⁹ As a result, there was an unresolved circuit split.

In some ways, the public disclosure bar still kept the door closed too tightly to attract all the whistleblowers that Congress wanted to incentivize. According to one court, “[a]lthough the original public disclosure bar was less restrictive than the government knowledge defense, it was by no means a low bar for relators to clear. Indeed, given its broad language, as well as different courts’ varying interpretations of that language, relators faced a formidable hurdle.”⁶⁰ Therefore, in 2010, Congress would take another stab at crafting the public disclosure bar and original source exception in hopes of finding the perfect balance.

II. ANALYZING THE 2010 AMENDMENTS

In 2010, Congress amended both the public disclosure bar and the original source exception of the False Claims Act.⁶¹ There were material changes made to each section designed to loosen the requirements in order to find the right balance.⁶² With respect to the public disclosure bar, it applies only to information contained in one of the specified ways in the statute, which are denoted as qualifying public disclosures. Thus, the public disclosure bar only applies if a qualifying public disclosure occurs before a *qui tam* complaint is filed. One change was that a disclosure in “a criminal, civil, or administrative hearing now qualifies as a public disclosure *only if* the information was disclosed in a federal case to which the government was a party.”⁶³ As a result, information that was disclosed in a federal case between private parties no

licly disclosed allegations, and (3) if so, whether the relator qualified as an “original source.” *Graham Cty. Soil & Water Conservation Dist. v. United States*, 559 U.S. 280, 286 (2010). The Court did not address or define the terms direct or independent from the original source exception. *See id.* at 286 n.4.

59. Hesch, *Restating the “Original Source Exception,”* *supra* note 17, at 128–32.

60. *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298 (3d Cir. 2016).

61. *See id.* at 298.

62. *See id.* at 299.

63. *Id.* at 299, 304 (emphasis added) (“[comparing] 31 U.S.C. § 3730(e)(4)(A) (2006) (listing a ‘criminal, civil, or administrative hearing’ as a public disclosure source), *with id.* § 3730(e)(4)(A)(i) (2012) (listing ‘a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party’ as a public disclosure source)”).

longer constitutes publicly disclosed information. Congress also amended the statute to ensure that the bar is no longer “jurisdictional” and expressly gave the government unilateral authority to object to and block dismissal based upon the public disclosure bar.⁶⁴

With respect to the original source exception, Congress not only dropped the requirement that a relator have direct knowledge of the fraud, but also essentially rewrote the entire provision. The 2010 original source exception can be met if either a relator told the government about the fraud before a qualifying public disclosure occurred or a relator’s information was independent from the public disclosure and materially adds to the public disclosure.⁶⁵ Altogether, there are now three ways for a relator to avoid the public disclosure bar: (1) the government opposes dismissal; (2) a relator reported the fraud allegations to the government prior to a qualifying public disclosure; or (3) a relator provides information that is independent from and materially adds to the information contained in a qualifying public disclosure.⁶⁶ Each is discussed below.

A. *The Government May Oppose Dismissal Under the Public Disclosure Bar*

With respect to the public disclosure bar, one thing Congress set out to do was to undo a ruling by the Supreme Court in *Rockwell International Corp. v. United States*.⁶⁷ In *Rockwell*, the Court held that the public disclosure bar was a jurisdictional requirement that neither the government nor the court could waive.⁶⁸ In that case, although a relator had filed and been assisting the government for many years in a hotly litigated *qui tam* case, which

64. *Id.* at 300.

65. *Id.* at 297 (discussing how Congress “removed the language that explicitly stated that a court was deprived of ‘jurisdiction’ over the FCA action if the bar applied to that action; reduced the number of enumerated public disclosure sources; and expanded the definition of ‘original source’ by allowing a relator who ‘materially adds’ to the publicly disclosed information to qualify”).

66. *See id.* at 298.

67. *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 476 (2007), *superseded by statute*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901-02 (2010).

68. *See id.* at 467–68. The author was one of the Department of Justice trial attorneys in this case.

ultimately went to trial and survived numerous appeals, the Supreme Court dismissed the relator from the case because he could not satisfy the 1986 original source exception.⁶⁹ The Court held it was irrelevant that the relator reported the fraud to the government prior to the public disclosure and was the source of the public disclosure.⁷⁰ The Court also held that the government's intervention in the case did not save the relator because it was jurisdictional.⁷¹

In 2010, Congress amended the FCA to remove the jurisdictional bar element of the public disclosure bar.⁷² In its amended form, the 2010 public disclosure bar provides:

The court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.⁷³

By inserting “unless opposed by the government,” Congress erased the jurisdictional impact of the bar. On its face, this language mandates that if the government submits to the court a written opposition to any motion to dismiss an action or claim under the public disclosure bar, the court shall not dismiss the action or claim even if the allegations or transactions had been publicly disclosed. In short, the government in its sole discretion may waive the public disclosure bar. Every circuit court that has considered this question has agreed that the public disclosure bar is no longer jurisdictional.⁷⁴ In short, when the government op-

69. *Id.* at 470, 475–76.

70. *Id.* at 475–76.

71. *Id.* at 476–77. The Court did permit the Government to continue with the case.

72. Compare Patient Protection and Affordable Care Act, Pub. L. No 111-148, § 10104(j)(2), 124 Stat. 119, 901-02 (2010) (codified at 31 U.S.C. § 3730(e)(4)(A) (2012)), with False Claims Amendments Act of 1986, § 3, 100 Stat. at 3157.

73. Patient Protection and Affordable Care Act, § 10104(j)(2), 124 Stat. at 901-02 (emphasis added).

74. See, e.g., *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 300 (3d Cir. 2016) (“[J]oin[ing] the other circuits that have ruled that the amended version does not set forth a jurisdictional bar.”); *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 810 (11th Cir. 2015) (“We conclude that the amended § 3730(e)(4) creates grounds for dismissal for failure to state a claim rather than for lack of

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poses dismissal, a relator need not meet the original source exception.

B. *The 2010 Original Source Exception*

Regarding the original source exception, Congress fundamentally shifted the language and paradigm of the original source exception by redefining how a relator can satisfy the original source requirement. The 2010 amendment reads:

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 (2) [sic] who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.⁷⁵

“Although no direct legislative history seems to exist, the textual changes alone evince Congress’s intent to lower the bar for relators, at least as to some of its components.”⁷⁶ One of the significant changes included doing away with the “direct knowledge” requirement because it was not only vague, but also untenable at achieving the purpose of the FCA.⁷⁷ The “original source status now turns on whether the relator has “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions.”⁷⁸ The focus now is on what independent knowledge the relator has added to what was publicly disclosed.⁷⁹ Under the 2010 original source exception, there are two completely different paths with slightly different purposes for achieving original source status.⁸⁰ A relator, however, need satisfy only one of the two in order to remain in the case.⁸¹

jurisdiction.”); *United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 916 (4th Cir. 2013) (“It is apparent . . . that the public-disclosure bar is no longer jurisdictional.”).

75. Patient Protection and Affordable Care Act, § 10104(j)(2), 124 Stat. at 901-02.

76. *Moore*, 812 F.3d at 299.

77. *United States ex rel. Bogina v. Medline Indus., Inc.*, 809 F.3d 365, 368 (7th Cir. 2016).

78. *Moore*, 812 F.3d at 299.

79. *Id.*

80. Patient Protection and Affordable Care Act, § 10104(j)(2), 124 Stat. at 901-02.

81. *Id.*

The first method is a bright-line test that automatically grants original source status if a relator approached the government with fraud allegations prior to a qualifying public disclosure.⁸² Essentially, if a relator reported the fraud to the government prior to a qualifying public disclosure but files her *qui tam* suit after such public disclosure, there is no requirement that she prove that her *qui tam* complaint was not based wholly or in part upon information the FCA considers publicly disclosed information.⁸³ She is credited because she was not initially prompted by what she learned through a public disclosure. The second method applies when a relator waited until after a qualifying public disclosure to contact the government to report fraud and requires evaluating the value of the information.⁸⁴ Both are discussed below.

1. Disclosing to the Government Prior to a Qualifying Public Disclosure

The first way a relator may satisfy the 2010 original source exception is if she discloses the fraud allegations to the government prior to a qualifying public disclosure.⁸⁵ The pertinent language reads: “‘original source’ means an individual who . . . 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.”⁸⁶

There are four prongs to this standard: (1) the disclosure must be prior to a qualifying public disclosure; (2) the disclosure must be to the government; (3) the disclosure must be voluntary; and (4) the disclosure must include information on which the allegations or transactions in a claim are based.⁸⁷ When all four are satisfied, a relator is an original source under this subpart.⁸⁸

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *See id.*

88. *See id.*

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a. The Disclosure Must Be Prior to a Qualifying Public Disclosure

The newly added manner of establishing original source status simply requires that a relator inform the government of the fraud allegations prior to a qualifying public disclosure.⁸⁹ The starting point is the precise public disclosure. As an initial matter, if there is no qualifying public disclosure prior to filing of a *qui tam* complaint, the public disclosure bar does not even apply, and thus, the original source exception need not be met.⁹⁰ Similarly, if there is information in the public domain that was not disclosed in one of the requirements specified by the bar, then no qualifying public disclosure occurred.⁹¹

Assuming that a qualifying public disclosure occurred prior to the filing of a *qui tam*, a relator meets the first prong of the original source exception if she informed the government of the fraud allegations prior to such qualifying public disclosure.⁹² No longer must a relator file the *qui tam* suit prior to the public disclosure, or even be the one who caused the public disclosure, as required by a few courts under the 1986 version.⁹³

In the past, assuming a relator called or wrote a letter telling the government of a fraud scheme prior to any public disclosure, but did not file a *qui tam* case until after a public disclosure, a relator would need to prove that her information met the exacting requirements that she both had direct and independent knowledge, even if she was the one who triggered the government investigation or public disclosure.⁹⁴ This was precisely the issue in the *Rockwell* case.⁹⁵ In *Rockwell*, the whistleblower contacted the FBI and the government initiated an investigation.⁹⁶ Prior to filing a *qui tam* complaint, a news article reported allegations that

89. *See id.*

90. *See id.*

91. *See id.*

92. *See Hesch, Restating the "Original Source Exception," supra note 17, at 126–27.*

93. *See id.* at 148 n.187, 148–52.

94. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 476 (2007), *superseded by statute*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901-02 (2010).

95. *Id.* at 466–67. The author was one of the Department of Justice trial attorneys in this case.

96. *Id.* at 461–62.

were based on information provided by a relator.⁹⁷ Therefore, the public disclosure bar was triggered, and the relator was required to establish direct and independent knowledge of the fraud notwithstanding that he was the person that prompted the government's investigation. The Court held that the relator's knowledge of the fraud was second-hand and therefore he was not an original source as defined by the FCA, even though he triggered both the investigation and the public disclosure and thus there would not have been any recovery without him reporting the fraud.⁹⁸

The 2010 version now contains a bright-line test that exempts altogether any relator who reports the fraud to the government prior to a qualifying public disclosure.⁹⁹ This new standard was intentionally made both automatic and simple to accomplish the purpose of rewarding whistleblowers for stepping forward prior to a qualifying public disclosure.¹⁰⁰

b. The Disclosure Must Be to the Government

The first method of becoming an original source also requires that a relator disclose the fraud to "the government."¹⁰¹ It would not be sufficient to report the fraud internally to her employer or to the news media. Rather, this provision requires that a relator report the allegations to the government prior to a qualifying public disclosure.¹⁰² The statute does not specify the manner in which a relator should inform the government, but requires only that the disclosure occur.¹⁰³ There are many ways to disclose information, including calling a hotline, writing a letter, or meeting

97. *Id.* at 462–63.

98. *Id.* at 475–76.

99. Patient Protection and Affordable Care Act, § 10104(j)(2), 124 Stat. at 901-02; see 31 U.S.C. § 3730(e)(4)(A)–(B) (2006 & Supp. IV 2011). The 2010 original source exception no longer contains the requirement of direct knowledge. "[I]f substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a federal criminal, civil, or administrative hearing in which the Government or its agent is a party; in a congressional, Government Accountability Office or other federal report, hearing, audit, or investigation; or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." *See id.*

100. Joel D. Hesch, *The False Claims Act Creates a "Zone of Protection" that Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361, 376 (2014).

101. 31 U.S.C. § 3730(e)(4)(A)–(B) (2012).

102. *See id.*

103. *See id.*

in person with a government employee. As far as which government official, the FCA does not contain any specific requirement or name any particular officials beyond requiring that it be to the government.¹⁰⁴ Thus, a relator need not contact a specific government official, such as the Attorney General or United States Attorney. Rather, the government includes any government official. Again, the focus of this exception is the timing of the disclosure. If the relator reported the fraud to the government prior to a public disclosure, she is an original source.

c. The Disclosure Must Be Voluntary

Next, a relator must have “voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based.”¹⁰⁵ The statute does not define “voluntarily.”¹⁰⁶ Although not controlling because it addressed a different version of the statute with a different purpose, the legislative history of the 1986 original source exception offers some guidance by indicating that a relator “voluntarily” discloses information if she was not compelled by subpoena and did not disclose the information only as a result of being subpoenaed.¹⁰⁷ In *United States ex rel. Stone v. AmWest Savings Ass’n*,¹⁰⁸ the district court when address-

104. *Id.*

105. *Id.* § 3730(e)(4)(B). Because this is a new provision, care must be taken when applying legislative history relating to a prior version of a statute even as to the same or similar words because it is used in a new context and approach. Congress obviously intended this new provision to be both automatic and simple; therefore, courts should not merely apply the same meaning to the word voluntary as used in older cases interpreting the prior version. Thus, a dictionary definition of the term voluntary should be used. *See infra* note 113. Nevertheless, this article points out the meaning of the term in the context of the old statute.

106. *See* 31 U.S.C. § 3730(e)(4)(A)–(B).

107. 132 CONG. REC. 20,536 (1986) (statement of Sen. Grassley) (explaining that the requirement was intended “to preclude the ability of an individual to sue under the *qui tam* section of the False Claims Act when his suit is based solely on public information and the individual was a source of the allegations only because the individual was subpoenaed to come forward. However, those persons who have been contacted or questioned by the Government or by the news media and cooperated by providing information which later led to a public disclosure would be considered to have ‘voluntarily’ informed the Government or media and therefore considered eligible *qui tam* relators”); *see also* *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005) (concluding that information provided in response to a subpoena is not voluntary); *United States ex rel. Repko v. Guthrie Clinic, P.C.*, No. 11-3682, 2012 U.S. App. LEXIS 15870, at *5–6 (3d Cir. June 5, 2012) (finding the information was not voluntary because providing it was part of the plea deal that compelled the disclosure).

108. 999 F. Supp. 852 (N.D. Tex. 1997).

ing the 1986 version explained “the relator must prove that his disclosure was made ‘of [his] own free will without valuable consideration . . . [or] without any present legal obligation . . . or any such obligation that can accrue from the existing state of affairs.’”¹⁰⁹ In that case, the relator made a disclosure in exchange for a grant of immunity from criminal prosecution prior to filing a *qui tam* suit relating to the information he disclosed.¹¹⁰ The court concluded that his disclosure was not voluntary because he disclosed the information in exchange for valuable consideration, namely, immunity.¹¹¹

One court applying the 1986 version, however, incorrectly ruled that if the only disclosures made to the government prior to filing were responses to interviews initiated by the government, as part of an ongoing investigation, then the disclosure is not voluntary.¹¹² This treatment of “voluntarily” is misplaced, even under the 1986 version. The court appears to have improperly used this prong to address whether the relator triggered the investigation, rather than upon the *voluntariness* of the witness.

This article proposes that under the 2010 original source exception, voluntarily simply means not compelled by law.¹¹³ Indeed, a witness being asked interview questions by a government investigator could refuse to meet or disclose information absent a subpoena. Thus, a relator’s choice to meet with an investigator and reveal fraud during the interview meets the definition of volun-

109. *Id.* at 857 (quoting *United States ex rel. Fione v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 744 (9th Cir. 1995)).

110. *Id.* at 857–58.

111. *Id.*

112. *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 704 (8th Cir. 1995) (holding that a relator who responded to a HUD investigator’s interview questions had not voluntarily provided information to the Government before filing suit). There is also a split in the circuits regarding whether a government employee whose duties involve investigating fraud can ever be considered to have voluntarily provided the information. Most courts have held that it is not voluntary under those conditions, but at least one circuit court disagrees. *Compare Chevron*, 72 F.3d at 744 (explaining that Fine was a government auditor tasked with conducting audits to detect fraud and thus, according to the court, was paid to report fraud and did not voluntarily provide the information), *with United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199, 1226 (10th Cir. 2003) (allowing government employees to be relators because the original source exception does not prohibit it). For a collection of cases on this topic, see CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* § 11:67 (2016).

113. *Voluntary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/voluntary> (last visited Apr. 5, 2017).

tary. The definition of voluntarily does not hinge upon who initiated the meeting. Rather, voluntarily means being made of a person's own free will and without being compelled.¹¹⁴

Classic examples of voluntarily providing information to the government include contacting the FBI to report fraud, sending a letter to the government outlining the fraud, and providing the government with a draft of the *qui tam* complaint prior to filing.¹¹⁵ Again, however, the key is whether the witness was being compelled to provide the information or did so through their own free will. Thus, this element should be met in most, if not all, cases in which there was not a subpoena or plea agreement requiring that the information be produced. It includes answering questions by a government agent, even when the government initiated the interview.

d. The Disclosure Must Include Information on Which the Allegations Are Based

The last prong of the original source exception requires that a relator had disclosed “*the information* on which allegations or transactions in a claim are based.”¹¹⁶ The exception does not require disclosure of all known details of the fraud, but only that

114. Another court incorrectly held that because the FCA requires a relator to submit a statement of material evidence (“SME”) with the *qui tam* complaint, she is being compelled to provide the SME and she therefore cannot meet the voluntary element by giving the government an advance copy of her SME. *United States ex rel. Beauchamp v. Academi Training Ctr., Inc.*, 933 F. Supp. 2d 825, 846 (E.D. Va. 2013) (concluding that disclosures made to the government two weeks before filing the complaint were made to satisfy § 3730(b)(2) and thus were not voluntary). This is circular reasoning. Moreover, the FCA does not compel anyone to report fraud. Rather, it establishes how to apply for a reward if you choose to report fraud. In any event, the FCA does not require providing the SME prior to filing the complaint, but contemporaneously with it. Thus, a relator may still voluntarily provide the same information prior to filing a complaint. If that court were correct, it would nullify the original source exception altogether because a relator must voluntarily provide information about the fraud allegations to satisfy either original source standard, and a statute cannot be read in a manner that nullifies an entire provision.

115. *See, e.g., United States ex rel. Ahumada v. Nish*, 756 F.3d 268, 275–76 (4th Cir. 2014) (finding the disclosure voluntary when he told the FBI everything he knew before filing suit); *United States v. Sanford-Brown, Ltd.*, No. 12-CV-775-UPS, 2014 U.S. Dist. LEXIS 40871, at *20–21 (E.D. Wis. Mar. 27, 2014) (holding the disclosure to be voluntary when a letter and draft complaint was sent to the Attorney General); *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, 709 F. Supp. 2d 1084, 1104 (D.N.M. 2010) (declaring the disclosure voluntary when a letter was sent to the Department of Justice a month before filing).

116. 31 U.S.C. § 3730(e)(4)(B) (2012) (emphasis added).

the relator approach the government with fraud allegations prior to a public disclosure.¹¹⁷ Again, this new provision seeks to remove the subjectivity of the exception. As long as the relator reported the fraud prior to a qualifying public disclosure, she is conferred with original source status. Elsewhere in the FCA, a relator is required to produce a statement of material evidence that discloses all key facts.¹¹⁸ But that statement is a submission that must be included with the actual filing of a *qui tam*. To require a full disclosure of the allegations at this stage would essentially defeat the purpose of this new exception, which rewards a whistleblower for stepping forward with information prior to a public disclosure. If the relator was required to turn over all of her evidence, it would essentially mean she must file a *qui tam* prior to a public disclosure. That is not what this new provision was intended to require.¹¹⁹ In fact, it put to death the few court decisions that required filing of a *qui tam* suit prior to the public disclosure or even being the one who caused the public disclosure.¹²⁰

The 2010 original source exception was designed to automatically grant original source status to anyone that approached the government with fraud allegations prior to a qualifying public disclosure.¹²¹ In other words, if a person reported fraud to the government prior to a public disclosure, they could not have possibly acted upon or been motivated by a public disclosure. Thus, the new standard simply requires that a relator have stepped forward with fraud allegations prior to a qualifying public disclosure. In fact, this special exemption is divorced from both the prior 1986 requirement that a relator possess direct and independent knowledge of fraud and the 2010 alternative method of establish-

117. See *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 208–09 (1st Cir. 2016) (“The ultimate inquiry, of course, is whether the government has received fair notice, prior to the suit, about the potential existence of the fraud.”).

118. § 3730(b)(2) (requiring that at the time of the filing of a *qui tam*, the relator also serve on the government “[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses”).

119. See *United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 299 (3rd Cir. 2016).

120. See Hesch, *Restating the “Original Source Exception,” supra* note 17, at 144–52 (detailing and critiquing several cases that were in conflict with the new standards implemented in the 2010 provisions).

121. See *Moore*, 812 F.3d at 299.

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ing original source status in which she must show how she acquired the information and the usefulness of it.¹²²

Based upon the purpose of the new provision and the clear language in the text, which does not contain any quantum or level of information that must be disclosed prior to the public disclosure, all a relator is required to do is report to the government that it is being defrauded and disclose the basis of her allegations. Thus, it does not require that she produce every piece of information she possesses, but only that she approached the government to report fraud prior to the public disclosure. For instance, a relator may send a one-paragraph email to a government official outlining the fraud against the government. The government certainly can ask for more details or set up an interview if it wants more details at that time, but the purpose of the original source exception is merely to weed out relators that show up after reading a qualifying public disclosure versus those that contacted the government with information about the fraud before such public disclosure. Therefore, the amount of information is not the focal point, but rather the timing. With respect to *qui tam* practice, it would be sufficient for a relator's legal counsel to send a short e-mail to an Assistant United States Attorney informing that official of the relator's intention to file a *qui tam* and briefly outline the fraud allegations. As long as a relator informed the government of the fraud allegations prior to a qualifying public disclosure, she is an original source.

2. Knowledge That Is Independent of and Materially Adds to the Publicly Disclosed Allegations

The second way a relator may satisfy the 2010 original source exception is if she possesses knowledge that is "independent of and materially adds" to the publicly disclosed information. The pertinent language reads: "original source' means an individual . . . who has knowledge that is independent of and materially

122. Compare 31 U.S.C. § 3730(e)(4)(B) (1988) (original source "means an individual who has direct and independent knowledge of the information on which the allegations are based . . ."), with 31 U.S.C. § 3730(e)(4)(b) (2012) (original source "means an individual who . . . prior to a public disclosure . . . has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based[.]").

adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.”¹²³

There are three components to this method of being considered an original source: (1) knowledge that is “independent of” the qualifying public disclosure; (2) knowledge that “materially adds” to the qualifying public disclosure; and (3) voluntarily providing information to the government before filing the *qui tam* complaint.¹²⁴ Each requirement is discussed below.

a. “Independent of” the Publicly Disclosed Allegations

The first prong requires “knowledge that is *independent of* . . . the publicly disclosed allegations or transactions.”¹²⁵ Although it did not define the term “independent of,” the statute used this term in a manner different from the 1986 version, which had required “independent knowledge.”¹²⁶ Because Congress reworded the language after a circuit split,¹²⁷ it is fair to assume Congress meant something different and hoped to avoid similar confusion. Thus, although Congress used the same word “independent,” it used a different structure and specifically tied it to the publicly disclosed allegations or transactions. Therefore, the courts should not simply adopt prior case law, but revisit their definition of the term “independent” as used in this new context, and should rule that it means that a relator’s knowledge is not derived from the public disclosure itself.

123. Patient Protection and Affordable Care Act, § 10104(j)(2)(B), 124 Stat. 119 at 901–02 (2010) (current version at 31 U.S.C. § 3730(e)(4)(A)–(B) (2012)).

124. *Id.* § 10104(j)(2)(B), 124 Stat. at 902.

125. *Id.* (emphasis added).

126. *Compare id.*, with 31 U.S.C. § 3730(e)(4)(B) (1988).

127. There was a circuit split regarding the definition of “independent knowledge” under the prior version of the original source exception. *See* Hesch, *Restating the “Original Source Exception,” supra* note 17, at 129–32. For instance, the Tenth Circuit had defined independent knowledge to mean that the relators’ knowledge “must not be derivative of the information of others,” *United States ex rel. Fine v. Advanced Scis., Inc.*, 99 F.3d 1000, 1007 (10th Cir. 1996); *Cf. United States v. Bank of Farmington*, 166 F.3d 853, 861–62 (7th Cir. 1999) (rejecting the Tenth Circuit’s interpretation in *United States ex rel. Fine v. Advanced Sciences, Inc.*). The Third Circuit ruled that knowledge must not be dependent upon publicly disclosed information. *See United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1159–60 (3d Cir. 1991). *But see United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519–20 (9th Cir. 1995) (rejecting the interpretation of *United States ex rel. Stinson v. Prudential Ins. Co.*).

Courts should begin their analysis with the plain language of the 2010 statute, which grants original source status if a relator can show that the source of her knowledge was independent of any qualifying public disclosures.¹²⁸ Here is an example. Assume that the government received an anonymous tip that hospital XYZ was upcoding Medicare patients to pneumonia when they really had a cold. The government acts by reviewing billing records and concludes that 90 percent of this hospital's Medicare patients are billed for pneumonia versus the state's average of 30 percent. Assume further that this finding is reported in a federal government audit report. Assume that a relator works for the hospital and was in a meeting in which all coders were instructed to upcode every Medicare patient to pneumonia. In this instance, a relator would have knowledge of the fraud scheme independent of the audit report and would therefore satisfy this element. Her knowledge of an important element of the fraud scheme is based upon the meeting. Accordingly, she satisfies the "independent of" the qualifying public disclosure because her knowledge was not derived from the audit.

Several circuit courts have ruled in this area since the passage of the 2010 amendments. For instance, in 2016 the Third Circuit, in *United States ex rel. Moore & Co. v. Majestic Blue Fisheries*,¹²⁹ after reviewing the evolution of the original source exception and the changes made in 2010, concluded that the relator's knowledge need only be independent of the qualifying public disclosure and not independent from any and all information existing in the public domain.¹³⁰ In that case, the relator was able to show that it learned of the fraud allegations during discovery in a civil lawsuit in which the federal government was not a party, and therefore it

128. Patient Protection and Affordable Care Act, § 10104(j)(2)(B), 124 Stat. at 902 (current version at 31 U.S.C. § 3730(e)(4)(A)–(B) (2012)).

129. 812 F.3d 294 (2016).

130. *Id.* at 305 ("This definition therefore states that a relator's knowledge must be independent of, and materially add to, not all information readily available in the public domain, but, rather, only information revealed through a public disclosure source in § 3730(e)(4)(A)."). The court also examined the history of the public disclosure bar and stated, "Congress overhauled the public disclosure bar" when it modified its requirements under the 2010 amendments. *Id.* at 299. The court concluded that the 2010 amendments' "textual changes alone evince Congress's intent to lower the bar for relators." *Id.* The court also noted that the 2010 original source analysis is significantly different than the analysis conducted before 2010. *See id.* at 305. The court then addressed the materially added requirement, which is discussed in the next section. *Id.* at 306.

was not derived from a qualifying public disclosure.¹³¹ Thus, the court ruled that the relator met the “independent of” standard.¹³²

The Fifth Circuit in *Stennett v. Premier Rehabilitation, LLC* also briefly addressed the new requirement for “independent knowledge” under the 2010 amendments.¹³³ According to the court:

A relator’s “independent” knowledge does not derive by the public disclosure. Although the relator need not show that he knew about the fraud before the public disclosures, his prior knowledge of the information, upon which he based his complaint, may help demonstrate that he obtained the information independent of the public disclosure. “Under this approach, we are required to ‘look to the factual subtleties of the case before [us] [sic] and attempt to strike a balance between those individuals who, with no details regarding its whereabouts, simply stumble upon a seemingly lucrative nugget and those actually involved in the process of unearthing important information about a false or fraudulent claim.’”¹³⁴

The court correctly noted that the focal point is where the relator derived the information, i.e. from a qualifying public disclosure or another source.¹³⁵ Unfortunately, the court did not further develop the meaning of the term “independent of” and simply applied case law interpreting “independent knowledge” from the 1988 original source exception.¹³⁶ Worse yet, the court cited to a case using a balancing approach that appeared to weigh the value of the information rather than focusing solely upon where the information was obtained.¹³⁷ Notwithstanding the flawed approach, the result was correct. Even though the tests for independent knowledge under the 2010 version of the Act is different from the 1986 version, it was abundantly clear that she did not meet either, which helps explain why the court might not have been careful in distinguishing between the two versions of the Act. Indeed, the relator’s sole source of knowledge was a federal government audit and other documents that clearly were qualifying

131. *Id.* at 304.

132. *Id.* at 306.

133. 479 Fed. App’x 631, 635 (5th Cir. 2012).

134. *Id.* (citations omitted).

135. *Id.*

136. *See id.*

137. *See id.* (citing *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg’l Healthcare Sys.*, 384 F.3d 168, 177 (5th Cir. 2004)).

public disclosures.¹³⁸ However, future courts should not view this case as a signal that it can apply definitions based upon the 1986 version of the Act for *qui tams* filed under the 2010 version.¹³⁹

In 2016, the Seventh Circuit also addressed the meaning of “independent of” the publicly disclosed information.¹⁴⁰ This too is a case that could be misinterpreted. Additionally, this court erroneously cited to case law addressing the 1986 independent knowledge standard before concluding that “a relator’s knowledge of the alleged wrongdoing must not ‘derive from or depend upon’ the public disclosure.”¹⁴¹ The court continued, “[i]nstead the relator must be ‘someone who would have learned of the allegation or transactions independently of the public disclosure.’”¹⁴² Although it cited to cases interpreting the old provision, the court did correctly state that the test should be based upon the source of the relator’s information. In that case, the court ruled that the relator’s knowledge was not independent of the public disclosure because the relator conceded that the source of knowledge was a federal government audit, which clearly constituted a qualifying public disclosure.¹⁴³ Although this result was also correct, there remains a danger in relying upon or applying cases that address the 1986 version of the statute.

In sum, the plain language and meaning of “independent of” means that a relator’s knowledge is not derived from a qualifying public disclosure itself.¹⁴⁴ That is not the same thing as if a rela-

138. *Id.* at 636.

139. *See, e.g.,* United States *ex rel.* Kraxberger v. Kan. City Power & Light Co., 756 F.3d 1075, 1079–80 (8th Cir. 2014). In 2014, the Eighth Circuit held that a relator did not possess independent knowledge because she obtained her information from a FOIA request. *Id.*

140. Cause of Action v. Chi. Transit Auth., 815 F.3d 267, 283 (7th Cir. 2016).

141. *Id.* (quoting United States v. Bank of Farmington, 166 F.3d 853, 864 (7th Cir. 1999)).

142. *Id.* (quoting *Bank of Farmington*, 166 F.3d at 865) (*comparing* Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 921 (7th Cir. 2009) (holding relator was not an original source where her “only knowledge that [the defendant]’s billing practices were improper came from [her attorney], with whom [she] had no prior relationship and who contacted her out of the blue”), *with* Leveski v. ITT Educ. Serv., Inc., 719 F.3d 818, 837 (7th Cir. 2013) (holding relator was an original source where knowledge was “personal and specific to her; it [wa]s not second- or third-hand evidence learned from another source”).

143. *Id.* The court also ruled that because the allegations were substantially similar to the prior public disclosure, the relator could not show that its knowledge materially added to the public disclosure. *Id.*

144. Hesch, *Understanding the “Original Source Exception,” supra* note 57, at 30 (applying the 1986 version: “In light of the purpose of the FCA, the most accurate definition of

tor's fraud allegations are similar to a public disclosure. Indeed, it is presumed that her allegations are substantially the same as a qualifying public disclosure or the public disclosure bar would not apply. The original source inquiry begins and ends with whether a relator can show that she acquired her information from a source other than a qualifying public disclosure. She satisfies the "independent of" requirement if she can show that her knowledge of an essential element of the fraud was not derived from the public disclosure.¹⁴⁵ She can do this by showing that she learned the information from a source other than the qualifying public disclosure.

The next prong, namely the "materially added" prong, addresses any requirement regarding the usefulness or value of the information.

b. "Materially Adds" to the Publicly Disclosed Allegations

Under the second method, a relator must also demonstrate that her knowledge "materially adds" to the qualifying public disclosure.¹⁴⁶ This requirement focuses upon the value of the information and whether the whistleblower is providing useful information not appearing in a qualifying public disclosure. At the same time, however, it is not meant to block out relators simply because there had been a qualifying public disclosure that contains similar allegations. After all, this is designed to be an exception to the public disclosure bar, which only kicks in if "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed. . . ."¹⁴⁷ The Third Circuit articulated this same point in *Moore*.¹⁴⁸ In that case, the defendants argued that because the essential elements of the fraud were publicly disclosed, the relator's additional details regarding how

'independent' knowledge is that *knowledge must not be derived from or dependent upon the public disclosure itself.*' (emphasis in original).

145. In other words, even if some of the information contained in a *qui tam* complaint appears within a public disclosure, a relator still qualifies as an original source if she possesses information as to an essential element that was obtained independent from a qualifying public disclosure.

146. 31 U.S.C. § 3730(e)(4)(A)–(B) (2012).

147. *Id.*

148. *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (2016).

the fraud originated or transpired could not be said to “materially add” to what was already publicly disclosed.¹⁴⁹ In response, the court declared:

Yet that cannot be the meaning of the term, for that would read out of the statute the original source exception. The exception, of course, comes into play only when some facts regarding the allegation or transaction have been publicly disclosed. The salient issue, then, is how to distinguish additional but immaterial information from information that “materially adds” to the publicly disclosed allegation or transaction of fraud.¹⁵⁰

Thus, the test for “materially adds” cannot be the same as the test for the public disclosure bar. In other words, merely because the allegations are substantially the same as a qualifying public disclosure, a relator still qualifies as an original source if she brings something to the table that adds value.

Another reason the “materially adds” requirement should not be too strict a standard is because in any case where it applies, a relator’s *qui tam* complaint is the first and only FCA proceeding. Indeed, the “first to file” provisions of the FCA restrict a relator when either the government¹⁵¹ or another relator has already filed suit.¹⁵² In other words, the FCA only pays a reward when a relator is the first one to file a FCA claim as to a particular fraud. In those instances, a second filed case would be dismissed without reaching the public disclosure bar. Because the FCA is the government’s most important tool for combatting fraud,¹⁵³ it is essential that FCA claims proceed on the merits, and not merely be dismissed because the government had a theoretical right to bring its own suit. Thus, courts should not use the public disclo-

149. *Id.* at 306.

150. *Id.*

151. 31 U.S.C. § 3730(e)(3) (“In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.”).

152. *Id.* § 3730(b)(5) (“When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”). This is known as the first to file bar.

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

sure bar to contravene the purpose of the first to file bar, which only requires dismissal if the government (or another relator) had already filed a FCA case. In addition, the FCA vests the government with the power to unilaterally “dismiss the action notwithstanding the objections” of a relator.¹⁵⁴ Thus, if a court is addressing the original source exception it means that not only has no other relator filed suit but also that the government itself has neither filed its own suit nor moved to dismiss the *qui tam* complaint. Thus, the structure of the FCA statute demonstrates that the original source exception is designed to purposefully invite and entice relators to file a *qui tam* even *after* a qualifying public disclosure has occurred and that contains substantially the same allegations. The only requirement here is that she demonstrates the value of her knowledge by showing that it *materially adds* to the public disclosure.¹⁵⁵

The term “materially adds” from the original source exception is not defined in the FCA. However, the section outlining liability under the FCA contains a definition of “material,”¹⁵⁶ which the Act itself says “means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”¹⁵⁷ The Supreme Court also recently addressed the meaning of “materiality” with respect to liability.¹⁵⁸ Specifically, in 2016, the Supreme Court addressed whether the implied certification theory of legal falsity under the FCA was viable. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Court recognized that “[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government’s payment decision in order to be actionable un-

154. 31 U.S.C. § 3730(c)(2)(A).

155. In addition, the 2010 original source provision is not intended to resurrect the 1943 government knowledge bar that killed the *qui tam* practice and prompted the 1986 original source exception. *See supra* Part I.A.2. The 2010 original source exception is also intended to be an improvement by lowering the bar for relators, not raising it. *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d, 294, 299 (3d Cir. 2016). Therefore, courts should not apply a standard based upon what the government knows or whether the allegations are substantially the same.

156. 31 U.S.C. § 3729(a)(1)(B) (2012) (declaring that a person is liable under the FCA if she “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim”).

157. *Id.* § 3729(b)(4).

158. *See generally* *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

der the False Claims Act.”¹⁵⁹ Accordingly, the Court was required to define “materiality.”

Although the Supreme Court’s definition was in a different context, it nevertheless sheds light upon how the term “material” should be interpreted in this context. For instance, the Court described the general meaning of the term material. Specifically, the Court noted that “[u]nder any understanding of the concept, materiality ‘look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.’”¹⁶⁰ It further noted that under tort law, a “‘matter is material’ . . . [if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction.”¹⁶¹ With respect to contract law, the Court cited to Williston for the meaning of material, and noted that the “‘most popular’ understanding is ‘that a misrepresentation is material if it concerns a matter to which a reasonable person would attach importance in determining his or her choice of action with respect to the transaction involved[.]’”¹⁶² Thus, this article proposes that under the 2010 original source exception, *materially adds* means that a reasonable person would attach importance to the information.

A few circuit courts of appeals have tackled the question of when information adds value or improves the quality of the qualifying public disclosure. In 2016, the Third Circuit in *Moore* began by rejecting the defendant’s argument that merely providing additional details of the fraud does not “materially add” because it only supports the publicly disclosed transactions.¹⁶³ The court reasoned that this “cannot be the meaning of the term, for that would read out of the statute the original source exception.”¹⁶⁴ The court added, “[t]he salient issue, then, is how to distinguish additional but immaterial information from information that ‘materi-

159. *Id.* at 1996.

160. *Id.* at 2002 (quoting 26 RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:12 (4th ed. 2003)).

161. *Id.* at 2002–03 (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 538 (AM. LAW INST. 1977)).

162. *Id.* at 203 n.5 (quoting § 26 RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:12, 549–50).

163. *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306 (3d Cir. 2016).

164. *Id.* (“The exception, of course, comes into play only when some facts regarding the allegation or transaction have been publicly disclosed.”).

ally adds' to the publicly disclosed allegation or transaction of fraud."¹⁶⁵

Because the term “materially adds” was not defined by the FCA, the court turned to dictionary definitions separately for each word “add” and “material.”¹⁶⁶ According to the court, “[t]he word ‘add’ means to ‘put (something) in or on something else so as to improve or alter its quality or nature.’”¹⁶⁷ The court next defined “material” as “significant, influential, or relevant.”¹⁶⁸ By combining the two terms, the court concluded: “So to ‘materially add[]’ to the publicly disclosed allegation or transaction of fraud, a relator must contribute significant additional information to that which has been publicly disclosed so as to improve its quality.”¹⁶⁹

In developing a test or standard, the Third Circuit looked to Rule 9(b)’s pleading requirements, which require the “who, what, when, where and how of the events at issue[,]” as a “helpful benchmark for measuring ‘materially adds.’”¹⁷⁰ “Specifically, a relator materially adds to the publicly disclosed allegation or transaction of fraud when it contributes information—distinct from what was publicly disclosed—that adds in a significant way to the essential factual background: the ‘who, what, when, where and how of the events at issue.’”¹⁷¹

When applying the standard to the facts of the case, the court compared the public disclosure to the additional information provided by the relator to identify what was added. The public disclosure consisted of two articles in the media, along with documents obtained through the Freedom of Information Act, stating that the defendants made false certifications to the U.S. Coast Guard in order to obtain licenses to fish under the South Pacific Tuna Treaty.¹⁷² Specifically, the media published information that the defendants represented that the fishing vessels were controlled and commanded by United States citizens when in fact

165. *Id.*

166. *Id.*

167. *Id.* (quoting *Add*, NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005)).

168. *Id.* (quoting *Material*, NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005)).

169. *Id.*

170. *Id.* at 306–07 (citations omitted).

171. *Id.* at 307.

172. *Id.* at 301.

they were not.¹⁷³ Thus, a qualifying public disclosure existed. However, the Third Circuit found that the relator added significantly to the publicly disclosed elements of the defendants' fraud by providing specific details about how the defendants formed a company using straw United States owners.¹⁷⁴ During civil discovery in a lawsuit in which the government was not a party, the relator was able to gather specific details as to how the defendants were surreptitiously establishing and controlling a company by having the sisters of one of the defendants act as straw owners of two fishing vessels as part of a fraud scheme.¹⁷⁵ The relator also showed that the sisters only capitalized the straw company with \$50 and knew nothing about fishing or the defendants' businesses.¹⁷⁶ This information went far beyond the basic allegation in the media that the vessels were not owned and controlled by a United States citizen.¹⁷⁷ Thus, the court correctly determined that this information added significant details to the essential factual background of the fraud, and therefore materially added to the public disclosure.¹⁷⁸ Specifically, it is clear that a reasonable person would attach importance to the information that uncovers how the fraud scheme works; namely the use of his sisters as straw purchasers, which evidences intent to defraud.

In 2016, the First Circuit in *United States ex rel. Winkelman v. CVS Caremark Corp.* also addressed whether a relator's knowledge "materially added" to publicly disclosed information.¹⁷⁹ This case provides a good distinction of when adding new information is not sufficient to add value necessary to qualify as an original source. According to the First Circuit:

At its most abecedarian level, an addition is material if it is "[o]f such a nature that knowledge of the item would affect a person's decision-making," or if it is "significant," or if it is "essential." This dictionary definition comports with the common law understanding of "material," which focuses the relevant inquiry on whether a piece of information is sufficiently important to influence the behavior of the recipient. As such, our task is to ascertain whether the relators' al-

173. *Id.*

174. *Id.* at 307.

175. *Id.*

176. *Id.*

177. *Id.* at 308.

178. *Id.*

179. 827 F.3d 201, 211 (1st Cir. 2016).

legedly new information is sufficiently significant or essential so as to fall into the narrow category of information that materially adds to what has already been revealed through public disclosures. As the level of detail in public disclosures increases, the universe of potentially material additions shrinks.¹⁸⁰

The court went on to caution that even though there is overlap between materially add and whether a qualifying public disclosure occurred, “the ‘materially adds’ inquiry must remain conceptually distinct; otherwise, the original source exception would be rendered nugatory.”¹⁸¹ Nevertheless, the court noted that it must still examine if the relator’s allegations are substantially the same as the public disclosure.¹⁸²

In *Winkelman*, the allegations of fraud were publicly disclosed when a coalition of labor unions issued a report alleging a price-gouging costing hundreds of millions of dollars by comparing the HSP drug prices charged by CVS to non-government customers with the prices charged to the federal government and then testified before Congress regarding the findings, which were widely reported in the media.¹⁸³ A year later, the relator filed suit alleging a best price violation under the Medicaid Rebate Statute.¹⁸⁴

The relator in *Winkelman* raised four types of knowledge that he claimed materially added to the public disclosures.¹⁸⁵ First, the relator argued that the same fraud scheme for the same drugs was occurring in other states and also violated Medicare Part D.¹⁸⁶ Because it was the exact same fraud scheme as outlined in the media, with the relator adding only that it was occurring nationwide, the court stated that the relator could not plausibly claim that it materially added to the public disclosure.¹⁸⁷ Although the result based on this set of facts was correct, care must be used not

180. *Id.* (citations omitted).

181. *Id.* (quoting *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306 (3d Cir. 2016)); *cf.* *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 25 (1st Cir. 2009) (explaining, under pre-amendment version of the original source exception, that a relator may sometimes provide “different information of the publicly disclosed fraud . . . of great significance,” especially when the public disclosures themselves rely on uncertain or unavailable information).

182. *Id.* at 213.

183. *Id.* at 204.

184. *Id.* at 205.

185. *Id.* at 212.

186. *Id.*

187. *Id.*

to extend this case further than required. For instance, expanding the scope of the fraud often can materially add value. In *Winkelman*, the fraud scheme was well-defined in the public disclosure relating to the same drug and thus this relator did not add value. If, however, there were additional fraud schemes relating to other drugs, not only would it not likely trigger the public disclosure bar, but even assuming it had, producing evidence of fraud pertaining to other drugs would constitute added value that a reasonable person would consider important. Similarly, if the publicly disclosed information reveals fraud at one hospital in a chain, if a relator brings forth evidence that it is also occurring at another location, that would also materially add to the disclosure.

Second, the relator alleged that the scheme continued after the media coverage occurred.¹⁸⁸ The court noted that because CVS publicly argued that its conduct was appropriate, the public disclosure indicated that it was ongoing and there was no reason to think that the practice had stopped, and thus the allegation that it was continuing did not materially add to the disclosure.¹⁸⁹ In other situations, however, alleging ongoing fraud can materially add value. For instance, if the evidence in the public disclosure does not indicate ongoing fraud, such as a prior settlement or other indicia that the fraud had ceased, then ongoing fraud can materially add value. The key is whether a reasonable person would attach importance to the information.

Third, the relator proffered that he added specific examples of fraud not included in the media reports of price gouging.¹⁹⁰ The court concluded that the media had already reported that the price gouging scheme cost the government hundreds of millions of dollars.¹⁹¹ The mere addition of a specific instance of fraudulent behavior did not materially add to the underlying conduct that was publicly disclosed.¹⁹² This decision, however, should be limited to cases where a particular fraud scheme has been publicly disclosed in such a manner that would satisfy the equivalent of Rule 9(b). In such cases, merely including additional examples would not materially add value. Yet, when a public disclosure

188. *Id.* at 212.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

contains only vague allegations, additional details that a reasonable person would find important would satisfy the original source exception.

Fourth, and most significant, the relator alleged that he brought forth evidence of intent.¹⁹³ The court recognized that evidence of scienter is important and could suffice as a material addition to information in the public domain.¹⁹⁴ However, the relator did not possess true evidence of scienter. For instance, he did not allege knowledge of any meetings or documents outlining the company's intent to cheat. Rather, the relator relayed that from his experience the company was intending to defraud the government. His evidence included that CVS did not try to enforce certain programs, which was considered a cover for the fraud scheme, and did not train its employees under that program.¹⁹⁵ None of his proffered evidence, however, directly showed intent or guilty knowledge. Thus, the court did not consider his information material in light of the public disclosure that CVS was refusing to provide the lowest price to the government.¹⁹⁶ In sum, the court concluded that at most the relator added detail about the precise manner in which CVS was operating the HSP program and that "a relator who merely adds detail or color to previously disclosed elements of an alleged scheme is not materially adding to the public disclosures."¹⁹⁷

Although the result in *Winkelman* was correct and the court correctly noted that scienter was an important issue when addressing "materially added," care must be used to ensure this case is not stretched in the wrong direction. In fact, this article posits that, regardless of how well defined the fraud allegations are in a qualifying public disclosure, when a relator brings forth actual knowledge of scienter it should be presumed to materially add value. Because FCA cases often turn on the issue of scienter and since the government is never in a good position to have direct evidence of guilty knowledge, courts should presume that adding any inside evidence of scienter materially adds to publicly disclosed information. Even if some details regarding scienter are

193. *Id.*

194. *Id.* at 213.

195. *Id.*

196. *Id.*

197. *Id.*

in a public disclosure, a relator still satisfies the “materially adds” requirement by bringing forth other knowledge of scienter. For instance, if the public disclosure contained information regarding one internal meeting, but there were other corporate meetings discussing fraud, knowledge of other meetings likely meets this test because of the critical need and crucial role scienter plays in FCA cases.¹⁹⁸ The point is that evidence of scienter that is not already publicly disclosed is highly valued and should be presumed to materially add value.

At the same time, it is not sufficient for a relator to merely claim that her information provides evidence of scienter. Again, the relator in *Winkelman* did not present true evidence of intent. The relator did not attend meetings in which fraud was discussed or produce information pertaining to the formation or inner workings of the fraud scheme. Rather, the relator merely added his own personal insights and conjecture.¹⁹⁹ Thus, simply claiming that information helps prove intent is not sufficient.

Similarly, the Eighth Circuit rejected the relator’s argument that he was adding value in the form of scienter when in fact he was only adding his personal views or insights.²⁰⁰ In *United States ex rel. Paulos v. Stryker Corp.*, the relator filed suit in 2011 alleging that the company knew that its pain pumps were causing chondrolysis²⁰¹ and failed to disclose danger when applying for FDA approval or during subsequent sales of the devices.²⁰² The relator conceded that his allegations had previously been publicly disclosed.²⁰³ In fact, the issue was raised years earlier when several studies were published that eventually linked pain pumps to chondrolysis.²⁰⁴ The relator, nevertheless, argued that he was an

198. In addition, every employee in a meeting in which the fraud scheme was discussed would meet the “materially added” requirement. This standard is not intended to address the issue of multiple relators or who has the best evidence of fraud. Rather, the “first to file” bar within the FCA mandates that the relator who properly files and meets the standard is entitled to the award. 31 U.S.C. § 3730(b)(5) (2012). Thus, courts should not use the “materially added” prong as a method of weeding out relators merely because someone else might have stronger information.

199. *Winkelman*, 827 F.3d at 213.

200. *United States ex rel. Paulos v. Stryker Corp.*, 762 F.3d 688, 695–96 (8th Cir. 2014).

201. Chondrolysis is a severe type of shoulder arthritis. *Id.* at 690–91.

202. *Id.* at 695–96.

203. *Id.* at 692.

204. *Id.* at 690. The issue was first raised in the early 2000s, when doctors saw a spike in the number of patients developing chondrolysis, and questions were raised whether

original source because he possessed evidence of scienter.²⁰⁵ The court, however, noted that the only information tendered on this point was a 2005 report by the relator in which he suggested to Stryker that there might be a causal connection.²⁰⁶ The court correctly ruled that the relator did not materially add to the public disclosure because (1) the relator provided no meaningful evidence of scienter by merely suggesting a possible connection,²⁰⁷ and/or (2) the proffered information was already part of the publicly disclosed information linking the pain pumps to chondrolysis.²⁰⁸ Therefore, a reasonable person would not attach importance to the fact that in 2005 the relator suspected a connection; this connection had been established and reported in the media after extensive studies were not only conducted but reported in the media prior to the filing of his *qui tam* suit in 2011.²⁰⁹ If, however, the relator had attended meetings in which Stryker was discussing how to conceal studies or lie to the FDA, the result would have been different. True evidence of intent or guilty knowledge is the type of information that materially adds value; simply stating personal views or conjecture does not.

In sum, based upon the statutory text and framework, and considering the case law, the term “materially adds to the publicly disclosed allegations or transactions” means that a relator brings something to the table that adds value²¹⁰ or improves the quality of the qualifying public disclosure.²¹¹ It adds value if a reasonable person would attach importance to the information. Knowledge that is considered material can relate to any essential element of a FCA claim, and includes improving the quality of essential factual background, such as additional details regarding “the who,

“this spike was related to the use of medical devices known as ‘pain pumps’ to deliver anesthetics via catheter into patients’ joint spaces (the area surrounding a joint).” *Id.* “This concern triggered several studies on the effects of placing pain pumps in patients’ joint spaces and also bred numerous product liability lawsuits against pain pump manufacturers. . . .” *Id.* Eventually, it was concluded and reported that the pain pumps were the cause. *Id.* at 694.

205. *Id.* at 693–94.

206. *Id.* at 693.

207. *Id.* at 694.

208. *Id.*

209. *See id.* at 694.

210. *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298, 306–07 (3d Cir. 2016).

211. *Id.* at 306.

what, when, where and how of the events at issue.”²¹² Thus, a relator materially adds when her knowledge significantly enlarges the scope of the case.²¹³ In addition, regardless of how well defined the fraud allegations are in a qualifying public disclosure, when a relator brings forth knowledge of scienter that is not specifically contained in a qualifying public disclosure it should be presumed to materially add value. Because of the critical need and crucial role scienter plays in FCA cases, a relator who brings new evidence demonstrating that the defendant knowingly submitted a false claim *prima facie* meets this standard. For instance, if a relator attended a meeting in which a supervisor discussed the fraud scheme, then it would significantly add to the allegations, provided the government did not already have such evidence from the same meeting.

Returning to the hypothetical raised earlier in this article,²¹⁴ even though the government conducted an audit that determined that hospital XYZ must have been upcoding because 90 percent of the hospital’s Medicare patients are billed for pneumonia versus the state’s average of 30 percent, not only was her knowledge independent from the disclosure as explained earlier, but she also clearly had knowledge that *materially added* to the publicly disclosed allegations. Specifically, she provided evidence of scienter that was not contained in a qualifying public disclosure. Her allegations contained evidence of intent stemming from internal company meetings with agents of the defendant in which the fraud scheme was discussed. Her knowledge adds to the available information about the defendant’s scienter, i.e., the knowing submission of a false claim. This is information not contained in the audit and not normally available to the government. In short, when a relator has inside information that shows the company knew it was submitting false claims, that is *prima facie* evidence

212. *Id.* at 307.

213. By itself, merely adding a larger time period or geographic area to an already well-defined fraud allegation, however, may not meet the materially added standard. Yet, if the publicly disclosed fraud is not well-defined or does not contain significant details, then adding new transactions or occurrences would materially add. “As the level of detail in public disclosures increases, the universe of potentially material additions shrinks.” United States *ex rel.* Winkelman v. CVS Caremark Corp., 827 F.3d 201, 211 (1st Cir. 2016). Conversely, the smaller the level of detail in a qualifying public disclosure, the more readily a court should find that a relator’s knowledge of additional facts or details materially adds to the disclosure.

214. *See supra* Part II.B.2(a).

that the information meets the requirement of materially adding. At the same time, it must be more than suspicions, conjecture, or legal arguments.

c. Notify the Government Before Filing

Finally, under this second method of establishing the original source exception, not only must a relator have voluntarily provided the information to the government,²¹⁵ but there also is language that suggests a relator must notify the government of the fraud allegations *before* filing the *qui tam* complaint.²¹⁶ The statute reads: “‘original source’ means an individual . . . who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government *before filing an action* under this section.”²¹⁷ Thus, the statute contains language suggesting that a relator must contact a government official *before filing* a *qui tam* complaint. Unlike the other original source exception that hinges upon notifying the government prior to a public disclosure, there does not appear to be a significant purpose for requiring notification to the government of the fraud before filing suit under this exception, because this exception hinges upon the value of the information and not the timing.²¹⁸ Indeed, this exception applies in situations in which there was a qualifying public disclosure before contacting the government. Whether or not the relator gives a heads up that a suit is forthcoming does not alter that fact or impact whether the information materially adds value.

There are relatively few cases discussing this point and most miss the mark. One court, however, understood that even under the 1986 version this language was not intended to be a gateway for turning away relators, and has outright dismissed this as a requirement, stating that if a relator cooperates with the gov-

215. The term “voluntarily” was defined in the discussion of the first manner of meeting the original source exception and that definition also applies here. *See supra* Part II.B.1(c). The disclosure must be voluntary.

216. *See* 31 U.S.C. § 3730(e)(4)(B) (2012) (“[V]oluntarily provided the information to the Government *before* filing an action under this section.”) (emphasis added).

217. *Id.* (emphasis added).

218. *See id.* § 3730(e)(4)(B)(2).

ernment, the provision's intent is satisfied.²¹⁹ A few other courts have erroneously attempted to set some time limits, such as notice a day or week before filing.²²⁰ But those cases are misguided. Those courts incorrectly view this requirement as giving the government time to investigate the allegation. This assumption is faulty because "the average time it takes the government to intervene in a case is slightly over three years."²²¹ Thus, if the court were truly intending to give the government time to investigate the allegations, it would have to impose a requirement that the relator wait three years to file a *qui tam* complaint once informing the government of the fraud.

The purpose of notifying the government appears to be simply to alert the government of the upcoming filing of a *qui tam* complaint so that the government can be ready to promptly begin investigating the allegations once the *qui tam* complaint is filed. This is because the FCA requires service of the complaint under seal and only upon the Attorney General and the United States Attorney.²²² However, neither of these high-ranking officials actually conducts the factual inquiry.²²³ The concern is that the *qui tam* complaint, which remains under seal for only sixty days without a request for more time,²²⁴ will get lost in the government's mailing system because the Attorney General receives

219. United States *ex rel.* Ervin & Assocs. v. Hamilton Secs. Grp., Inc., 332 F. Supp. 2d 1, 10 (D.D.C. 2003); *see also* Hesch, *Understanding the "Original Source Exception," supra* note 57, at 34 ("There does not appear to be much value in demanding any prior notice, but if required, it should be very limited.")

220. *See, e.g.,* United States *ex rel.* King v. Solvay S.A., No. H-06-2662, 2015 U.S. Dist. 25132, at *10 (S.D. Tex. Mar. 3, 2015). A few courts have stated it cannot be simultaneous with filing the *qui tam*. *E.g.,* United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 865–66 (7th Cir. 1999).

221. Hesch, *It Takes Time, supra* note 1, at 931. "In reality, it often takes between three and six years for the government to properly investigate and bring a complex fraud case that satisfies Rule 9(b) and fulfills the duty to conduct a parallel criminal investigation without prematurely or wrongfully accusing a company of defrauding the government." *Id.* at 903. ("In short, the actual investigation period for cases in which the government intervenes can take three years for standard cases and six years for large and complex cases, and even as much as eight years in a [sic] rare situations."). *Id.* at 917.

222. *Id.* This article explains in detail the entire procedural process of the government's investigation.

223. *See id.* at 917–18 (explaining the delegation process).

224. According to the FCA, the *qui tam* complaint must be filed under seal and served only upon the Attorney General and United States Attorney. 31 U.S.C. § 3730(b)(2) (2012). The FCA provides an initial sixty day seal period for the government to evaluate the fraud allegations. *Id.* To obtain longer than sixty days the government must file an ex parte application asking the court for additional time. *Id.* § 3730(b)(3).

hundreds, if not thousands, of mailings each day.²²⁵ In addition, the Department of Justice in Washington, D.C. must determine whether to delegate certain cases to the United States Attorney's Office.²²⁶ Thus, the purpose of this language in the statute appears to be merely to notify the government that a *qui tam* complaint is about to be filed to merely ensure it can more quickly be distributed to the attorneys actually conducting the investigation.²²⁷

In short, even assuming there is a requirement that a relator notify the government *before filing*, it means that a relator's disclosure may occur at any time before filing the *qui tam* suit. The term "before" means "during the period of time preceding (a particular event, date, or time)."²²⁸ Therefore, a relator satisfies the "before" aspect of the original source exception if she notifies the government of fraud at any time before filing her *qui tam* complaint, even if it is only minutes before.²²⁹ Since the FCA does not impose any length of time requirement for such disclosures other than "before," courts should not impose their own.

225. Logistically, the government office tasked with investigating *qui tam* cases (the Civil Fraud Section of United States Department of Justice in Washington, D.C.) is even housed in a completely different building than the Attorney General. The Attorney General's Office is located at 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001. See *Department of Justice*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov> (last visited Apr. 3, 2017). The Civil Fraud Section, which has nationwide authority over investigating *qui tam* cases, moved outside of the Department of Justice's, main facility over fifteen years ago while the author worked there, and is presently located at 601 D. Street, N.W., Washington, D.C. *Fraud Section*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/civil/fraudsection> (last visited Apr. 3, 2017). The Fraud Section uses a post office box for *qui tam* communication because it too receives such large quantity of mail that it wants to ensure that it receives information timely. *Contact Us*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/civil/contact-us-9> (last visited Apr. 3, 2017).

226. Hesch, *It Takes Time*, *supra* note 1, at 917–18 (explaining the delegation process).

227. It is sufficient that the relator provide a draft of the complaint to the government prior to filing it. See *United States ex rel. Judd v. Quest Diagnostics Inc.*, 2014 U.S. Dist. LEXIS 73760, at *41 (D.N.J. May 30, 2014) (rejecting argument that submission of a disclosure statement, summarizing known material evidence and information related to the complaint, did not meet the requirement of providing information on which allegations were based prior to filing as "hyper-technical"); *United States ex rel. Woods v. Southern-Care, Inc.*, 2013 U.S. Dist. LEXIS 141524, at *7 (S.D. Miss. Sept. 30, 2013) (finding it sufficient to provide "information that includes any essential element of the fraudulent scheme").

228. *Before*, NEW OXFORD AMERICAN DICTIONARY (3rd ed. 2010).

229. Government officials are not always interested in learning all of the details, especially when told that a *qui tam* is about to be filed. Therefore, it is not necessary to provide all information to the government. It is sufficient to inform the government of the nature of the fraud and provide as much detail as requested.

2017]

PUBLIC DISCLOSURE BAR

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III. RESTATING THE NEW PUBLIC DISCLOSURE BAR AND ORIGINAL SOURCE EXCEPTION UNDER THE 2010 AMENDMENTS

This section restates the original source exception in order to provide a uniform set of standards and guidance to the courts and practitioners.

A. 2010 Public Disclosure Bar

The FCA allows relators to file a *qui tam* claim alleging fraud against the government and to share in the proceeds.²³⁰ However, the FCA also contains a public disclosure bar. The 2010 public disclosure bar reads:

The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.²³¹

The FCA's 2010 public disclosure bar provides for the dismissal of a *qui tam* claim that brings “substantially the same allegations or transactions” that were already publicly disclosed.²³² The public disclosure bar contains a three-part test: (1) whether there was a qualifying public disclosure of allegations or transactions; (2) whether the *qui tam* action contains “substantially the same allegations or transactions;” and if so, (3) whether the government objects or a relator qualifies as an “original source.”²³³

To be considered a qualifying public disclosure, however, the information must have been disclosed in one of the following

230. 31 U.S.C § 3730(b)(d) (2012).

231. *Id.* § 3730(e)(4)(A).

232. *Id.*

233. *See id.*; *see also* Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 293 (2010) (applying a three-prong test under the 1986 public disclosure bar, before the FCA was amended, to allow the government to object to dismissal). In short, the public disclosure bar is triggered only by a qualifying public disclosure; namely that the fraud was disclosed in one of the enumerated manners specified in this provision. If there is no qualifying public disclosure prior to the filing of a *qui tam* complaint, the relator need not meet the original source exception.

sources: “a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;” “a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation;” or “the news media.”²³⁴ If information exists in the public domain from any other source, it does not trigger the public disclosure bar and cannot be considered under the public disclosure bar. For instance, information on a company website or information revealed in a lawsuit in which the government is not a party are not qualifying public disclosures and cannot be considered as part of the public disclosure analysis. Only information contained in a qualifying public disclosure may be considered under the public disclosure bar.²³⁵ In addition, for “substantially the same allegations or transactions as alleged in the action or claim” to be considered “publicly disclosed,” the critical, or material elements of the allegations or transactions of the *qui tam* complaint must appear in the public disclosure.²³⁶ That means that the public disclosure must have either alleged fraud with respect to the same allegations or transaction in the *qui tam* complaint, or contain essential information about the same transactions or allegations to reach the conclusion that a fraud had occurred.²³⁷ In short, a qualifying public disclosure occurs only when the fraud is disclosed in one of the specifically enumerated manners identified in one of the sources listed within the FCA.

Even if there is a qualifying public disclosure, the government may still block the public disclosure bar. The 2010 public disclosure bar is not jurisdictional.²³⁸ It authorizes the government to oppose dismissal under the public disclosure bar.²³⁹ If the government notifies the court that it opposes dismissal based upon

234. See 31 U.S.C. § 3730(e)(4)(A).

235. See *id.*

236. See *id.*

237. See, e.g., *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (“Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.”).

238. See, e.g., *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 300 (3d Cir. 2016) (joining “the other circuits that have ruled that the amended version does not set forth a jurisdictional bar”); *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 810 (11th Cir. 2015) (“We conclude that the amended § 3730(e)(4) creates grounds for dismissal for failure to state a claim rather than for lack of jurisdiction.”); *United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 916 (4th Cir. 2013) (“It is apparent . . . that the public-disclosure bar is no longer jurisdictional.”).

239. 31 U.S.C. § 3730(e)(4)(A).

the public disclosure bar, the court must not dismiss the *qui tam* claim based upon the public disclosure bar.²⁴⁰ Under this condition, a relator need not satisfy the original source exception.

If the government does not file an objection, a relator may also remain in the case if she qualifies as an original source.²⁴¹

B. 2010 Original Source Exception

The 2010 original source exception reads:

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 provided the information to the Government before filing an action under this section.”²⁴²

To qualify as an original source, a relator must have either (a) reported the fraud allegations prior to the qualifying public disclosure, or (b) provided the government with information that is independent from and materially adds to the information contained in the public disclosure.²⁴³ Thus, the FCA provides two distinct ways of satisfying the original source exception to the public disclosure bar. A relator only needs to satisfy one of these standards to be an original source.

1. The First Original Source Exception: Disclosure to the Government Prior to a Qualifying Public Disclosure

A relator satisfies the first original source exception if she “voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based” *prior* to a qualifying public disclosure.²⁴⁴ This involves a four-prong test: the disclosure must be made (1) prior to a qualifying public disclosure; (2) to the government; (3) voluntarily; and (4) with information on

240. *See id.*

241. *See id.*

242. *Id.* § 3730(e)(4)(B).

243. *Id.*

244. *Id.*

which the allegations or transactions in a claim are based.²⁴⁵ When all four are satisfied, a relator is an original source under this subpart.²⁴⁶

The principal requirement under this standard is that a relator disclosed her allegations *prior* to a qualifying public disclosure. The test is straightforward: a relator qualifies as an original source if she discloses information about the fraud before a qualifying public disclosure occurred.²⁴⁷ It does not matter whether or not a relator was aware of any prior public disclosure. To qualify under this standard, she must disclose information to the government alleging fraud before a qualifying public disclosure. Even if a relator had first-hand knowledge of the fraud, if there had already been a prior qualifying public disclosure before she contacted the government, she would not meet this standard and would need to qualify under the alternative exception.

Next, the disclosure must have been made to the government.²⁴⁸ It is not sufficient that a relator tell the news media, her employer, or others of the fraud; the disclosure must be to the government prior to a qualifying public disclosure. The manner in which a relator informs the government is not important. For instance, she may call a government hotline, write a letter, or meet in person with a government employee. A relator need not contact the Attorney General or any of the various United States Attorneys. Rather, under this provision the “government” includes any government employee or official.²⁴⁹ Accordingly, this element is met if a relator informs any government official of the fraud allegations prior to a qualifying public disclosure.

In addition, the disclosure to the government must have been voluntary.²⁵⁰ “Voluntary” simply means that a relator was not legally compelled to provide the information.²⁵¹ It is not considered voluntary if a relator was required to provide the information pursuant to a subpoena or as part of a criminal plea agreement.²⁵²

245. *See id.*

246. *See id.*

247. *See id.*

248. *Id.*

249. *See supra* note 104 and accompanying text.

250. 31 U.S.C. § 3730(e)(4)(B).

251. *See supra* notes 106–12 and accompanying text.

252. 31 U.S.C. § 3730(e)(4)(B).

On the other hand, it is still considered voluntary even if a government investigator initiated the conversation.²⁵³ In short, provided that a relator elects to cooperate and disclose information regarding the fraud, it is considered voluntary as long as she was not compelled to provide the information.

Finally, the information that a relator provides to the government prior to any qualifying public disclosure must include information on which the allegations or transactions in a claim are based.²⁵⁴ This element is not intended to be onerous. Rather, it simply requires that the relator disclose the basis for a fraud allegation. A relator need not, however, include every piece of knowledge or even every element of a false claim. It is sufficient that a relator intended her report to say that the defendant was cheating or committing fraud and that she disclosed the fraud allegations to the government prior to a qualifying public disclosure.²⁵⁵ The purpose of this new method of obtaining an original source exception is to reward relators that approach the government with fraud allegations prior to a qualifying public disclosure. A relator's status is sealed if she approached the government prior to the public disclosure, and it does not depend upon revealing every detail of the fraud. It is sufficient if a relator describes the fraud scheme.²⁵⁶

2. The Second Original Source Exception: Independent of and Materially Adds to a Qualifying Public Disclosure

If a relator does not disclose the fraud allegations to the government prior to a qualifying public disclosure, she may still be considered an original source if she possesses knowledge that is “independent of and materially adds to the publicly disclosed allegations or transactions” and that she “has voluntarily provided the information to the Government before filing” the *qui tam* complaint.²⁵⁷ This involves a three-prong test: (1) a relator's knowledge is independent of the qualifying public disclosure; (2)

253. *Id.*

254. *Id.* § 3730(e)(4)(A)–(B).

255. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.02(B) (4th ed. 2016).

256. *See supra* notes 116–17 and accompanying text.

257. 31 U.S.C. § 3730(e)(4)(B)(2).

her information materially adds to the publicly disclosed allegations or transactions; and (3) she voluntarily provided this information to the government prior to filing a *qui tam* action.²⁵⁸

Knowledge that is “independent of . . . the publicly disclosed allegations or transactions” means that a relator cannot derive her knowledge from any of the qualifying sources listed in the public disclosure bar located in § 3730(e)(4)(A).²⁵⁹ In other words, the qualifying public disclosure cannot be the source of a relator’s knowledge.²⁶⁰ A relator has the burden of establishing the manner or means of acquiring the information in order to show that her knowledge was derived independent of the public disclosure.²⁶¹ This element is not intended to exclude a relator merely because she is alleging the same fraud scheme as noted in a qualifying public disclosure. Rather, this exception only bars a relator when she cannot demonstrate that she obtained the information independent of a qualifying public disclosure.²⁶² In addition, the original source exception no longer requires that a relator have “direct” knowledge of the fraud. Therefore, she can learn of the fraud through any sources other than a qualifying public disclosure.²⁶³ For instance, a relator satisfies this element if she learns of the fraud from an employee of the wrongdoer or even through a public lawsuit in which the government was not a party. On the other hand, if a relator cannot show that she obtained the information apart from a qualifying public disclosure, this element is not met.

A relator must also demonstrate that her knowledge “materially adds to the publicly disclosed allegations or transactions.”²⁶⁴ This focuses upon the value of the information. At the same time, however, it is not meant to block out a relator simply because there has been a public disclosure that contains similar allega-

258. *See id.*

259. *Id.*

260. *Id.*; *see also* Cause of Action v. Chi. Transit Auth., 815 F.3d 267, 283 (7th Cir. 2016).

261. Stennett v. Premier Rehab., LLC, 479 F. App’x 631, 635 (5th Cir. 2012).

262. *Id.*

263. In addition, a relator does not need to show that she had knowledge of the fraud *prior* to the public disclosure to meet this element; only that she learned of the fraud independent from the disclosure. At the same time, if she knew of the fraud prior to a qualifying public disclosure, it would establish that she did not learn of it through a qualifying public disclosure.

264. 31 U.S.C. § 3730(e)(4)(B)(2) (2012).

tions. A relator qualifies as an original source if she brings something to the table that adds value²⁶⁵ or improves the quality of the qualifying public disclosure.²⁶⁶ It adds value if it “contribute[s] significant additional information . . . so as to improve its quality.”²⁶⁷ Knowledge that is considered material can relate to any essential element of an FCA claim, and includes improving the quality of essential factual background, such as additional details regarding “the who, what, when, where and how of the events at issue.”²⁶⁸ A relator also materially adds value when her knowledge significantly enlarges the scope of the case.²⁶⁹ For example, if the publicly disclosed information reveals fraud at one hospital in a chain, and a relator brings forth evidence that it is also occurring at another location, that would also materially add to the disclosure.

Regardless of how well defined the fraud allegations are in a qualifying public disclosure, when a relator brings forth knowledge of scienter that is not specifically contained in a qualifying public disclosure, it is presumed to materially add value. Because of the critical need and crucial role scienter plays in FCA cases, a relator who brings new evidence demonstrating that the defendant knowingly submitted a false claim *prima facie* meets this standard. For instance, if a relator attended a meeting in which a supervisor discussed the fraud scheme, then it would significantly add to the allegations, provided the information from the same meeting was not already publicly disclosed.

Finally, the statute contains a requirement that a relator “has voluntarily provided the information to the Government before

265. United States *ex rel.* Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294, 306 (3d Cir. 2016).

266. *Id.*

267. *Id.*

268. *Id.* at 307 (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 217 (3d Cir. 2002)).

269. By itself, merely adding a larger time period or geographic area to an already well-defined fraud allegation, however, may not meet the materially added standard. Yet, if the publicly disclosed fraud is not well-defined or does not contain significant details, then adding new transactions or occurrences would materially add value. “As the level of detail in public disclosures increases, the universe of potentially material additions shrinks.” United States *ex rel.* Winkelman v. CVS Caremark Corp., 827 F.3d 201, 211 (1st Cir. 2016). Conversely, the smaller the level of detail in a qualifying public disclosure, the more readily a court should find that a relator’s knowledge of additional facts or details materially adds to the disclosure.

filing” a *qui tam* action.²⁷⁰ A relator voluntarily provides information when she has not been compelled by a subpoena or given the information only in exchange for a grant of immunity or as part of a criminal plea deal.²⁷¹ The author argues that information should also be considered voluntarily provided when given in response to an interview initiated by the government as part of an ongoing investigation.²⁷² The definition of “voluntarily” does not hinge upon who initiated the meeting.²⁷³ Rather, “voluntarily” means being made of a person’s “own free choice” and without being compelled.²⁷⁴ Accordingly, this element should be met absent a relator having been compelled, such as a subpoena or plea agreement requiring that the information be produced.

The statute also has language appearing to require a relator to notify the government of the fraud allegations *before* filing the *qui tam* complaint.²⁷⁵ Assuming that this is an enforceable requirement,²⁷⁶ a relator’s disclosure may occur at any time before filing

270. 31 U.S.C. § 3730(e)(4)(B)(2) (2012).

271. See *United States ex rel. Repko v. Guthrie Clinic, P.C.*, 490 F. App’x 502, 503 (3d Cir. 2012) (finding the information was not voluntary because providing the information was part of a plea deal that compelled disclosure); *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 340 (3d Cir. 2005) (finding the information provided in response to a subpoena was not voluntary).

272. The few courts that have addressed this issue have reached opposite results. See *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 704 (8th Cir. 1995) (holding that relator who responded to HUD investigator’s interview questions did not voluntarily provide information to the Government before filing suit); *United States v. McMahon*, No. 11-CV-4620, 2016 WL 5404598, at *10 (N.D. Ill. Sept. 28, 2016). However, those courts approached this issue from the wrong perspective. The plain language of the statute, which only requires voluntariness, does not permit a policy argument that *timeliness* is a factor, let alone dispositive in defining the term voluntary. There are other FCA provisions that address timeliness, such as the first to file bar and the triggering of the public disclosure bar. In addition, this particular original source exception has other safeguards regarding the usefulness of the information, i.e., it must materially add to the public information. Assuming there is not a pending FCA case and the information being provided by the relator materially adds to the public disclosure, Congress has spoken that the relator shall be allowed to proceed provided she voluntarily provided the new information to the government. The plain language of the Act and definition of the term voluntarily leaves no room to treat the decision of a relator to choose to disclose material evidence to a government investigator as anything other than voluntarily.

273. In addition, it is not necessary that the relator know at the time of providing the information that the FCA offers rewards for filing *qui tam* actions.

274. *Voluntary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/voluntarily> (last visited Apr. 5, 2017).

275. As discussed earlier, any requirement to notify the government prior to filing a *qui tam* case does not serve any useful purpose and should not be considered a jurisdictional requirement.

276. The author suggests that this is not a material requirement and should not be

the *qui tam* suit, even a moment prior to filing the *qui tam* complaint. The term “before” means prior to or preceding,²⁷⁷ which signifies the order in which events should occur, but not the length of time between events. Therefore, a relator satisfies this aspect of the original source exception if she notifies the government of fraud allegations at any time before filing the *qui tam* complaint. Because the FCA does not impose any actual length of time requirements for such disclosures, neither should a court.

CONCLUSION

Because the government is ill-equipped to detect fraud, Congress pays whistleblower rewards for reporting fraud against the government. The FCA’s *qui tam* provisions prove to be the most effective method of combatting fraud against the government and account for 70 percent of all fraud recoveries gained through cases pursued by the government.²⁷⁸ To avoid needlessly paying awards when the government is already hot on the trail of fraud, however, in 1986, Congress inserted into the *qui tam* provisions a public disclosure bar.²⁷⁹ The public disclosure bar prevents paying an award when fraud allegations have already been publicly disclosed in certain ways specified in the FCA prior to a relator filing a *qui tam* complaint. At the same time, Congress recognized that there remain valid reasons for enlisting a relator in certain circumstances even when the public disclosure bar is triggered.²⁸⁰ Thus, in 1986, Congress also added an “original source” exception to the public disclosure bar if the whistleblower had “direct and independent knowledge” of the fraud.²⁸¹ The courts were divided in determining the meaning of these requirements²⁸² and some courts too narrowly closed the door.

considered jurisdictional because it is not consistent with the purpose or intent of this new provision.

277. *Before*, NEW OXFORD AMERICAN DICTIONARY (3rd ed. 2010).

278. *See supra* note 6.

279. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3157 (codified as amended at 31 U.S.C. § 3730(e)(4)(A) (2012)).

280. S. REP. NO. 99-345, at 12 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5277.

281. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3157 (codified as amended at 31 U.S.C. § 3730(e)(4)(A)–(B) (2012)).

282. Hesch, *Restating the “Original Source Exception,” supra* note 17, at 114.

In 2010, Congress amended both the public disclosure bar and the original source exception of the FCA to loosen the requirements in order to find the right balance between attracting whistleblowers and not paying rewards when the government was already pursuing fraud.²⁸³ In addition to clarifying that a qualifying public disclosure does not include information learned in discovery in cases not involving the federal government, Congress provided that the government could waive the public disclosure bar altogether.²⁸⁴ With respect to the original source status, Congress rewrote the original source exception. The 2010 original source exception can basically be met in one of two ways: either (1) a relator told the government about the fraud before a qualifying public disclosure, or (2) a relator's information is independent of and materially adds to the publicly available information.²⁸⁵

Since 2010, only a handful of circuit courts have ruled on certain aspects of the new original source exception, but there remains considerable question and need for a uniform standard. For instance, the courts were split over the term "independent knowledge" from the 1986 version²⁸⁶ and are already divided over the meaning of the 2010 requirement that knowledge be "independent of" the public disclosure.²⁸⁷ In addition, the FCA did not define "materially adds" and the courts have not developed a full or uniform standard.²⁸⁸ Therefore, this article addresses the boundaries and application of the 2010 version of the original source exception. It outlines the statutory framework for meeting the 2010 original source exception, including a discussion of how the courts have been interpreting these new provisions. Because *qui tam* cases remain the most important anti-fraud tool, assuring that it is properly interpreted and applied is critical. Therefore, the last section of this article concisely restates the entire original source exception in order to provide a uniform standard and guidance to the courts and practitioners when interpreting the 2010 amendments.

283. Hesch, *Breaking the Siege*, *supra* note 15, at 230.

284. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 901 (codified at 31 U.S.C. § 3730(e)(4)(A) (2012)).

285. 124 Stat. 901-02 (codified at 31 U.S.C. § 3730(e)(4)(B) (2012)).

286. See Hesch, *Restating the "Original Source Exception," supra* note 17, at 125 (discussing different circuits' interpretations of "independent knowledge").

287. See *supra* Part II.B.2(a).

288. See *supra* Part II.B.2(b).