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A Fair Competition Theory of the Civil False Claims Act

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I. INTRODUCTION

Whistleblowers are helping recover over $5 billion a year of fraud against the federal government under the False Claims Act,[1] but reliance on whistleblowers and prosecutorial discretion raises challenges

1. Press Release, Dep't of Justice, Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014) [hereinafter Dep't of Justice Press Release], *archived at* http://perma.unl.edu/32CG-VNQQ.

when fraud allegations incorporate knowingly undisclosed regulatory violations.[2] On the spectrum of fraud charges, criminal charges fit the cases with the worst behavior: a healthcare provider billing Medicare for a service that is never actually provided.[3] Such behavior establishes clear losses for the government. More difficult, and the focus of this Article, is the distinction between civil fraud and non-culpable behavior under the civil False Claims Act (FCA). Does failure to disclose a known regulatory violation constitute civil liability under the FCA? Given the common difficulty in measuring the resultant harm, courts have struggled to articulate a cohesive regime of civil FCA liability for such clear regulatory violations.

For example, what if a provider billing Medicare knowingly identifies the wrong physician associated with an otherwise legitimate, effective healthcare service? Under existing case law, knowingly identifying the wrong physician *supervisor* does not generate civil liability under the FCA, but knowingly identifying the wrong physician *provider* does generate civil liability.[4] Courts use formalistic doctrines to find that some companies "implicitly" certify false compliance with regulations and thus are liable,[5] while others do not implicitly certify compliance and thus are not liable.[6] This erratic civil liability creates problems for all involved parties. Companies doing business with the government face uncertain liability in addressing regulatory compliance, as they may encounter dramatically different sanctions for similar regulatory violations. The government and society likely suffer underenforcement of regulatory violations, resulting in unnecessary risks from excess violations and misuse of government funds. Whistleblowers helping expose violations under the FCA may be less likely to come forward, wary of the risk that some clear, knowing regulatory violations are not legally actionable.

2. *See, e.g.*, United States *ex. rel.* Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001) (rejecting FCA liability if compliance failure "is only tangential to the service for which reimbursement is sought").

3. *See, e.g.*, Brief for the United States as Appellee at 10, United States *ex rel.* Shutt v. Cmty. Home & Health Care Servs., 305 F. App'x 358 (9th Cir. 2008) (No. 07-56060), 2008 WL 937385. The difference between criminal and civil sanctions as applied to corporate defendants is not always readily apparent. *See, e.g.*, Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

4. *Compare* United States *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707 (6th Cir. 2013) (finding no FCA liability for improperly identified supervising physician), *with* United States v. Mackby, 261 F.3d 821 (9th Cir. 2001) (upholding FCA liability for improperly identified physician provider).

5. *See, e.g.*, Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994) (noting a falsely implied certification of compliance with Small Business Act), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

6. *See, e.g., Hobbs*, 711 F.3d 707.

In this Article, I propose a new reading of the civil False Claims Act that is anchored on the principle of fair competition among those doing business with the government. Instead of focusing solely on punishment for the deception and immediate loss caused by a potential defendant, the FCA should be read as a solution to the problem that falsity and violations will occur in the government contracting process. A focus on fair competition comports with the FCA's goal of providing a level playing field for government business.

This reading flows naturally from the history of the FCA. The federal government does not itself produce all of the goods and services it uses, but it instead contracts with the private sector for certain needs.[7] The private sector ostensibly is superior to direct government production in providing those needs, due in part to competition and specialization. If, however, some private companies are more successful by secretly violating contracts in their government business without repercussions, then reliance on the private contracts becomes troubling.[8] By paying whistleblowers for information, the FCA further leverages the private sector to help detect and combat fraud.[9] Private entities can thus help the government through two distinct paths: by (1) producing goods and services per government contracts, and (2) revealing contractual breaches in existing government contracts.

The result of this competitive marketplace focus is that clear technical violations should normally be subject to FCA liability. Compliance with technical elements of contracts and regulatory schemes is costly; allowing a government contractor to avoid compliance costs may grant it a competitive advantage over other entities. In the long run, such a contractor may be able to push out competitors and obtain market power. Without competitors, the lone contractor may face little incentive to improve on pricing or services. The government then may pay more for inferior services, and this is the harm the FCA is well-equipped to address. Even though the precise level of competitive, long-term harm is difficult to measure, the underlying compliance costs are more easily measurable. Correcting inequities regarding non-compliance should help ameliorate the long-term competitive harms.

Courts can facilitate this application of the FCA by moving away from the excessively formalistic false certification doctrines and instead adopting a fair competition approach. Under this fair competi-

7. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 555 (2000) (discussing military reliance on private small arms manufacturing).
8. *See, e.g.*, *id.* (addressing the problem of defective weapons in the military).
9. *See* 31 U.S.C. § 3730 (2012) (authorizing whistleblower payment of up to 30% of the government recoveries under the FCA).

tion approach, if a defendant knows that it has committed a clear regulatory violation and bills the government without disclosing the violation, courts should presume the existence of competitive harm. The cost of compliance is a rough, low-end estimate for the sanction. This approach allows courts to focus upon their core competencies: identifying clear regulatory violations and determining the defendant's mens rea. The FCA's statutory procedures require extensive Department of Justice (DOJ) participation in the litigation process. Courts should rely on the DOJ and the contracting government agencies to evaluate the precise impact of violations on competitive markets. Since the DOJ can unilaterally dismiss any case over the objection of the whistleblowers, courts can set a bright-line rule regarding competitive harm without fear of abusive private litigation. If the DOJ allows the litigation to proceed, courts should presume that clear regulatory violations cause competitive harms. This broad presumption of FCA liability will support society's interest in government transparency and accountability, and it will facilitate the crucial role of whistleblowers in bringing difficult-to-detect violations to light.

I begin with some background on the False Claims Act in Part II. Part III outlines the present judicial doctrines that address clear regulatory violations in the government contracting context. Part IV describes the various problems with the existing doctrines, and Part V outlines the fair competition approach to the FCA. Part VI covers the numerous advantages of the proposal, and Part VII addresses a number of related concerns under the FCA.

II. BACKGROUND ON THE FALSE CLAIMS ACT

The False Claims Act is one of the most prominent tools used to combat fraud against the federal government. The FCA targets false or fraudulent behavior against the federal government through the imposition of both civil[10] and criminal[11] liability. The civil FCA generally focuses on "false or fraudulent claims" made to the federal government.[12] Defendants who knowingly make false claims for payment are liable, and the statute defines "knowingly" as a person who "acts in reckless disregard of the truth or falsity of the information; and require[s] no proof of specific intent to defraud."[13]

Originally, the statute was enacted to address the problem of defective goods being provided to the military during the Civil War.[14] Specifically, Congress was aware of the difficulties in assigning blame for defective war supplies:

10. 31 U.S.C. §§ 3729–3733 (2012).
11. 18 U.S.C. § 287 (2012).
12. 31 U.S.C. § 3729(a).
13. 31 U.S.C. § 3729(b)(1).
14. *See* Beck, *supra* note 7, at 554–65 (discussing the history of the FCA).

> Necessity, haste and carelessness can explain the acceptance of a great many of these contracts and a very great deal of inferior goods. But a large amount of blame must go to a horde of government-paid officials who, either through criminal negligence or criminal collusion, permitted or encouraged this robbing of the government treasury and cruelty to the American soldier * * * . Accused inspectors passed the blame on to those letting the contracts, the latter blamed the contractors, and the contractors in turn contended that they furnished goods according to specification.[15]

Due to the challenge of detecting and prosecuting such offenses, Congress incorporated *qui tam* provisions into the FCA.[16] The *qui tam* provisions allowed private litigants known as relators to pursue civil actions and prosecute cases of fraud in lieu of the Department of Justice.[17] Upon successful prosecution of a case, relators received a portion of the recoveries against the defendant.[18] The *qui tam* provision's purpose was "to hold out to a confederate a strong temptation to betray his coconspirator."[19]

The *qui tam* provisions fell into disuse around World War II, but they received renewed attention in 1986 when Congress enhanced the reward structure.[20] Legislators noted the need to provide sufficient incentives for the disclosure of fraud and the limited DOJ enforcement efforts.[21] The Senate recognized the FCA's importance in "deterring fraud."[22]

Today, relators can receive as much as 30% of the civil recovery, which can be substantial given the treble damages provisions in the statute.[23] Civil penalties also include $5,500 to $11,000 in fines per false claim.[24] While modern relators have great flexibility in filing civil FCA actions against companies they suspect are defrauding the federal government,[25] they must follow unusual statutory procedures before proceeding with litigation.[26] The DOJ has the first right of re-

15. United States *ex rel.* Marcus v. Hess, 127 F.2d 233, 236 (3d Cir. 1942) (alterations in original) (quoting 1 FRED. A. SHANNON, ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 56–58 (1928)) (internal quotation marks omitted), *rev'd*, 317 U.S. 537 (1943).
16. *See* Beck, *supra* note 7, at 554–65.
17. 31 U.S.C. § 3730(b) (2012).
18. *See id.*
19. *See* Beck, *supra* note 7, at 556 n.64 (citing CONG. GLOBE, 37th Cong., 3d Sess. 955–56 (1863) (statement of Sen. Jacob M. Howard)).
20. *See* Beck, *supra* note 7, at 554–65 (discussing the history of the usage of *qui tam* provisions).
21. *See id.* at 563–64.
22. United States v. Mackby, 261 F.3d 821 (9th Cir. 2001) (quoting S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269).
23. *See* 31 U.S.C. § 3729(a)(1) (2012).
24. *See* 28 C.F.R. §§ 71.3, 76.3 (2014).
25. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771–78 (2000) (describing how relators do not have to satisfy the modern requirement of standing).
26. *See* 31 U.S.C. § 3730(b) (2012).

fusal over any case,[27] and the DOJ may also unilaterally dismiss any case despite relator objection.[28]

In 2009, Congress passed the Fraud Enforcement and Recovery Act of 2009 (FERA),[29] which made some changes to the FCA. Of particular note, prior to 2009, the FCA did not contain any explicit reference to materiality. FERA added "materiality" to particular causes of action, namely §§ 3729(a)(1)(B) and 3729(a)(1)(G). It defined materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[30]

III. THE PROBLEM OF "TECHNICAL" CONTRACT VIOLATIONS

One recurring problem in determining liability for FCA violations lies in the complex statutory and regulatory regimes surrounding government contracts. If a company agrees to a government contract and commits a regulatory violation, can it be held liable under the FCA? In particular, this Article refers only to companies that have committed clear, knowing violations of unambiguous regulatory or contractual requirements.[31] As shorthand, I refer to these as regulatory violations. The parties are not debating whether a regulatory violation occurred, but rather whether the violation should legally generate civil FCA liability. The government or the relator argues that the defendant's contract fulfillment is deceptive or fraudulent because the defendant knows of a regulatory violation but fails to disclose it to the government. I do not address challenges regarding the reasonableness of different interpretations of ambiguous regulations or contracts.[32] I also do not focus on mens rea, but as indicated by the statute, the defendant must satisfy the knowing mens rea of the offense.[33]

Courts have shown hesitation in allowing FCA liability for regulatory violations, concerned with overly broad FCA enforcement.[34] While regulatory violations are evidence of wrongdoing, courts may be

27. *See id.*
28. *See* 31 U.S.C. § 3730(c)(2)(A).
29. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 U.S.C. and 31 U.S.C.).
30. *See* 31 U.S.C. § 3729(b)(4) (2012).
31. A rough analogy would be to say these are clear violations of a rule rather than a standard. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).
32. *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4.31 (2d ed. 2010).
33. 31 U.S.C. § 3729(b)(1). The FCA is not a strict liability statute. *See* SYLVIA, *supra* note 32, at § 4.31.
34. *See, e.g.,* United States *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 717 (6th Cir. 2013).

uncertain if the FCA is the proper route of enforcement. The Ninth Circuit, for example, held a healthcare provider liable under the FCA for knowingly misleading the government by submitting physical therapy bills under a different doctor's identity.[35] In contrast, the Sixth Circuit held that a healthcare provider was not liable under the FCA for knowingly submitting medical imaging bills involving unapproved doctor supervision.[36]

Regulatory violations may constitute fraud in two distinct circumstances. First, there could be fraud in the inducement, also known as pre-contract-formation fraud.[37] Pre-contract formation fraud occurs, for example, when a defendant does not intend to perform the contract at the time it signs the contract.[38] The other circumstance in which regulatory violations may constitute fraud occurs after the contract is signed. Post-contract formation fraud occurs when, after a defendant signs a contract, it subsequently commits a violation in performance of the contract but invoices the government as if it had properly performed.

A. Pre-Contract Formation Fraud

Fraud in the inducement covers a variety of problems occurring pre-contract formation; one example is bid-rigging.[39] Under this theory, fraud at the initial point of contract formation renders subsequent related business fraudulent.[40] For example, in *Marcus v. Hess*, electrical contractors colluded to "remove all possible competition" in bidding for government projects in the Pittsburgh area.[41] Many, but not all, of the contractors certified that their bids were genuine and noncollusive.[42] After completing the bidding process, the contractors submitted monthly estimates for payment.[43] Specifically, the Court held

35. *See* United States v. Mackby, 261 F.3d 821, 824 (9th Cir. 2001).
36. *See Hobbs*, 711 F.3d at 717.
37. *See* Sylvia, *supra* note 32, at §§ 4.29, 4.35.
38. *See, e.g.,* United States v. Lockheed Martin Eng'g & Sci. Servs. Co., 491 F.3d 254, 259 (5th Cir. 2007) ("[Relator] must prove . . . that Lockheed had no intention to perform the research contract according to the terms of the [offer]." (alterations in original) (citing United States. *ex rel.* Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 384 (5th Cir. 2003))); United States v. United Techs. Corp., 626 F.3d 313, 320 (6th Cir. 2010), *as amended* (Jan. 24, 2011) (holding improper cost estimate in defendant's offer is sufficient basis for FCA liability).
39. *See, e.g.,* United States *ex rel.* Miller v. Bill Harbert Int'l Constr., Inc., 608 F.3d 871 (D.C. Cir. 2010). It is unclear whether an unsuccessful bid-rigging attempt can be a basis for FCA liability. *See* United States *ex rel.* Taylor v. Gabelli, 345 F. Supp. 2d 313, 335–36 (S.D.N.Y. 2004) (finding no liability for unsuccessful bid-rigging).
40. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 543 (1943).
41. *Id.*
42. *Id.*
43. *Id.*

that the contractors' subsequent estimates for work were a sufficient basis for FCA liability.[44] The Court noted that the "fraud did not spend itself with the execution of the [initial] contract. Its taint entered into every swollen [subsequent] estimate which was the basic cause for payment of every dollar paid."[45]

Similarly, the Fifth Circuit in *United States ex rel. Longhi v. Lithium Power Technologies, Inc.* held that Lithium Power violated the FCA when it misled the Department of Defense's (DoD) Small Business Innovation Research (SBIR) program.[46] In *Longhi*, Lithium Power misrepresented its capabilities and personnel figures in order to qualify for $1.6 million in SBIR grants.[47] Even though Lithium Power ultimately utilized the grants to develop batteries the DoD found to be satisfactory, their misrepresentation resulted in liability for a trebled damages award of $4.9 million ($1.6 million multiplied by three).[48] The court explained that the purpose of the SBIR grant program was to award money to eligible deserving small businesses.[49] The government lost the intangible benefit of "providing an 'eligible deserving' business with the grants."[50] Because these benefits were "impossible to calculate, it [was] appropriate to value damages in the amount the government actually paid to the Defendants."[51] The court thus upheld the $4.9 million award.[52]

B. Post-Contract Formation Fraud (False Certification)

The second possibility for incurring liability under the FCA occurs after the contract has been formed. Perhaps due to difficulty in establishing ex ante mens rea regarding regulatory violations, more difficult cases of regulatory violations have been raised in the post-contract formation context. Liability for these post-contract formation violations generally occurs at the point of invoicing. These cases are known as "false certification" cases because the defendant has falsely certified through the invoice that it has complied with the government contract.

When a defendant is charged with FCA violations for having failed to comport with a technical requirement in a contract or regulation, courts have been hesitant to impose liability, given concerns with

44. *Id.*
45. *Id.*
46. United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 575 F.3d 458 (5th Cir. 2009).
47. *Id.* at 464.
48. *Id.* at 472.
49. *Id.* at 473.
50. *Id.*
51. *Id.*
52. *Id.*

overly broad FCA enforcement.[53] If there is a complex regulatory regime surrounding performance of the contract, minor technical violations may not seem sufficiently harmful to justify punishment as fraud.[54] This concern may be stigmatic in nature—that a minor technical violation, even if the defendant knowingly committed the violation, should not be labeled as fraud.

Alternatively, the underlying concern may simply be that the sanction for the regulatory violation should not greatly outweigh the harm from the violation. The harm from a regulatory violation may be difficult to establish, and a resulting problem is the calculation of damages. Since so much of the judicial system strives to impose liability in an attempt to remedy the harm caused, courts are uncertain how to assess liability when the harm caused is not immediately evident or is difficult to determine. For example, in *Ab-Tech*, the contractor did not comply with the terms of the Small Business Act. Nonetheless, the contractor did construct the automated data processing facility in accordance with the physical specifications.[55] While the government paid $1.4 million to Ab-Tech and requested $4.2 million plus interest as trebled damages, the court found there were no damages to treble.[56] "[V]iewed strictly as a capital investment, the Government got essentially what it paid for."[57]

A third potential version of this argument is that the government did not care about the regulatory violation and thus would have paid for the good or service regardless of the violation. Therefore, courts argue, there is no reason to penalize the defendant for the regulatory violation.[58]

For some or all of the above reasons, courts have applied a variety of approaches in limiting civil FCA liability for regulatory violations.

1. Express False Certification

The doctrine of express certification is relatively uncontroversial: a defendant becomes liable under the FCA for a regulatory violation by "falsely certifying that it is in compliance with regulations which are prerequisites to Government payment in connection with the claim for

53. *See, e.g.,* United States *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 717 (6th Cir. 2013).
54. *See* United States *ex. rel.* Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001) (rejecting FCA liability if compliance failure "is only tangential to the service for which reimbursement is sought").
55. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).
56. *Id.*
57. *Id.*
58. *See Mikes*, 274 F.3d at 697 ("[I]t would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay.").

payment of federal funds."[59] While the defendant may not have known about the regulatory violation prior to contract formation, this doctrine considers whether a defendant subsequently certifies or affirms its compliance post-contract formation.[60] If the defendant knows it is not in compliance yet certifies otherwise, that false certification is a false claim under the statute and thus generates FCA liability.[61]

2. *Implied False Certification*

The more difficult question occurs if the defendant has not expressly certified compliance with the relevant regulatory regime. Not every post-contract formation invoice incorporates an explicit formal compliance certification, so courts have also read in implied certification under certain circumstances.[62] In *Ab-Tech*, for example, the U.S. Army Corps of Engineers awarded a contract to Ab-Tech as part of a program supporting minority-owned small businesses.[63] After the contract award, the United States discovered that Ab-Tech had made improper arrangements with a non-minority-owned business in violation of the program rules.[64] The court held that Ab-Tech's progress payment vouchers in the course of performing the contract were an "implied certification" of continuing adherence to the requirements of the small business program.[65]

3. *Condition of Payment vs. Participation*

Some courts have restricted the implied false certification doctrine by distinguishing between conditions of payment versus conditions of participation.[66] The Sixth Circuit embraces this restriction. It generally recognizes the false certification theory of FCA liability in which a defendant "knowingly falsely certifies that it has complied with a statute or regulation the compliance with which is a *condition for Government payment* [from Medicare funds]," and this certification may be

59. United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011).
60. *See* United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1172 (9th Cir. 2006) ("So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.").
61. *See id.*
62. *See Ab-Tech*, 31 Fed. Cl. 429 (noting a falsely-implied certification of compliance with Small Business Act).
63. *Id.* at 432.
64. *Id.* at 432–33.
65. *Id.* at 433–34.
66. *See* United States *ex. rel.* Mikes v. Straus, 274 F.3d 687, 700–01 (2d Cir. 2001); United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 307 (3d Cir. 2011).

express or implied.[67] If the defendant's certification is a "condition of participation" in the Medicare program, however, there is no FCA liability.[68]

The Sixth Circuit recently struck down an $11 million FCA award in *United States ex rel. Hobbs v. MedQuest Associates, Inc.*, holding that "the 'blunt[ness]' of the FCA's hefty fines and penalties makes them an inappropriate tool for ensuring compliance with technical and local program requirements."[69] In *Hobbs*, the DOJ and a whistleblower brought an FCA action against MedQuest, a diagnostic testing company. They alleged that MedQuest used non-approved supervising physicians at two testing facilities.[70] When MedQuest enrolled two of its facilities as Medicare providers, it named specific board-certified radiologists as "supervising physicians" for the facilities.[71] The Centers for Medicare & Medicaid Services (CMS) requires that those named radiologists supervise contrast MRI and CT scans.[72] MedQuest acknowledged that it hired other physicians after enrollment and that some of those physicians, who were not radiologists, supervised contrast MRI and CT scans.[73] The district court granted summary judgment against MedQuest.[74]

The Sixth Circuit held there was no express certification by MedQuest. While the enrollment form specified that the supervising physicians expressly claimed to "abide by the Medicare laws, regulations, and program instructions," the court noted that the Government did not demonstrate any MedQuest intent to violate those regulations at the time of enrollment.[75] "Moreover, the certification does not contain language conditioning *payment* on compliance with any particular law or regulation."[76] The court noted that the only express certification on the CMS-1500 claim form was that the services were "medically indicated and necessary for the health of the patient."[77]

67. United States *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 717 (6th Cir. 2013) (emphasis added) (citing *Wilkins*, 659 F.3d at 305; Chesbrough v. VPA, P.C., 655 F.3d 461, 467 (6th Cir. 2011)).
68. *Id.* at 714 (citing *Wilkins*, 659 F.3d at 309; United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1220 (10th Cir. 2008); *Mikes*, 274 F.3d at 701–02).
69. *Id.* at 717.
70. The DOJ and the whistleblower also alleged improper usage of a former physician's billing code, and the district court also granted summary judgment against MedQuest on this improper usage count. *See id.* at 712.
71. *Id.* at 711.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 714–15.
76. *Id.* at 715.
77. *Id.* at 715.

The Sixth Circuit also held there was no implied certification by MedQuest. It noted that federal statutes and regulations did not specify the requirement of radiologist supervision.[78] Rather, the requirement for radiologist supervision of contrast MRI and CT scans came from the Local Medical Review Policies (LMRP), the set of policies specified by the CMS-selected local Medicare carrier.[79] The court held that signing the CMS-1500 claim form did not implicitly certify compliance with the LMRP.[80] The court also signaled that the LMRP only denied payment for limited reasons, and lack of radiology training was not one of those reasons.[81] Furthermore, an LMRP appendix acknowledged that a testing facility failing to meet a credentialing criterion could continue to operate for up to a year while obtaining the proper credential or licensure.[82]

Cumulatively, the Sixth Circuit reversed the trial court's grant of summary judgment, holding that there was neither express certification to a condition of payment nor implied certification to a condition of payment. Rather than allowing FCA liability, the court suggested that compliance could instead "be enforced administratively through suspension, disqualification, or other remedy."[83]

4. *Materiality*

One other response to the problem of technical violations has been materiality analysis: while the pre-2009 FCA did not contain an express materiality requirement, some courts read in materiality as an element of an FCA violation.[84] Other courts and commentators have already discussed the statutory and doctrinal bases for such a materiality imputation, so I do not explore those here.[85] The basic idea is that some regulatory violations are immaterial and thus not subject to FCA liability; I address some doctrinal variations in section VII.A.

Nonetheless, I raise the issue of materiality here because courts are divided, not only on the relevance of materiality in the FCA, but also on the intersection of materiality with false certification. Some courts have described false certification and materiality as indepen-

78. *Id.* at 715–17.
79. *Id.* at 711.
80. *Id.* at 717.
81. *Id.*
82. *Id.*
83. *Id.* at 717.
84. *See* James B. Helmer, Jr. & Robert M. Rice, *The False Claims Act and Implied Certification: An Update on the State of the Law*, 34 FALSE CLAIMS ACT & QUI TAM Q. REV. 51, 64–65 (2004) (summarizing implied certification doctrines and describing courts' search for a "sufficient nexus between payment and adherence to the particular contract term, regulation, rule or statute violated").
85. *See* SYLVIA, *supra* note 32, at § 4.49.

dent issues.[86] Other courts have explicitly rejected portions of false certification and relied on materiality as a limitation for FCA liability.[87] The Fifth Circuit has suggested that false certification doctrines are a substitute for materiality analysis. In a pre-FERA case, the Fifth Circuit noted that false certification doctrines drive at the issue of materiality, limiting FCA liability to "material misrepresentations made to qualify for government privileges or services."[88]

IV. THE FAILURE OF IMPLIED FALSE CERTIFICATION DOCTRINE

Courts' hesitation to apply FCA sanctions to regulatory violations has resulted in the patchwork, inconsistent doctrines that make liability unpredictable. In reality, implied false certification is misleading and formalistic. It is hard to imagine a scenario in which any person makes a claim to the government for money and is not at least implicitly agreeing to follow government regulations or terms. Why should a claim for government funds be any less deceptive or harmful if it does not include the magic phrase, "I certify that I am in compliance with government regulations"?[89] The present regime offers ambiguity as to the default assumption regarding clear compliance issues. As applied, the various false certification doctrines generally operate to reduce the opportunity for FCA liability in regulatory violations. There are numerous reasons to believe that the judicial creation of implied false certification and the resulting limited FCA liability for regulatory violations are undesirable outcomes.

A. Implied Certification Lacks Transparency

As a practical matter, judicial decisions incorporating implied certification lack transparency in explaining why some forms of non-com-

86. *See, e.g.*, United States *ex. rel.* Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001) (endorsing false certification doctrine but not addressing materiality requirement); Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 533 (10th Cir. 2000) (endorsing false certification doctrine but leaving materiality question open).
87. *See, e.g.*, United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 390–92 (1st Cir. 2011); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010) (holding broad implied certification liability limited by materiality of breach).
88. United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997) (quoting United States *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456, 461 (5th Cir. 1977)) (internal quotation marks omitted); *see also* SYLVIA, *supra* note 32, § 4:33; James B. Helmer, Jr. & Julie Webster Popham, *Materiality and the False Claims Act*, 71 U. CIN. L. REV. 839 (2003).
89. *See* United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1172 (9th Cir. 2006) (refusing to give "paramount and talismanic significance" to the term "certification" in part because it does not appear in the text of the FCA).

pliance are not violations of the FCA.[90] The Fifth Circuit has suggested that implied certification is just a substitute for materiality analysis.[91] In creating parallel doctrines of implied certification and materiality, however, courts are creating confusing and potentially divergent case law that makes liability less predictable. The lack of explanatory principles could easily lead other potential defendants to believe that regulatory compliance simply is not required in certain circumstances. Doctrinally, the implied certification doctrine's focus upon "conditions of participation" seems like a re-tread of the disfavored "outcome materiality" test.[92] Given that most circuits have rejected this particular materiality test and that FERA explicitly described a different materiality standard, the "conditions of participation" requirement seems to lack justification.

B. Limiting Implied Certification Lacks Statutory and Legislative Support

Moreover, FCA liability for regulatory violations seems to fit legislative intent, and using false certification to limit liability runs against that intent. The legislative history suggests that claims under the False Claims Act "may take many forms, the most common being a claim for goods or services not provided, *or provided in violation of contract terms, specification, statute, or regulation*."[93] The express condition of participation requirement also appears contrary to legislative intent, since the legislative history notes that "claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program . . . ."[94]

Unlike courts' claimed concern of "doubly penalizing" regulatory violations, the FCA targets falsity and fraud. Thus, courts should not solely analyze whether the government would have paid had it known of the regulatory violation. Rather, the full counterfactual is whether the government would have acted differently had it either (1) known

90. *See Hutcheson*, 647 F.3d at 385–86 ("The text of the FCA does not refer to 'factually false' or 'legally false' claims, nor does it refer to 'express certification' or 'implied certification.' Indeed, it does not refer to 'certification' at all. In light of this, and our view that these categories may do more to obscure than clarify the issues before us, we do not employ them here." (citations omitted)).

91. *See Thompson*, 125 F.3d at 902 (citing *Weinberger*, 557 F.2d at 461); *see also infra* subsection III.B.4 (discussing materiality).

92. *See infra* section VII.A; Rabushka *ex rel.* United States v. Crane Co., 122 F.3d 559, 563 (8th Cir. 1997) (requiring relator to demonstrate that government would have terminated a pension plan had it known about misrepresentations and nondisclosures).

93. Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 531 (10th Cir. 2000) (quoting S. REP. NO. 99–345 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274).

94. United States *ex rel.* Pogue v. Am. Healthcorp, Inc., 914 F. Supp. 1507, 1511 (M.D. Tenn. 1996) (quoting S. REP. NO. 345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274) (internal quotation marks omitted).

of the defendant's regulatory violations, or (2) known that the defendant lied about regulatory violations. While a regulatory violation may have been tangential to the government's interests, the fact that a company is willing to be deceptive about violations is core to the FCA and should have relevance to government decisions.

Finally, failure to find liability also cuts against the core assumption of entities working with federal funds: "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law . . . ."[95] There is little in the statute or legislative history to suggest that regulatory violations should not constitute civil FCA liability.

C. Limited FCA Liability Leads to Underenforcement

There are numerous reasons to believe that there is underenforcement of regulatory violations. Whistleblowers and agencies can supplement enforcement through the False Claims Act, but the false certification doctrines typically operate to limit civil FCA liability for cases of regulatory violations.

For a regulatory violation, there exists a direct enforcement mechanism: the regulatory agency can pursue administrative or civil actions against the defendant. The distinctive aspects of allowing a civil FCA action are twofold: first, the FCA allows for third parties to become involved in the enforcement process, and second, the FCA provides for treble damages and per-claim penalties. I assume here that a civil FCA action is supplementary in nature: FCA liability is not displacing or substituting for direct regulatory enforcement.[96]

I also assume regulations focus primarily on direct benefits of regulation.[97] For example, under *Hobbs*, I assume that the regulations requiring radiologist supervision of MRIs are primarily because of regulator concern for the safety and efficacy of the patients receiving those MRIs at MedQuest facilities.

1. Low Direct Harm and Constrained Enforcement Resources

For the same reasons that courts are hesitant to assign FCA liability (and perhaps explicitly because courts are hesitant to assign liability), regulators may not prioritize seeking and correcting technical

95. United States v. Mackby, 261 F.3d 821, 828 (9th Cir. 2001) (quoting Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 63 (1984)).
96. It is entirely possible that an agency might reduce enforcement efforts knowing that another agency or whistleblowers have incentives to bring enforcement actions. Nonetheless, as discussed below, given that the regulatory violations most likely to be problematic from an implied certification perspective are probably not high on the primary agency's priority list, this substitution effect is unlikely.
97. *See* discussion *infra* subsection IV.C.5; there are a variety of reasons to believe that market competition is not a primary emphasis for regulation.

violations. As an organization, a regulatory agency may prioritize detection and prosecution of the most severe offenses with the greatest immediate, direct harm.[98]

For both retributive and deterrence rationales, this approach may make sense for a regulator with limited resources.[99] Serious violations that cause harm deserve sanctions, and society may be better off if those serious violations can be deterred. Nonetheless, society could still be better off if both technical violations and serious violations were deterred; the resource constraint results in the emphasis on serious violations.

Even without explicit organizational prioritization of serious offenses, individual regulators likely face incentives to pursue the serious offenses. An auditor working for HHS, for example, may find her career prospects improved if she identifies and pursues serious violators that have directly caused social harm to the public. Serious violations that cause tremendous direct harm will likely attract greater media and public attention.

2. *Costs of Detecting and Sanctioning Non-Compliance*

Distinct from the limited resource and prioritization argument above, the costs of detecting non-compliance and compelling compliance may be too high for the regulator. Even if the regulator has sufficient resources for detection and investigation, the organization might apply cost-benefit analysis and determine that the costs of detection and enforcement outweigh the perceived net direct benefits of compliance.[100]

More specifically, compliance with the regulation itself may be socially desirable in that the costs of compliance, born by the regulated company, are less than the aggregate social benefits provided by regulatory compliance. Because detection and enforcement are costly, however, a regulator might determine that those regulation costs exceed the aggregate social benefits provided by compliance. In the alternative, a regulator might add the regulated company's compliance costs with the regulation costs and find that those costs exceed the aggregate social benefits of compliance. In either scenario, a regulator might rationally decide that detection and enforcement are not in soci-

98. *See, e.g.*, DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2 (2013), *archived at* http://perma.unl.edu/WF2P-REKM; DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.230(A) (1997); DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.300(A) (rev. ed. 2008).

99. *See, e.g.*, Margaret Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9 (2010).

100. *See* R.B. COOTER & T. ULEN, LAW & ECONOMICS 510 (5th ed. 2008) (noting that social planners should minimize social costs, which equal "the sum of the harm [the offense] causes and the costs of preventing [the offense]").

ety's best interest. I will refer to this line of analysis as a static cost-benefit analysis.

To come to such a conclusion, a rational regulator would entertain certain beliefs. First, the regulator might believe that deterrence of non-compliance is not possible or is ineffective. If deterrence were possible, the static cost-benefit analysis suggested above might not come into play if the regulator does not actually incur high detection and enforcement costs; the threat of detection and enforcement is sufficient to obtain compliance. Under a rational model of company behavior, deterrence might fail for a number of reasons. First, regulated companies might not believe in the credibility of the regulator's threat to detect and enforce. There could be lack of credibility in both the short term and long term, due in part to the uncertainties described above. Second, non-compliance might still be rational if the probability of detection and sanction is sufficiently low and the penalty for doing so is also relatively low. More precisely, the expected costs of non-compliance might be sufficiently low that non-compliance is the rational, amoral choice for the company.

Alternatively, it is possible that a regulator simply does not prioritize deterrence and thus adheres to the static cost-benefit analysis. Deterrence is notoriously difficult to measure, as a regulator must attempt to estimate how much non-compliance there would have been had she not taken enforcement action.

As a third possibility, it is possible that the regulator believes a cooperative approach may be a more cost-effective method of managing the regulated industry.[101] Determining liability through conflict may escalate the transaction costs of determining whether or not there have been regulatory violations. Cooperation may be a more desirable model, in which regulators and the regulated entities work together towards the common goal of minimizing social harms. For serious violations that garner broad public attention, cooperative solutions are likely unacceptable politically. Public pressure for retribution will force punitive measures against a corporation that, for example, recklessly poisons customers. This Article focuses on technical regulatory violations, though, which are less likely to draw broad political pressure.

3. *Regulatory Capture*

A cooperative approach might look similar to the scenario of regulatory capture.[102] According to capture theory, a regulatory agency

101. *See id.* at 242–43 (discussing the importance of relationship repair in contract law).

102. *See, e.g.*, STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 26–52 (2008); PREVENTING REGULATORY CAP-

may come to disregard the public interest and instead become focused on serving the entities it should be regulating.[103] If capture is a possibility, low-level, technical regulatory violations seem to be the best area for regulators to give in to companies. These technical violations will not draw excessive media attention or political opposition. The potentially high volume of technical violations makes such concessions valuable to the regulated companies.

4. Failure to Prioritize Incapaciation

As noted above, regulators might not prioritize deterrence of technical regulatory violations for a variety of reasons. I suggest there is a further, related reason to urge greater emphasis on technical regulatory violations: prosecution of such violations may actually lead to an incapacitation effect, alternatively described as specific deterrence of the company that is being prosecuted. This incapacitation might occur through a number of mechanisms.

First, the technical regulatory violation might be an early step in the course of a more serious offense.[104] For example, detection and prosecution of a company that is in the process of disposing of a small amount of waste improperly may prevent that company from continuing in that improper disposal course of action. If that detection and prosecution had not occurred in a prompt fashion, the ongoing improper disposal might have gotten worse, to the point where it would be causing measurable harm to the environment and surrounding areas.

In a similar fashion, companies that commit technical regulatory violations may be also prone to committing more serious violations.[105] By identifying and prosecuting the technical violation, there is pressure on that type of company to steer clear of more serious violations.

As noted above, regulators' failure to prioritize such technical regulatory violations may simply be due to resource constraints and the uncertainty of whether such technical regulatory violations actually

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TURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., 2013) [hereinafter PREVENTING REGULATORY CAPTURE].

103. *See, e.g.*, Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

104. *See, e.g.*, United States v. Christopher, 142 F.3d 46, 55 (1st Cir. 1998) (discussing the violation of a regulatory order as a potential component of wire fraud); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 266 (2002).

105. *See* Dorothy Thornton, Neil A. Gunningham & Robert A. Kagan, *General Deterrence and Corporate Environmental Behavior*, 27 LAW & POL'Y 262 (2005) (describing company strategy of "overcompliance" with regulations to demonstrate good citizenship).

lead to worse offenses.[106] In a more cynical turn, though, it is also possible that regulators deliberately avoid pursuing such minor violations in the hopes that such violations become more serious and thus beneficial to their careers.

5. *Failure to Consider Competitive Harm*

Regulators may also underestimate or disregard the harm resulting from non-compliance and thus underenforce compliance. The fact that only limited companies in an industry may be compliant and thus incurring greater expenses may not be an important factor for regulators, who may favor taking a case-by-case approach towards each regulated company. Moreover, there is good reason to believe that underenforcement exacerbates the competitive harms from regulation.

First, regulatory capture seems more likely with the power of a larger, more established company.[107] Smaller companies are less likely to have surplus resources to invest in government affairs.

Second, on an individual basis, individual regulators may also favor lax enforcement with larger companies in the anticipation of a comfortable private-sector job after leaving government service.[108] Again, smaller companies are less likely to have the infrastructure and capacity to absorb such additional labor.

Third, government officials in charge of an awarded contract are likely to treat technical regulatory violations as "immaterial." A government official may have a variety of justifications for awarding a contract to a large company; the decision may be overdetermined. Upon discovery of some technical regulatory violations, it may be easy ex post to continue justifying the award of the contract. Effectively, the official tells himself that the large company would have been awarded the contract anyway, even if he had ex ante known about technical regulatory violations. Because public awareness of additional, previously undisclosed regulatory violations do not all occur at one point in time, the official can continue to claim that each newly discovered regulatory violation is immaterial, even though in aggregate those violations might have been sufficient to award the contract to another party.

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106. *See Factors in Decisions on Criminal Prosecutions for Environmental Violations*, DEP'T OF JUSTICE (July 1, 1991), http://www.justice.gov/enrd/selected-publications/factors-decisions-criminal-prosecutions, *archived at* http://perma.unl.edu/8ZFQ-UJX5 (explaining factors to be considered when determining whether to prosecute).

107. *See* Luigi Zingales, *Preventing Economists' Capture*, *in* PREVENTING REGULATORY CAPTURE, *supra* note 102, at 124, 144.

108. *See id.*

Fourth, government officials in an "external" regulatory sphere are also likely to disregard competitive harm in the decision to enforce a regulation. For example, a defense contractor might violate an OSHA regulation that is incorporated by a generalized statement of compliance in the DoD contract. As an independent decision maker, OSHA is likely to look solely at the direct costs and benefits of pursuing enforcement action against the defense contractor. OSHA is unlikely to consider what impact regulatory enforcement would have upon the competitive marketplace for defense contractors; OSHA's more relevant frame of reference is all companies that fall within the regulations' sphere.

Finally, there are reasons to believe that regulators may be more likely to pursue a cooperative or non-aggressive enforcement approach with larger companies.[109] Since cooperation is ostensibly less costly than a conflict-centric litigation approach and larger companies tend to have longer track records and a longer ongoing relationship with the regulator, cooperative enforcement may appear more attractive with the larger companies. Regulators may find it difficult to establish trusting, cooperative relationships with smaller companies and their shorter track records. This may be a legitimate investment on behalf of the regulator, but it may also be evidence of a sunk cost fallacy regarding past investment in the large company. It is possible that a cooperative approach may foster greater compliance, but it may also foster weaker compliance if the larger company can simply demonstrate "good faith" efforts to improve.

The combination of these factors suggests that there may be harms to the competitive marketplace resulting from regulatory enforcement. Regulations may inherently favor certain companies, and underenforcement of regulations may exacerbate the problem. In the short term, certain competitors may bear the burden of this competitive harm. The companies that comply with regulations face higher costs and are potentially less competitive than their non-compliant counterparts. In the longer term, the public and the government may bear the competitive marketplace harm; if the non-compliant companies come to dominate the marketplace, there may be no compliant alternatives for government contracts.

As a result, regulatory violations are likely underenforced by regulators. Therefore, broad liability for regulatory violations under the FCA is a desirable supplement to direct enforcement.

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109. *See generally* Peter C. Yeager, *Structural Bias in Regulatory Law Enforcement: The Case of the U.S. Environmental Protection Agency*, 23 SOC. PROBS. 330, 333 (1987).

D. Unnecessary Risks for Whistleblowers

Unpredictable liability for regulatory violations under the FCA also produces unnecessary risks for whistleblowers. Whistleblowers face a variety of risks upon choosing to expose wrongdoing by their employer. A whistleblower may be fired or face other negative career consequences from her decision to blow the whistle, including being blackballed by the industry.[110] She may also encounter social consequences, such as the disfavor of colleagues and supervisors, for her actions.[111] There may also be financial consequences beyond employment, as the revealed wrongdoing may result in the downfall of her employer and perhaps the loss of her retirement funding.

The unprincipled, unclear false certification doctrine further exacerbates the risks for whistleblowers. A potential whistleblower faces additional uncertainty in revealing clear regulatory violations: will a court even recognize and compensate her for her efforts? It is understandable if such uncertainty discourages whistleblower participation in a larger sense; will a whistleblower know when fraud constitutes a regulatory violation as opposed to a more "serious" violation that courts are likely to recognize?

V. PROPOSAL: THE FAIR COMPETITION THEORY OF THE FCA

A. An Instrumental View of *Hobbs*

Let us return to *Hobbs* for a moment. The Sixth Circuit did not specify precisely why it felt the FCA was too "blunt" of an instrument to be applied to the knowingly incorrect specification of supervising physicians; its analysis focused on the false certification doctrines described above.[112] If we take a more instrumental view of *Hobbs*, it is possible that the court was looking to serve society's general interests through cost-benefit analysis—do the benefits of allowing FCA liability exceed the costs of doing so? One basic unstated motivation may have been the lack of allegations of actual harm occurring to patients due to the qualifications of the supervising physicians. The court might have felt that assessing any civil monetary sanction was excessively punitive without a method of quantifying any societal harm in the form of injured or misdiagnosed patients.

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110. *See, e.g.*, Jessica R. Mesmer-Magnus & Chockalingam Viswesvaran, *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, 62 J. BUS. ETHICS 277, 281–82 (2005).

111. *Id.* at 281.

112. As discussed *infra* in Part VI, the lack of transparency in the underlying logic of FCA liability raises a number of problems, including the challenge of predicting judicial decisions regarding liability.

More generally, the court may have been evaluating the costs and benefits of applying FCA liability to the facts of *Hobbs*. Let us assume there was cost-benefit analysis justifying the general principle that labs must have a named radiologist supervise the technicians conducting the MRIs. This analysis ostensibly incorporated the additional risk of harm or error that might result from the average unsupervised technician conducting the MRI. When weighed against the cost of paying a supervising radiologist, the additional labor cost ostensibly was less than the expected harm from the unsupervised technician.

The Sixth Circuit thus may have been suggesting that the specific facts of *Hobbs* did not satisfy cost-benefit analysis. Perhaps the lack of error or harm suggests that the actual supervising physicians, while not radiologists by training, were sufficiently skilled in supervision such that there was no real increase in the comparative expected harm. Alternatively, perhaps the technicians employed by MedQuest were sufficiently skilled such that supervision by radiologists would not have improved their performance.

Another parallel possibility is that, regardless of whether the facts of *Hobbs* satisfied cost-benefit analysis, incorporation of civil FCA liability would be excessive in comparison to the harm caused by claiming the wrong supervising physicians. It is possible the court did not value the potential deterrence generated by higher civil sanctions available via the FCA, or that the court did not want judicial resources involved in such cases.

The larger problem, though, is that even if some form of cost-benefit analysis justified the lack of liability in *Hobbs*, the court was not transparent in the decision. As discussed earlier, there is little reason to believe false certification doctrines are well directed toward social goals. MedQuest, competitors, and future competitors may draw the wrong conclusions from the *Hobbs* decision. For example, they might infer that compliance with certain regulations is unimportant and not worth substantial investment. Whistleblowers would certainly draw the conclusion that authorities were uninterested in learning about allegations of improper physician supervision.

Worse yet, there may be a real impact in the marketplace due to MedQuest's violations. Compliance is costly. Permitting such technical violations by entities that are capable of minimizing the risk of these technical violations gives those entities a competitive advantage. In *Hobbs*, MedQuest gained a competitive advantage by using non-radiologist physicians to supervise contrast MRI and CT scans. Radiologists are among the highest compensated subspecialist physicians, earning twice as much as a family physician.[113] Other diagnostic testing organizations, presumably following the law, would have double the supervisory labor costs of the MedQuest labs. Without the participation of the whistleblower in *Hobbs*, it is unclear if and when the federal government would have discovered the regulatory violations.

B. A Fair Competition Approach to the FCA

While theoretically desirable, the reality is that courts would likely perceive the express cost-benefit analysis discussed above as costly and ill-suited for judicial analysis; such analysis is better performed by the regulating or enforcement agencies. As discussed in Part IV, however, existing false certification doctrines present many problems.

Courts can improve by rejecting existing implied certification doctrine and instead adopting a fair competition approach to the statute. Fundamentally, when dealing with an FCA case premised on clear regulatory violations, courts should operate with the presumption that regulatory compliance satisfies cost-benefit analysis. Given that the DOJ can control whether FCA cases proceed or not, courts can rely on Executive Branch oversight to determine whether asserting liability is in society's best interest. Through this presumption, courts can focus on their comparative strength: identifying clear regulatory violations and the attendant mens rea.[114] Stated another way, the default assumption for an undisclosed and clear regulatory violation is civil FCA liability. Under this approach, the only difference between pre- and post-contract formation liability under the FCA is the mens rea timeframe—pre-contract formation liability looks at mens rea at the time of contract agreement, while post-contract formation liability looks at mens rea at the time of invoicing or payment.

This assumption makes sense within the purposes and framework of the FCA. Rather than focusing solely on punishing fraud and the elements of deceit and loss, I suggest that the FCA is also cognizant of fair competition in the marketplace. By relying upon companies in the private marketplace, the federal government obtains benefits that would be more costly to provide if it were to produce those goods or services alone. Rather than building data centers itself, the federal government issues procurement contracts to allow private businesses to build those data centers at comparative lower cost.

113. *See* Leslie Kane & Carol Pekham, *Medscape Physician Compensation Report 2014*, MEDSCAPE MULTISPECIALITY (Apr. 15, 2014), http://www.medscape.com/features/slideshow/compensation/2014/public/overview, *archived at* http://perma.unl.edu/49Z7-5WB3?type=live.

114. As noted in the statute, FCA liability requires a "knowing" mens rea. *See supra* note 13 and accompanying text. The fair competition approach to the FCA does not affect the mens rea requirement; this is not a proposal for strict liability.

Fair competition is key to making this system work. If a private business can obtain a government contract without competition, the government may not enjoy any comparative cost savings. In the same way, a private business that violates government regulations may obtain an advantage over competitors because compliance with regulations is costly, and a non-compliant business would have lower costs. Those illegitimately lower costs might allow a non-compliant business to offer goods or services to the government at a price that compliant business could not match. In the long run, not only do the compliant businesses lose out, but the government loses out, too, as it may end up with marketplace of only non-compliant businesses.

1. Cost of Compliance as a Sanction

Courts may have difficulty in precisely calculating the level of competitive harm and thus the relevant sanction. One basic first step in addressing the level of harm is to calculate the cost of compliance. Courts can look at the cost of compliance as a rough low-end measure of the benefit gained by the non-compliant company. Given that the non-compliant company knowingly failed to comply, logic suggests that a rational company would choose to do so only if it believed the expected gains from non-compliance exceeded the cost of compliance. Thus, the cost of compliance can be a low-end estimate for the expected benefit enjoyed by the defendant.[115] The key first step for courts, then, is to apply a sanction at least as high as the cost of compliance. A defendant who commits a technical violation should pay civil sanctions that would be at least equivalent to the cost of the defendant having properly implemented a control system that would have caught such a technical violation.

This proposal thus avoids the problem of focusing excessively on the difficult question of determining the precise level of harm to the government. Focusing on fair competition also addresses the secondary concern that may underlie courts' reluctance to incorporate civil liability for technical regulatory violations: that the weight of fraud sanctions exceeds the harm from the violation. As noted above, the fair competition assumption gives courts a method of estimating at least the defendant's gain from the violation. Rather than viewing the sanction as punitive, though, courts may view FCA liability as analogous to disgorgement. The defendant gained some benefit from the regulatory violation, and the defendant should at least pay back that

115. In theory, the proper sanction should equal the total harm caused by the non-compliance; as noted above, such calculation is likely difficult and better performed by a specialized agency. Nonetheless, the treble damages provision of the FCA, along with the per-claim sanctions, may provide additional leverage to move in the proper direction of full harm.

gain. By emphasizing this civil disgorgement aspect, courts can move away from the stigmatic claims of labeling the behavior as fraud.

While using competition as a guideline for FCA liability will improve the current analysis, it is important to distinguish this approach from one that explicitly embraces greater market competition as a guideline for FCA liability. It is entirely possible that greater regulatory enforcement might lead to reduced market competition; I discuss this possibility in section VII.F. Nonetheless, I argue that fair competition is a step in the right direction, and the focus on compliance costs is an area that courts have comparative advantages in addressing. Comparatively, assessing actual greater market competition is an area better handled by Congress and expert agencies. Agencies will have every opportunity to weigh in on cases that do not actually improve market competition through the procedures of the FCA.

Also note that this proposal does not accurately reflect true disgorgement. Fair competition would require full disgorgement for improper profits, but such calculation is difficult. From a disgorgement perspective, low-compliance providers may gain improper profit and may secure government business as a result of their low-compliance advantages. Alternatively, though, those low-compliance providers may not be gaining any additional profit in comparison to a high-compliance provider because their avoided costs of compliance are transferred to the government in the form of a lower bid. There still may be difficult-to-measure benefits accruing to the low-compliance provider in its ongoing business: the fact that it obtained government business may have reputational benefits and may ease the process of obtaining future business.

This proposal also does not claim to be a precise calculation of actual harm to the government. As noted above, in the short term, it is possible that the government gained the "benefit" of the non-compliance; a company may have saved money by not complying and passed along those savings to the government in the form of a lower bid. In the longer term, estimating the changes to the marketplace as a result of technical regulatory violations will be a costly and imprecise endeavor.

Providing civil liability based on the cost of compliance is a rough proxy for fair competition. In summary, this fair competition framework proposes setting aside existing false certification doctrines for clear regulatory violations. In other words, all requests for payment implicitly certify compliance with applicable rules and regulations. If the defendant was aware of clear non-compliance and submitted a request for payment without disclosing the non-compliance,[116] the defendant should be civilly liable under the FCA.

2. *Limited Defenses Regarding No Competitive Harm*

As part of the court's limited role in analyzing competitive harm, there should be very limited means by which a defendant could affirmatively defend against the presumption of competitive harm.

a. *Competitive Market with No One in Compliance*

First, the presumption of competitive harm may be overcome if the defendant can demonstrate that there is a thick competitive market in which all competitors routinely forgo compliance with the relevant regulations and none of the competitors face sanctions for their non-compliance. These conditions present a situation where seemingly everyone agrees that compliance is not required and is apparently unimportant. If a defendant can establish this, there is no reason to apply civil liability under the FCA.

Of course, direct regulatory action by the relevant agency is still an enforcement possibility, and to the extent that agency wishes to begin enforcement efforts in a fully non-compliant industry, direct regulatory action makes sense as a first step. Courts should be wary of too quickly applying civil FCA liability to other companies after an agency has first "made an example" of one non-compliant company in a historically non-compliant industry.

b. *De Minimis*

Second, a defendant could potentially defend an FCA claim through *de minimis* analysis, arguing that the regulatory violation is too minor for the courts to consider. I suggest that the relevant dollar amount is the civil penalty minimum, presently at $5,500.[117] Thus, if compliance with the regulation would have cost an order of magnitude under $5,500, then the violation might be *de minimis* and not subject to FCA liability.

Note, though, that the cost of regulatory compliance is only a low-end estimate of the harm to competition. It is entirely possible that low-cost regulatory violations could result in substantial competitive advantages that should still lead to civil FCA liability. For example, assuming that bribery is at least a regulatory violation, the fact that a decision maker was swayed by a low $50 bribe or dinner outing should

116. Note that disclosure of non-compliance alone may not remove the potential for civil FCA liability. See *infra* subsection V.B.2.c for a discussion on government knowledge.

117. The minimum civil penalty may be a rough estimate of legislative intent regarding *de minimis* violations.

not automatically establish that the violation was *de minimis*, especially if the resulting contract or award is of substantially higher value.

c. *Government Knowledge*

A common existing defense against FCA charges is that a government agent knew, or even condoned the defendant's behavior. The argument is that since a government agent knew what was going on, there can be no fraud or deception.[118]

> If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA.[119]

Stated another way, if the defendant believed the government approved of the defendant's actions, the defendant lacked the mens rea for an FCA violation. At least one court has rejected this as a broad defense, though, noting that a government agent who had knowledge of the behavior might simply be a co-conspirator in defrauding the federal government.[120]

This government knowledge problem parallels the materiality concern: if the government knows about a violation, either pre- or post-contract formation, a defendant could similarly argue that the violation was not material to the government's decision to award a contract or to pay subsequent invoices.[121]

Adopting an approach to FCA liability emphasizing fair competition suggests that a government agent's knowledge alone should not be a defense; just because a government agent had an understanding with one particular entity does not mean that there was fair competition. Rather, competitors must also know that the government knows and condones such behavior. If competitors do not know they may ex-

118. *See, e.g.*, United States *ex rel.* Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 289 (4th Cir. 2002); Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 534 (10th Cir. 2000); United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1157 (2d Cir. 1993); United States *ex rel.* Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991); *see also* Sylvia, *supra* note 32, at § 4:42 (discussing the relevance of government knowledge as a defense to liability under the False Claims Act).

119. United States *ex rel.* Durcholz v. FKW, Inc., 189 F.3d 542, 545 (7th Cir. 1999).

120. United States *ex rel.* Asch v. Teller, Levit & Silvertrust, P.C., No. 00 C 3289, 2004 WL 1093784 at *3 (N.D. Ill. May 7, 2004) ("[K]nowledge and even acquiescence on the part of a government employee is not a defense to a false claims Act [sic] case because, if that were so, a contractor in cahoots with a government official would be insulated from a false claims Act [sic] suit.").

121. *See* United States v. Intervest Corp., 67 F. Supp. 2d 637 (S.D. Miss. 1999) (finding the government's continued payment while knowing about false certification demonstrated that the certification was not material).

ercise excessive care in following contracts, rules, or regulations, thus resulting in less profitability and the possibility that they exit the market for government services.

Explicitly demonstrating competitor knowledge is difficult, as courts would have to address questions regarding which entities count as competitors and what percentage of competitors would have to know of the government's position. Instead, establishing this defense should simply require clear government disclosure of the understanding. Thus, closely-held information by a single government agent would be insufficient to establish a defense against FCA liability. In particular, the clear public disclosure by the government must be *ex ante*, occurring before entities have a chance to bid or participate in the government process.

Relatedly, a government agent may obtain knowledge of the non-compliance because of direct disclosure by the defendant at the time of invoicing in an attempt to avoid FCA liability. For liability to not attach, though, it is important that there is also some corrective action or sanction for the non-compliance.

3. *Defenses that Courts Should Not Consider*

a. *Actual Market Competitiveness*

To be clear, this proposal explicitly rejects detailed judicial analysis regarding actual market competition. For instance, the market for a product or services to the government in some areas may not actually have competition. For the most part, this concern may be ameliorated by the existence of potential competitors; the fact that there may be no actual direct competitor at a certain point in time should not diminish the importance of ensuring a fair competitive market. I suggest that this form of analysis should not be considered by the court; the DOJ and contracting agency are better suited for this form of analysis.

Similarly, this proposal rejects analysis of conditions in which potential competition is unlikely or undesirable. First, there may be natural monopolies or other structural reasons for a lack of competition during an extended timeframe. For example, a geographically remote area may only be able to support a single Medicare provider, and a combination of personal connections in that remote area may make it unreasonable to expect competition. Another example would be non-competitive situations that the government actually desires. The government might believe that a particular monopolistic entity is in the best interests of society, or the government might desire no competition for reasons related to government capture.

Again, because the government has unilateral control over FCA cases through its intervention process, this is not an area that requires judicial intervention. If the government desires information regarding the non-compliance of monopolists, it can do so by pursuing such cases. If it deems these cases improper, it can shut down these causes of action. There is no need for courts to single out these areas for exception.

b. *Lack of Gains or Payment*

This proposal also rejects detailed judicial analysis of the defendant's gains or lack thereof from the non-compliance. A defendant might claim, for example, that any additional profits gained from non-compliance were actually passed along to the government as cost savings. Courts should not recognize this line of argument; if such cost savings are to be legitimate considerations, they must be publicly acknowledged ex ante.

Another variant is if the defendant does not even get paid by the government; I suggest that this should not be a consideration for courts. Courts have discussed whether FCA liability should attach when the government does not actually pay on a false claim.[122] A defendant might argue that since the government did not make a payment, the government did not suffer harm. Under the principle of fair competition, I suggest that FCA liability should attach. As discussed earlier, the fact that a company is non-compliant may allow it to offer lower prices or other incentives. Compliant competitors may observe such pricing and unnecessarily expend greater costs trying to determine how that company could be legitimately achieving such prices. Harm to fair competition has already occurred when the non-compliant company attempts to obtain government business; the fact that the government had not paid should not play a role in determining liability.[123]

C. Two Alternatives to the Fair Competition Proposal

If courts are reluctant to adopt the above fair competition proposal that generally leads to civil FCA liability for regulatory violations, I suggest two potentially more palatable alternatives to the existing false certification framework.

1. *Judicial Deference for Intervened Cases*

If courts are reluctant to broadly allow civil liability for technical violations, I argue that courts should at least do so in intervened cases. In *Hobbs*, the DOJ intervened in the private litigation and thus led the litigation process; this is a strong signal of the government's

122. For a summary of various arguments, see SYLVIA *supra* note 33, at § 4:52.
123. An alternative view of the non-payment scenario is looking at the behavior as attempted fraud.

interest in the private party's case.[124] The appellate court nonetheless overturned the case. The court described FCA liability as inappropriate as a policy matter, but the underlying logic is not entirely clear. Note that the court distinguished the specific bodies making regulatory decisions.[125] Is the court concerned about HHS or CMS overriding the proper role of the local CMS-authorized provider?

This is unusual. If this were a conflict between separate branches of government (Executive vs. Legislative), perhaps a more active role for the courts is justified. It is entirely possible that different personnel and entities might disagree about the proper sanctions for the improper supervision at play in *Hobbs*. For example, it is possible that CMS, the Inspector General of HHS, and the DOJ all differed as to the level of civil sanctions they believed appropriate in *Hobbs*. Nonetheless, those parties are not independently represented in court, and it is unclear how the court would be well suited towards addressing such a conflict.

Courts that are hesitant to embrace broad civil liability for technical violations could at least rely on DOJ intervention as a signal that there is sufficient Executive agreement that litigation is important. If courts believe that the DOJ is failing in its duty to dismiss cases, they can apply more stringent oversight to non-intervened cases through cost-benefit analysis as described below, while allowing broad civil liability for intervened cases.

This alternative is inferior to the broad fair competition approach, though, as it increases the ease by which the DOJ or particular agencies might act in anti-competitive fashion while seeming neutral. Most non-intervened cases are unsuccessful, but the reasons for the lack of success are unclear. Forcing the DOJ and the corresponding agencies to dismiss cases rather than letting them languish will be a strong statement about either the lack of merits or the importance of the named defendant. Allowing cases to proceed on a non-intervened basis supports the overall goal of the FCA by allowing privately litigated cases to proceed when the DOJ has insufficient resources to handle all legitimate cases.

2. *Express Adoption of Cost-Benefit Analysis*

If courts are reluctant to delegate detailed analysis to the DOJ and agencies as suggested above, they could still improve over the existing false certification scheme by explicitly embracing cost-benefit analysis in determining whether FCA liability should apply. Such transparent reasoning would help agencies craft better contracts and regulations

124. *See* United States *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 710 (6th Cir. 2013).
125. *Id.* at 710–11.

rather than focus on false certification doctrines. As this Article suggests, competitive harms should be part of the cost-benefit analysis adopted by courts. There are variations to the rule, however. For example, courts might say that the regulation itself must satisfy cost-benefit analysis. Alternatively, the regulation might have to satisfy cost-benefit analysis as applied to the specific defendant. Another alternative might be to indicate that litigation costs must be factored into the analysis: FCA actions are acceptable only if the benefits exceed the costs of both the regulation itself and of enforcement litigation.

One basic example that courts might adopt to simplify the cost-benefit analysis process is simply to state that if any regulated entity actually complies with the technical regulation at play, that is sufficient to establish that cost-benefit analysis supports the regulation. Thus, all the DOJ must demonstrate is that there is a compliant entity in existence.

VI. FAIR COMPETITION'S SUPERIORITY OVER THE STATUS QUO

A. Transparency and Predictability

This fair competition proposal offers a clear default rule: the presumption of regulatory compliance. If a company invoices the government, courts and the government can assume compliance with all regulations. To overcome this presumption, the government must expressly waive a compliance requirement or a contractor must expressly disclose non-compliance at the time of invoicing.

The fair competition framework is transparent regarding its aims and is fair to the participating parties. If a company participates in a government contract, it will be held liable if it knowingly violates a rule or regulation as part of the contract. Companies can be confident that the same rules apply to all companies within the regulated industry, and they can all compete fairly for government business. Instead of facing the uncertainty of false certification doctrine, with its focus on particular words that may or may not appear in subsequent invoicing, companies should be on notice at the time of contract that they may face civil liability for regulatory violations.

Similarly, whistleblowers, who have contributed greatly to the enforcement of the FCA, will enjoy greater predictability in their decision to blow the whistle. Whistleblowers face enormous career risks in choosing to file FCA actions; clear regulatory violations should fall within the ambit of their concerns. This straightforward default presumption will improve whistleblower confidence in the judicial process.

B. Closer to Statutory and Legislative Intent

As previously discussed, civil liability for regulatory violations seems to follow both the text of the statute and its legislative history. The legislative history suggests that claims under the False Claims Act "may take many forms, the most common being a claim for goods or services not provided, *or provided in violation of contract terms, specification, statute, or regulation*."[126] Moreover, "claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program . . . ."[127]

Liability for knowing, clear regulatory violations also fits with the core expectation of entities working with federal funds: "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law . . . ."[128]

Finally, the fair competition framework reflects the two distinct claims addressed by the FCA. The statute proscribes "false or fraudulent" claims against the federal government.[129] "False" and "fraudulent" are not synonymous; a fraudulent claim incorporates both deceit and loss to the victim.[130] I argue that the explicit inclusion of both false claims and fraudulent claims in the statute demonstrates legislative awareness of the potential difficulties in calculating precise losses attributable to deceptive claims. Including liability for false claims in addition to fraudulent claims suggests that Congress wanted the flexibility to pursue cases in which government losses were attenuated or unclear. This broader conception should easily incorporate the attenuated harms due to unfair competition through regulatory noncompliance.

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126. Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 531 (10th Cir. 2000) (quoting S. REP. NO. 99–345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. §§ 5266, 5274) (internal quotation marks omitted).

127. United States *ex rel.* Pogue v. Am. Healthcorp, Inc., 914 F. Supp. 1507, 1511 (M.D. Tenn. 1996) (citing S. REP. NO. 99-345, at 9).

128. United States v. Mackby, 261 F.3d 821, 828 (9th Cir. 2001) (quoting Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 63 (1984)) (internal quotation marks omitted).

129. 31 U.S.C. § 3729(a)(1) (2012).

130. Like many other federal fraud statutes, the FCA fails to explicitly define fraud. See Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 736–40 (1999), for a review of federal fraud statutes and the definition of fraud. *See also* JAMES FITZJAMES STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 121–22 (1883) ("I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy.").

C. Improved Regulatory Enforcement

Providing straightforward civil FCA liability for clear regulatory violations will help mitigate the problem of regulatory underenforcement.[131] First, FCA liability will increase the resources available for the prosecution of such offenses.[132] Law firms, whistleblowers, and competitors have direct incentive to invest in discovering and prosecuting regulatory violations. As demonstrated by the explosive growth in FCA actions, the private sector has been eager to participate since the 1986 amendments to the FCA removed barriers to private compensation.[133]

Second, FCA liability will improve the efficiency of detecting such offenses through the efforts of whistleblowers who are better situated to detect violations in comparison to government efforts.[134] Government oversight of technical regulatory compliance is costly, as it involves additional manpower and infrastructure. In comparison, whistleblowers are already embedded in a company's organizational structure, and they already have expertise in the relevant industry. Discovery of regulatory violations may be much less costly for the whistleblower.[135]

Third, FCA liability will better align incentives to improve deterrence: as noted above, it offers greater resources for enforcement, and it adds per-claim penalties that can increase sanctions.[136] FCA liability ensures that defendants who knowingly violate regulations have every incentive to disclose and correct those violations.

Fourth, the FCA is well positioned to recognize and prosecute the problem of competitive harms derived from regulatory regimes. Unlike the general discussion above regarding private enforcement, this focus on fair competition is distinctive to the FCA and I explore it in more detail here.

131. I discuss the problem of regulatory underenforcement in section IV.C. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107 (2005) for a summary of the general benefits of private enforcement.

132. *See id.* at 107–08.

133. *See* Dep't of Justice Press Release, *supra* note 1.

134. *See* Stephenson, *supra* note 131, at 108.

135. Of course, while discovery of violations may be low cost to the whistleblower, revealing those violations to an external authority may be very costly to the whistleblower depending on the availability of secrecy and whistleblower protections. *See* Mesmer-Magnus & Viswesvaran, *supra* note 110.

136. Greater expected sanctions may result in deterrence of potential offenders who weigh expected sanctions against the gains of regulatory violations. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 494–99 (5th ed. 2007).

1. *Private Enforcers Care About Competitive Markets*

Private enforcement under the FCA may originate from a variety of parties. Sometimes companies identify wrongdoing within other companies and bring FCA actions.[137] Many actions are by internal whistleblowers—employees or former employees of a company who identify wrongdoing by their employer. These are all parties that have an interest in a fair, competitive marketplace. Companies do not want other companies gaining an unfair competitive advantage by profiting through regulatory violations. Losing out on government contracts because of unfair competitive advantages causes real harm to the competitors.[138] Relying on the private marketplace to supply technical regulatory compliance may simply offer an opportunity for those individuals most harmed to supply the enforcement that regulators may be unlikely to perform.

Given the generally poor treatment of whistleblowers by their employers, it is also understandable that whistleblowers have an interest in a fair, competitive marketplace, too. Whistleblowers will likely find their careers limited at their present employer. They may alternatively find that they must resort to litigation or threats of litigation to protect their careers. To the extent that there are competitors to their employer, those competitors may provide outside employment options for the whistleblowers and thus some insurance in the event of adverse employment actions by their present employer.[139]

2. *The Contracting Agency Has Some Comparative Concern for Competitive Markets*

When an external agency is responsible for enforcing the underlying regulation, the contracting agency likely has more immediate concern for competitive markets. The DoD has more interest than OSHA in ensuring that there is a competitive market for weapons manufacturing. Thus, OSHA may be less willing to expend resources on a technical safety violation at a military manufacturer, while the DoD may be more willing. Giving the contracting agency slightly more leverage by providing a cause of civil action under the FCA may help

137. *See, e.g.*, *In re* Pharm. Indus. Average Wholesale Price Litig., 491 F. Supp. 2d 12 (D. Mass. 2007) (discussing a pharmacy identifying wrongdoing by medical manufacturer).

138. *See, e.g.*, Zechariah Chafee, Jr., *Unfair Competition*, 53 HARV. L. REV. 1289, 1303 (1940).

139. There has been speculation that this factor explains the tremendous growth of whistleblower activity in healthcare fraud compared to the slow growth in defense industry fraud. There is comparatively little competition in the American defense industry, while there are numerous healthcare providers. A healthcare worker is thus more likely to be able to find alternative employment and is less easily blackballed.

mitigate some underenforcement tendencies by the external regulatory agency.

Failure to comply allows unmerited profit; competitors who properly implement compliance systems are at a disadvantage in comparison. Civil sanctions are necessary to maintain competitive balance; otherwise, in the long run, the government will lose out because of the comparative success of these low-compliance entities. Over time, the low-compliance entities will be more profitable and thus dominate the market, leaving the contracting agency with no high-compliance providers.

In a less cynical turn, regulators may actually desire enforcement by a separate agency. To the extent a regulator desires compliance but finds herself in a difficult situation due to competing pressures within an agency, allowing another agency or a third party to pursue enforcement may be a desirable alternative.

As this last point suggests, I recognize the possibility that agency capture may complicate this comparative analysis. Nonetheless, as noted in subsection IV.C.3 above, should agency capture exist, it will likely tend towards regulatory underenforcement. As suggested earlier, courts are ill-suited in managing such inter-agency disputes in the context of an FCA action; permitting civil FCA liability places the burden on the agencies to resolve their disputes.[140]

3. Fair, Competitive Markets Are Part of the Underlying Premise of the FCA

The two key principles driving the FCA are (1) protecting the public fisc, and (2) engaging private third parties.[141] The general premise in allowing *qui tam* actions is reliance on the "market" of private parties to detect and sanction fraud. Thus, in a symmetrical design, the government contracts with the private market for various goods and services, and it also relies on the private market to protect those contracts against falsity and fraud. In the context of technical regulatory violations, these principles translate into one key objective for the FCA: fair competition in the marketplace. This objective will generally lead to liability under the FCA for one main reason: compliance with regulations is costly. Without consistent civil liability for non-compliance, a non-compliant contractor may obtain a competitive advantage over those who do pay for compliance. In the long run, failure to assess civil liability may result in a market that consists only of contractors with low compliance.

140. *See supra* subsection V.C.1.
141. *See supra* Part II.

4. *Government Control of Litigation Limits the Downside of Private Enforcement*

Courts and commentators alike have recognized various potential downsides of private enforcement; in comparison to public enforcement, for example, private enforcement may result in inconsistent enforcement actions, may discourage cooperative efforts, and may inappropriately burden courts.[142] In the FCA context, though, the DOJ has ultimate control over any private litigation. The DOJ has the ability to unilaterally dismiss cases that involve private excess or improper behavior.[143] While the DOJ historically has not aggressively exercised this power,[144] it is obligated to conduct due diligence on every case.[145] Taken at face value, such due diligence should enable the DOJ to throw out inappropriate litigation that is not in the public interest. For example, if the DOJ and the contracting agency believe that cooperation is a better solution, they can dismiss a whistleblower's FCA suit that raises otherwise legally valid claims.[146]

For all of these reasons, courts should generally permit civil FCA liability in the context of clear technical regulatory violations. More precisely, courts should aim to incorporate the benefits and losses of competition into the determination of civil FCA liability for clear technical regulatory violations. As a practical matter, courts should presume the existence of unfair competition when a company commits a clear regulatory violation, and the cost of compliance should be a rough estimate of the damage award under the civil FCA.

VII. CONCERNS

A. Materiality

Prior to FERA's 2009 express introduction of "materiality" into the FCA, some courts read in a materiality requirement into the statute in an effort to limit liability. The Ninth, Fourth, and Sixth Circuits adopted a "natural tendency" test for materiality, focusing on the potential effect of the false statement rather than the actual effect.[147] In

142. *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 667 (2013); David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONT. L.J. 225, 230–32 (2013).

143. *See* 31 U.S.C. § 3730(c)(2)(A) (2012).

144. *See* Kwok, *supra* note 142, at 240 tbl.2.

145. *See* 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a violation . . . .").

146. *See, e.g.*, United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1144–45 (9th Cir. 1998).

147. *See* United States v. Bourseau, 531 F.3d 1159, 1171 (9th Cir. 2008); United States *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 913, 916–17 (4th Cir. 2003); United States *ex rel.* A+ Homecare, Inc. v. Medshares

contrast, the Eighth Circuit adopted a more restrictive "outcome materiality" test, requiring proof that the government actually would have taken a different action had it known of the fraud.[148] FERA included a definition of materiality that mirrored the natural tendency test, arguably rejecting the Eighth Circuit's approach.[149]

The condition of payment distinction limiting implied false certification is like the disfavored outcome materiality test. The argument for requiring a violation to be a condition of payment rather than a condition of participation is the idea that the outcome of payment would have been the same if the government had known of the regulatory violation. This narrow interpretation of the fact that regulatory compliance is a condition of participation rather than a condition of payment may have some appeal as a bright line rule, but it does not make sense logically. If the government would not want a non-compliant company to even participate in a program, why would the government want to pay that non-compliant company any money?

As noted earlier, I do not take a stand as to whether, for doctrinal reasons, materiality should be read into the statute. This Article's proposed market competition framework addresses the underlying problems of harm and enforcement that I argue underpin courts' reasoning in false certification cases. Explicit, separate materiality analysis is duplicative and unnecessary under the false certification framework. As a practical matter, I suggest the fact that, in the aggregate, the government expended the effort to promulgate or pass a regulation is sufficient to demonstrate that compliance with the regulation is per se material.

Thus, if courts continue to pursue explicit materiality analysis, they should frame it as taking place in a competitive marketplace. Under this analysis, regulatory violations will be per se material. Materiality is defined as "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[150] One possible, but flawed, interpretation of this materiality standard would be to apply it in a non-competitive situation. As an example, a court

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Mgmt. Grp., Inc., 400 F.3d 428, 445 (6th Cir. 2005); SYLVIA *supra* note 32, at § 4.51*; see also* United States *ex rel.* Longhi v. United States, 575 F.3d 458, 470 (5th Cir. 2009) (holding that a false statement is material under the False Claims Act if it has a natural tendency to influence the decision-making body to which it was addressed).

148. *See* Rabushka *ex rel.* United States v. Crane Co., 122 F.3d 559, 563 (8th Cir. 1997) (requiring relator to demonstrate that government would have terminated a pension plan had it known about misrepresentations and nondisclosures); *see also Bourseau*, 531 F.3d at 1171 (citing Costner v. URS Consultants, 153 F.3d 667, 677 (8th Cir. 1998)) (acknowledging the Eighth Circuit's adoption of the outcome materiality test).

149. *See* 31 U.S.C. § 3729(b)(4) (2012).

150. *Id.*

might ask in the counterfactual, would the government still have paid this specific defendant had it known about the technical regulatory violation? This question, I argue, is an excessively cramped view of materiality. Rather, the proper question regarding materiality should include the presence of competitors. Given the market for services to the government, would knowledge of this technical regulatory violation have influenced the government's decision to select and pay any defendant? Unless everyone systematically commits this technical regulatory violation, it seems reasonable to believe that any government agency would rather pay money to an entity that complied with all requirements rather than one that did not comply with all requirements. Regulatory violations therefore will generally be per se material.

B. Overcriminalization

Part of the underlying concern regarding civil FCA liability for regulatory violations may be a fear of overcriminalization; courts do not want to be seen as exacting undue punishment.[151] Careful separation of civil and criminal FCA cases will help highlight the distinctive role of civil sanctions outside of the punitive realm. One basic step to aid in the development of civil FCA doctrine is to clearly distinguish criminal versus civil doctrines under the FCA. The Fourth Circuit, for example, has acknowledged this criminal/civil distinction, rejecting application of the rule of lenity in a civil FCA case because the rule as expressed in *United States v. McNinch*[152] was appropriate only for the criminal FCA.[153]

Unfortunately, the Fourth Circuit has also been willing to conflate both forms of liability. In *United States ex rel. Nathan v. Takeda Pharmacaceuticals North America, Inc.*, the court was reluctant to interpret the FCA's language of a "claim" in a broad sense, relying on the criminal justice principle of narrow statutory construction in citing *Harrison* and *McNinch*.[154] Both *Harrison* and *McNinch* were concerned about *punishment*; the Fourth Circuit should not have applied those decisions in *Takeda*.

The fact that a claim is solely under the civil FCA, though, does not preclude the possibility that it still may be punitive in nature. The civil sanctions may be so great as to be punitive rather than compen-

151. *See* United States *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 717 (6th Cir. 2013).
152. 356 U.S. 595 (1958).
153. *See* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 786 (4th Cir. 1999) (rejecting application of *McNinch*, 356 U.S. at 598, because it concerned criminal FCA).
154. United States *ex rel.* Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d at 456 (4th Cir. 2013); *Harrison*, 176 F.3d at 785; *McNinch*, 356 U.S. at 599.

satory in nature, and the Supreme Court has struggled with this issue.

The Supreme Court first directly addressed this question in *United States v. Bornstein*, which discussed an earlier version of the FCA.[155] At the time, the FCA offered double damages, unlike the modern treble damages statute.[156] The Court held that the FCA's double damages were compensatory in nature, serving the "make-whole" purpose of the FCA.[157] Of note, the Court expressly rejected the idea that double damages were compensatory because the government did not receive the full double damages but had to pay out a potential relator's share.[158] In *Bornstein*, there was no relator to be paid, but the Court still held that double damages were necessary to "compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims."[159] The Court noted that the relator's share had varied over time, even though the double damages provision had not changed.[160] Overall, "The device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."[161]

In contrast, the majority in *Vermont Agency of Natural Resources v. United States ex rel. Stevens* described the FCA as "essentially punitive" in a secondary line of argument whose importance is unclear.[162] *Stevens* concerned a non-intervened FCA action; the United States was not an active party to the litigation.[163] The Court held that, as a matter of statutory interpretation, Congress did not intend for states to be a "person" subject to FCA liability.[164] Six Justices signed onto the Court's opinion. The second of three arguments supporting the Court's conclusion that states are not subject to FCA liability was a presumption against the imposition of punitive damages on governmental entities, and that the FCA's damages were "essentially punitive."[165] The Court, however, did not discuss the relevance of the relator's share in analyzing treble damages as punitive.[166]

Moreover, Justices Breyer and Ginsburg signed onto a concurring opinion indicating that they left "open the question whether the word

155. United States v. Bornstein, 423 U.S. 303 (1976).
156. *See id.* at 314.
157. *Id.* at 314–15.
158. *Id.* at 315 n.11.
159. *Id.* at 315.
160. *Id.* at 315 n.11.
161. *Id.* at 314 (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 551–52 (1943)) (internal quotation mark omitted).
162. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784–85 (2000).
163. *Id.* at 770.
164. *Id.* at 783–87.
165. *Id.* at 784–85.
166. *See id.*

'person' encompasses States when the U.S. itself sues under the False Claims Act."[167] They therefore thought the fact that the United States declined to intervene was significant in the analysis of whether States could be held liable.[168] Justices Stevens and Souter rejected the Court's statutory interpretation, arguing that States were persons subject to FCA liability but their decision did not hinge on punitiveness.[169]

A unanimous Supreme Court later referenced *Stevens* and equivocated on the punitive nature of FCA liability in *Cook County v. United States ex rel. Chandler*, claiming that "the tipping point between payback and punishment defies general formulation . . . ."[170] The Court affirmed *Bornstein* in the compensatory need for liability beyond the amount of the fraud.[171] The Court recognized relator payment as a relevant cost, and it also affirmed that treble damages may be "necessary for full recovery even when there is no *qui tam* relator to be paid."[172] The Court referenced the lack of prejudgment interest and the lack of consequential damages under the FCA as relevant to the compensatory nature of treble damages.[173]

As reflected in *Chandler*, the Supreme Court presently rejects the idea that the civil FCA is inherently punitive in nature, but as applied, civil FCA sanctions may be entirely compensatory or they may incorporate punitive elements. Courts should therefore be aware of potentially punitive applications of the civil FCA when only compensation, and not punishment, is justified. That being said, courts should not automatically assume that the existence of treble damages or a per-claim penalty in the FCA makes any civil FCA sanction punitive in nature. Rather than a binary decision ruling out FCA liability, courts should continue with the existing process of evaluating whether civil sanctions as applied, bearing in mind competitive harm, violate the Excessive Fines Clause of the Eighth Amendment.[174]

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167. *Id.* at 789 (Ginsburg & Breyer, JJ., concurring).

168. *See id.*

169. *See id.* at 789–802 (Stevens & Souter, JJ., dissenting).

170. Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 130 (2003) 538 U.S. 119, 130 (2003).

171. *Id.*

172. *Id.* at 131.

173. *Id.*

174. *See, e.g.*, United States *ex rel.* Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 405 (4th Cir. 2013); United States v. Mackby, 261 F.3d 821, 831 (9th Cir. 2001). *But see* United States v. Rogan, 517 F.3d 449, 453–54 (7th Cir. 2008) (holding it unclear whether the Excessive Fines Clause applies to civil actions under FCA).

C. Excessive Compliance Costs

Expansive FCA liability for clear regulatory violations may trigger excessive compliance costs, particularly if regulatory agencies fail to exercise their duty to oversee FCA actions. It is possible, for example, that agencies might ignore cost-benefit analysis and simply pursue defendants for maximum settlements.

Alternatively, there may be regulatory violations that are justifiable. Regulations may not be sufficiently comprehensive to cover every scenario, and there may be cases where application of a strict rule is not justifiable. We might think of these as "efficient" regulatory violations, analogous to "efficient breach" in contract law, and penalizing defendants for such breaches may not be desirable.

In the short term, defendants may feel this scenario is unfair and detrimental to society; why should a company be compelled to follow a regulation in which the costs outweigh the total benefits? Nonetheless, I suggest that this problem is self-correcting in the medium term. First, if companies are aware that strict compliance is necessary, they will either price their services accordingly or exit the government market. There will be market and political pressure on the agency to either revise the rules or explicitly modify enforcement patterns. Second, if some companies deviate from compliance, there will be an incentive under the FCA for competitors and whistleblowers to file litigation such that all companies must comply or face additional civil sanctions. For both of these reasons, agencies will face pressure to address the cost of compliance for regulated companies and to exercise better control over potential litigation.

D. Stigmatic Concerns in Incorporating Technical Violations

Allowing FCA liability for attenuated causation issues may raise the problem of excessive stigmatic harm by lumping defendants with varying levels of moral culpability together. A healthcare provider committing fraud by collecting Medicare payments for which no service was provided could be liable under the FCA, as could a *Hobbs*-style provider who did provide real, medically necessary services.

I suggest that on the balance, there is actually insufficient stigmatic harm under the FCA. As stated in that statute, the FCA addresses *false* claims. Falsity is a less morally laden description in comparison to fraud.[175] Only certain portions of the FCA actually require fraudulent intent.[176] Thus, for a defendant that commits outright fraud through non-delivery of service, there is probably

175. Fraud incorporates the intent to deceive for the purposes of causing some loss. *See, e.g.*, United States v. Hawkey, 148 F.3d 920 (8th Cir. 1998).
176. *See, e.g.*, 31 U.S.C. § 3729(a)(1)(E) (2012).

insufficient stigmatic harm in FCA liability. Nonetheless, to the extent that there may be excessive stigmatic harm through the aggregation of fraud and falsity in the statute, the DOJ could seek to alleviate this harm by emphasizing the falsity aspect in press releases.

Another solution would be to pursue civil remedies under the doctrine of unjust enrichment.[177] For those knowledgeable about the doctrine of unjust enrichment, civil liability here incorporates the possibility that the defendant did no wrong but was simply the unknowing recipient of unjust gains. While this might reduce stigmatic harm to the defendant, it is unlikely given the need to understand the doctrinal details. The "unjust" portion of the label may have sufficient stigmatic power against the defendant for those reading the popular press. Moreover, proceeding under unjust enrichment removes the potential of damage multipliers under the FCA that help cover the enforcement costs of technical contract violations.

One other potential avenue of enforcement is to proceed under existing unfair competition law.[178] This analysis is presently outside the scope of this Article, but I note that the level of moral condemnation for unfair competition is unclear in comparison to making a false claim with the federal government.

E. Increased Liability Only for Those with Government Contracts

This proposal will create some differential in regulatory enforcement; companies in various industries may be subject to the same regulations on paper, but the presence of FCA liability will likely increase enforcement efforts against the subsection of companies that do business with the federal government. Companies that do not conduct business directly with the federal government may be subject to similar regulations, but whistleblowers will not have the same incentive under the FCA to raise regulatory violations against them. I have earlier discussed the issue of overenforcement and the DOJ's ability to control that element; the concern I raise here is the distinctive issue of comparatively lesser enforcement for companies not doing business with the federal government. The existence of effectively higher compliance requirements may drive costs higher in government contracts. This is, though, likely what the government explicitly intended when passing laws and regulations mandating such behavior. Additionally, there have been numerous arguments raised suggesting why the federal government is particularly vulnerable to fraud and contractual violations, distinct from other private entities: the government does a poor job of monitoring private performance, government contractual

177. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 41 (2011).
178. *See generally* RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

complexity is high, and third parties are often the direct beneficiary of services paid for by the government.[179] The government's distinctive vulnerability to contractual and regulatory violations helps justify the need for further enforcement via FCA liability.

F. Potentially Anti-Competitive Application of FCA Liability

It is possible that generally allowing civil FCA liability for regulatory non-compliance may be anti-competitive in reality. If only a limited number of companies are capable of compliance and maintaining profitability, greater enforcement of technical regulations may result in a lower number companies in the marketplace.

FCA litigation, however, is unlikely to lead in this direction. Relators and relators' counsel, like many plaintiffs, must earn a living and the natural target would be to identify deep pocketed defendants. These defendants are also the entities most likely to have sufficient funds to pay for better compliance.

Second, regulations may be drafted with multiple intents. At one end of the spectrum, regulations may legitimately be in the public interest, while at the other end, some regulations may be solely to restrict competition. If regulatory compliance is in the public interest, the loss in competition is assumedly in the cost-benefit calculation used in establishing the regulation. If the regulations tend towards competition restriction, this is a variant of regulatory capture. I suggest that it is unclear whether private enforcement will exacerbate or reduce the impact of regulatory capture. Nonetheless, if courts are willing to address this concern of potentially anti-competitive impact, they can do so with some additional refinement of liability analysis.

First, we must acknowledge that regulations themselves may have disparate impacts on the competitive marketplace, and second, the enforcement regime may either mitigate or exacerbate such problems.

Regulatory compliance may have different impacts on companies. Let us consider two different archetypes of compliance costs: fixed and variable. A fixed compliance cost is a one-time cost incurred by a company; regardless of the volume of widgets produced or services rendered, the fixed compliance cost is the same. In contrast, variable compliance costs increase when the volume of widgets produced or services rendered increases.

Note, then, that fixed compliance costs are more easily born by larger, more productive companies. Those large companies can spread the fixed compliance costs across a large volume of goods and services. If the volume is sufficiently large, there may be no measurable impact on the price the large company can charge its customers. A small com-

179. *See* Michael Holt & Gregory Klass, *Implied Certification Under the False Claims Act*, 41 PUB. CONT. L.J. 1, 13 (2011).

pany, in comparison, may have to increase the price of its goods or services to cover the fixed compliance costs.

Congress and agencies have recognized this type of disparate impact of regulations across the size of organizations. For example, OSHA requires employers to record and report injuries, death, and illnesses,[180] but it exempts employers with fewer than ten employees.[181] The SEC was similarly concerned about the impact of requiring smaller companies to comply with the same internal controls and auditing standards as those of larger companies.[182] Ostensibly similar logic allows smaller employers to avoid the requirement of offering leave for childbirth.[183]

While there have been clear attempts to ameliorate the regulatory burdens on smaller companies, there will continue to be disparities in compliance impact. There is little reason to believe, for example, that an employer with eleven employees is substantially better equipped to handle OSHA reporting requirements than an employer with nine employees, despite the bright line rule above.[184]

Overall, larger companies are less likely to be competitively disadvantaged by a regulatory scheme. As noted in section IV.C, there are reasons to believe that there is underenforcement of technical regulatory requirements that favor larger companies; therefore, greater enforcement would reduce the large company advantage. Nonetheless, it is possible FCA litigation itself might become disproportionately focused on smaller companies if private relators view smaller companies as easier targets. Another factor may be whether larger companies explicitly invest in pursuing litigation against smaller companies.

In light of these concerns, there are a number of adaptations courts could make in focusing more on developing the competitive market.

180. 29 C.F.R. § 1904.0 (2014).

181. 29 C.F.R. § 1904.1.

182. The Commission stated: "However, we are sensitive that many small business issuers may experience difficulty in evaluating their internal control over financial reporting because these issuers may not have as formal or well-structured a system . . . ." Financial Reporting and Certification of Disclosure in Exchange Act, 68 Fed. Reg. 36636 (June 18, 2003) (to be codified at 17 C.F.R. pts. 210, 228, 229, 240, 249, 270, and 274). In 2005, the SEC again deferred the deadline, stating: "Due to the significant costs that smaller companies are likely to incur to prepare for initial compliance with the internal control requirements, we think that it is critical to [extend the deadline]." Financial Reporting and Certification of Disclosure in Exchange Act, 70 Fed. Reg. 56825 (Sept. 29, 2005) (to be codified at 17 C.F.R. pts. 210, 228, 229, 240, and 249). In 2010, the Commission permanently exempted small issuers from the requirement. Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, 75 Fed. Reg. 57385 (Sept. 21, 2010) (to be codified at 17 C.F.R. pts. 210, 229, and 249).

183. The Family Medical Leave Act (FMLA) only covers employers with fifty or more employees that work for more than twenty weeks per year. 29 C.F.R. § 825.104 (defining "covered employers").

184. *See* 29 C.F.R. § 1904.1.

One option would be to look at the competitive landscape and simply reject liability in situations that would decrease competition in the marketplace. As acknowledged earlier, this form of analysis is challenging. Another option would be to impose civil liability for regulatory violations for particular classes of violations. As described above, requiring variable cost compliance tends to be more equitable across various sized competitors. Courts might thus rule out civil liability for fixed cost regulatory violations.

Again, this would have the potential downside of reducing actual compliance and enforcement efforts with valuable regulations that happen to look like fixed cost issues.

VIII. CONCLUSION

Fraud comes in many forms, and the distinctive capabilities of the civil False Claims Act uniquely position it to be effective in developing a fair competitive marketplace for government services. Unlike criminal fraud sanctions, which emphasize punishment of wrongdoing, I propose that the FCA recognizes the harm to both the government and to market competitors due to falsity and failures in the government contracts. Even low levels of falsity, in the form of clear contractual or regulatory violations, cause real harm in the marketplace because compliance is costly. These harms sooner or later result in losses to the government. By embracing the distinctive advantages of FCA liability over criminal fraud charges, courts can address these harms and provide compensation to the government and possibly to competitors. The significant involvement of the DOJ and other government agencies in the FCA process ensures that courts can set bright line rules in establishing a presumption of competitive harm in instances of clear regulatory violations. Rather than existing formalistic doctrine that adds uncertainty and needless complexity, whistleblowers, government agencies, and competitors all benefit from a principled rule establishing that clear regulatory violations are actionable under the FCA.