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THE FEDERAL FALSE CLAIMS ACT AND THE ACCREDITATION OF INSTITUTIONS OF HIGHER EDUCATION

INTRODUCTION

Students across the country rely heavily on federal financial aid when deciding to pursue a college degree. To obtain federal financial aid funding, the Higher Education Act (the HEA) requires students to attend accredited institutions.1 The agencies that accredit colleges and universities employ a complex process and rely on a vast number of characteristics in evaluating institutions of higher education. The volume of information that a school must provide creates a possibility that an institution of higher education may either inadvertently or willfully make misrepresentations to accreditation agencies in order to maintain an accredited status.2 Recently, these types of misstatements have opened the door for private citizens to sue these institutions on behalf of the United States government, and the courts have been quite willing to hear such claims.3

The federal False Claims Act (the FCA) was enacted to assist the government in recovering losses sustained by fraudulent activity against the government.4 The FCA creates liability for a party who "knowingly presents, or causes to be presented to the government a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" paid by the government.5 "Knowingly" is defined in the statute as "actual knowledge," "deliberate ignorance of the truth or falsity of the information," or "reckless disregard of the truth or falsity of the information."6

6. § 3729(b)(1)–(3).
Generally, any organization or individual obtaining federal money has the possibility of being charged as a defendant in an FCA "qui tam" action. As it would be nearly impossible for the government to uncover and prosecute all potential violations of the FCA, the statute has a qui tam provision which allows a private party, known as a relator, to bring a lawsuit against a party who has defrauded the United States government.

To initiate an FCA suit, a qui tam relator files a complaint under seal in a U.S. district court along with a written disclosure providing the government with enough information to investigate the claim. While the complaint is under seal, the Department of Justice has the option to join the lawsuit, decline to join the lawsuit, move to dismiss the claim, or attempt to settle the claim. The Department of Justice generally has sixty days to make its decision but may get an extension under certain circumstances. If the government declines to join in the action with the relator who filed the suit, the relator maintains the ability to investigate and prosecute the case. FCA qui tam actions are very attractive to potential relators because a relator is entitled to recover a portion of the settlement or money judgment recovered by the government.

In recent years, federal circuit courts have expanded the relators' ability to bring qui tam actions against higher education institutions. Furthermore, President Barack Obama signed the Fraud Enforcement and Recovery Act of 2009 into law on May 20, 2009, further expanding the ability of private parties to bring qui tam actions. Because of the potentially lucrative outcome, there will likely be a drastic increase in FCA qui tam litigation against institutions of higher education, specifically in the area of accreditation. The increased litigation will result from the reduction in procedural hurdles to bring qui tam actions coupled with the complex and fact-specific nature of the accreditation process.

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10. Id.
11. Id.
12. Id.
13. See § 3730(d)(1)–(2). When the government intervenes in the action, a relator may recover between 15% and 25%, and when the government elects not to intervene a relator may recover between 25% and 30% of any amount recovered by the government. Id.
The increased litigation will defeat the overall purpose of the FCA, which is to deter fraud against the government, because it will merely create additional expenses for educational institutions, which will likely be passed on to students in the form of higher tuition rates. Higher tuition rates will require these students to take out a larger amount of federal loans in order to cover the cost of tuition. Increased student debt burdens will increase the risk of default on loan repayments, which will cause the government to lose money on these loans. Hence, not only will educational institutions found to violate the FCA suffer, but so will the innocent students and the government itself, the very institution the Act was created to protect. Only relators will end up benefiting from the FCA actions, even though relators are not the intended beneficiaries of the FCA.\textsuperscript{15}

Part II explains the background of the federal False Claims Act as it relates to educational institutions, and discusses (1) the various types of federal funding that higher education institutions receive; (2) the accreditation process for higher education institutions; (3) the developing case law relating to FCA qui tam actions against institutions of higher education; and (4) the amendments made to the FCA that were signed into law by President Obama in 2009, as well as the bills currently pending in Congress related to the FCA.\textsuperscript{16} Part III analyzes the likely effect of recent case law and the FCA amendments on the accreditation process for educational institutions and why the ultimate result will not be in line with the goal of the FCA.\textsuperscript{17} Finally, Part IV evaluates the increased litigation that will result and the corresponding cost to universities that will be pushed down to students.\textsuperscript{18}

\section*{II. Background}

The FCA was originally enacted in 1863 and has continually evolved since that time. Section A discusses the history of the FCA.\textsuperscript{19} Section B discusses federal funding of institutions of higher education.\textsuperscript{20} Section C discusses the accreditation process for institutions of


\textsuperscript{16} See \textit{infra} notes 19-141 and accompanying text.

\textsuperscript{17} See \textit{infra} notes 142-202 and accompanying text.

\textsuperscript{18} See \textit{infra} notes 203-15 and accompanying text.

\textsuperscript{19} See \textit{infra} notes 25-39 and accompanying text.

\textsuperscript{20} See \textit{infra} notes 40-56 and accompanying text.
higher education.\textsuperscript{21} Section D discusses the history of FCA actions against higher education institutions.\textsuperscript{22} Section E discusses the 2009 amendments to the FCA.\textsuperscript{23} Finally, Section F discusses the bills currently pending in both the House and Senate and their potential effect on the FCA if passed.\textsuperscript{24}

\textbf{A. History of the Federal False Claims Act}

The FCA was enacted in 1863 by President Abraham Lincoln during the Civil War to prevent private contractors from profiting off of fraudulent sales to the government.\textsuperscript{25} Contractors were taking advantage of the state of war by selling useless items to the government, thus making a large profit from these sales.\textsuperscript{26} The FCA created criminal and civil penalties for anyone submitting a false claim for money to the government.\textsuperscript{27} The FCA contained a “qui tam” provision, which allowed private attorney generals (now referred to as relators) to bring a private civil action on behalf of the United States government against the party perpetrating the fraud.\textsuperscript{28} Qui tam is derived from the Latin phrase “\textit{qui tam pro domino rege quam pro se ipso in hac parte sequitur},” which means “who as well for the king as for himself sues in this matter.”\textsuperscript{29} The United States could choose whether to intervene in the private civil action, but regardless, the private party bringing the action was entitled to one half of the damages recovered on the government’s behalf.\textsuperscript{30}

In 1943, Congress first amended the FCA in order to bar recovery by a relator in cases in which the government had prior knowledge of the allegations regardless of whether the relator was the original source of the information.\textsuperscript{31} Congress implemented this change in order to prevent relators from bringing qui tam actions that were already disclosed to the government by copying the allegations from publicly filed criminal cases.\textsuperscript{32} The amendments also reduced the eco-
nomic incentive to bring qui tam actions by reducing the amount a relator could recover from 50% to 25% if the government did not intervene, and 10% if it did.\textsuperscript{33}

It was not until 1986 that Congress again amended the FCA, this time with the intent to make it easier for a relator to bring a qui tam action.\textsuperscript{34} With these amendments, Congress allowed relators to bring qui tam actions even if the government was previously aware of the fraud as long as the relator was the "original source" of the information, with "direct and independent knowledge" of the fraudulent activity.\textsuperscript{35} Now under the statute, a violation of the FCA would result in a civil penalty of $5,000 to $10,000, plus three times the amount of damages that the government sustained due to the violation.\textsuperscript{36} Additionally, the amendments increased the amount a relator could recover to between 15% to 25% if the government chose to intervene, and between 25% to 30% if it did not.\textsuperscript{37} After the 1986 amendments, FCA claims dramatically increased, with qui tam relators having recovered over $2 billion since the 1986 amendments.\textsuperscript{38} Furthermore, 75% to 80% of FCA actions have been brought by qui tam relators since 2000.\textsuperscript{39}

\textbf{B. Federal Funding of Higher Education Institutions}

Under Title IV of the Higher Education Act of 1965, various federal loan programs are available to students.\textsuperscript{40} These programs include federal Pell Grants,\textsuperscript{41} the federal Family Educational Loan (FFEL) Program,\textsuperscript{42} the William D. Ford Federal Direct Loan Program,\textsuperscript{43} and the federal Perkins Loan Program.\textsuperscript{44} Federal Pell Grants do not need to be repaid to the government.\textsuperscript{45} The grants are awarded solely to undergraduate students, with the

\begin{itemize}
  \item \textsuperscript{33} Perkins, supra note 15, at 749.
  \item \textsuperscript{35} 31 U.S.C. § 3730(e)(4)(B) (amended); see also Perkins, supra note 15, at 750.
  \item \textsuperscript{36} 31 U.S.C. § 3729(a); § 2, 100 Stat. at 3153.
  \item \textsuperscript{37} 31 U.S.C. 3730(d)(1)–(2); see also Perkins, supra note 15, at 750.
  \item \textsuperscript{38} Braceras & Bell, supra note 28, at 8-6.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} See 20 U.S.C. §§ 1070–1099 (2006).
  \item \textsuperscript{41} § 1070a.
  \item \textsuperscript{42} §§ 1071–1087.
  \item \textsuperscript{43} § 1087a–1087j.
  \item \textsuperscript{44} § 1087aa–1087ii.
\end{itemize}
maximum award being $5,350 during the 2009–10 academic year.\textsuperscript{46} The federal Perkins Loan Program provides low-interest loans for undergraduate and graduate students with exceptional financial need.\textsuperscript{47} The school is the lender for Perkins Loans, but the funds come from the federal government.\textsuperscript{48} A student may borrow up to $5,550 per year as an undergraduate student and $8,000 per year as a graduate student.\textsuperscript{49}

The FFEL Program and the William D. Ford Federal Direct Loan Program consist of Stafford Loans for students and PLUS Loans for parents and graduate or professional degree students.\textsuperscript{50} The federal government may subsidize Stafford Loans on the basis of a student’s need—the government pays the interest on the loan while the student is in school.\textsuperscript{51} In addition to subsidized Stafford Loans, a student may borrow unsubsidized Stafford Loans without demonstrating financial need.\textsuperscript{52}

In order for an institution to be eligible to receive federal student funding, it must enter into a written Program Participation Agreement (PPA) with the Secretary of the Department of Education.\textsuperscript{53} By signing the PPA, the institution agrees to comply “with all statutory provisions of or applicable to Title IV of the [Higher Education Act (the HEA)], all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of the statutes applicable to Title IV of the HEA . . . .”\textsuperscript{54} Institutions must also be accredited or preaccredited in order to qualify for federal funding.\textsuperscript{55} Once

\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Direct Stafford Loans, United States Department of Education: Federal Student Aid, http://studentaid.ed.gov/PORTALSWebApp/students/english/studentloans.jsp (last visited Sept. 27, 2010). On July 1, 2010, the law changed so that private leaders may no longer make loans under the FFEL Program. Id. All Stafford and PLUS loans now come directly from the Federal Direct Loan Program. Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{54} § 668.14(b)(1).
\textsuperscript{55} § 600.4(a)(5)(i). Accredited is defined as “[t]he status of public recognition that a nationally recognized accrediting agency grants to an institution or educational program that meets the agency’s established requirements.” § 600.2. Preaccredited is defined as “[a] status that a nationally recognized accrediting agency, recognized by the Secretary to grant that status, has ac-
an institution is qualified to receive federal funding, a student currently attending or planning to attend the school may apply to receive funding via the Free Application for Federal Student Aid (FAFSA). 56

C. The Accreditation Process

Accrediting agencies are private regional or national associations that "develop evaluation criteria and conduct peer evaluations to assess whether or not those criteria are met." 57 While the Department of Education does not accredit educational institutions, the Secretary of Education publishes a list of nationally recognized accreditation agencies that the Secretary determines to be reliable. 58 An accreditation agency's role is to establish whether "an institution has clearly defined appropriate objectives, whether it has established conditions under which it can reasonably be expected to obtain them, and whether it appears to be obtaining them." 59 The process of accreditation is based on trust, standards, evidence, judgment, and peer review. 60 The process requires knowledge of appropriate curricula, appropriate student–faculty ratios, adequacy of educational facilities, faculty competence, and student competence. 61

The accreditation process involves a number of steps. First, the accreditation agency determines the standards that must be met. 62 Next, the institutions of higher education seeking accreditation engage in a self-study to measure their performance against the pre-set accreditation standards. 63 After the self-study, a team selected by the accreditation agency performs an on-site evaluation of the institution to determine whether the institution is meeting the accreditation stan-

58. Id.
63. See Eaton, supra note 60, at 4.
The accreditation agency will then publish a list of the institutions it grants accreditation to. The accreditation agency then continuously monitors the accredited institutions to ensure that the institutions continue to meet the agency's standards. Finally, the accreditation agency performs periodic re-evaluation to ensure that the institution continues to meet accreditation standards.

Accreditation may be granted to the institution as a whole (institutional accreditation) or to individual programs or departments within an institution (programmatic accreditation). Accreditation or preaccreditation status allows educational institutions to establish eligibility to participate in the U.S. Department of Education federal student financial assistance programs under Title IV of the HEA. The accreditation process is very fact-specific and does not lend itself to bright-line rules, but rather requires subjective evaluations and judgments of the persons involved in the accreditation process. For that reason, courts have typically given accreditation agency decisions great deference.

D. History of FCA Actions Against Higher Educational Institutions

Prior to 2005, relators bringing FCA claims against colleges and universities were unsuccessful in cases in which the institution had not made a false claim directly to the government in its PPA. For instance, in United States ex rel. Graves v. ITT Educational Services, the qui tam relators brought an FCA claim against ITT Educational Services claiming that the school made a false claim to the government through misstatements in its PPAs with the Department of Education, which allowed it to receive Title IV funds that it otherwise would not have qualified for. The relators were admissions and recruitment representatives of the school who claimed to be paid under an “incentive compensation” structure, which was a violation of federal law. The relators did not claim that the student’s FAFSAs contained any

64. Id.
65. Id. at 2; see also Standards for Accreditation, supra note 61.
66. Eaton, supra note 60, at 5.
67. Id.
68. See id. at 2.
69. Id. at 3.
72. Graves, 284 F. Supp. 2d at 490.
73. Id. at 491.
false certifications or that the school filed false applications for funding directly to the government.\textsuperscript{74} The relators argued only that the students were able to receive federal funding due to the school’s certification in its PPA that it had complied with federal regulations.\textsuperscript{75} The court, however, dismissed the action, finding that the relator’s claim was insufficient to establish liability under the FCA because there could be no liability under the FCA unless the false certification was a prerequisite to payment.\textsuperscript{76} The court recognized a “distinction between generally certifying compliance with applicable regulations and statutes governing participation in a program, as opposed to certifying compliance with a particular requirement that is a prerequisite to receiving or retaining payment under that program.”\textsuperscript{77}

That same year, a federal district court in Texas used the same reasoning as the Graves court to dismiss a qui tam FCA action against a higher education institution for failure to state a claim upon which relief could be granted.\textsuperscript{78} Similar to Graves, the relators in \textit{United States ex rel. Gay v. Lincoln Technical Institute} were the school’s admissions representatives who claimed to have been paid on a commission basis while the school participated in federal loan programs.\textsuperscript{79} The relators contended that by executing PPAs with the Department of Education, the school was representing that it was in compliance with the regulations of the HEA even though it was violating the statute by paying the commission-based salary.\textsuperscript{80} The court, however, rejected the relators’ theory, concluding that the they had failed to establish that the school “made a false certification of compliance, either implied or express, as a condition of payment.”\textsuperscript{81} Therefore, the relators had failed to allege that Lincoln made a false claim under the FCA.\textsuperscript{82}

In 2005, a Seventh Circuit Court of Appeals opinion in \textit{United States ex rel. Main v. Oakland City University} marked a dramatic shift from the rejection of the false certification theory by the courts in Graves and Gay.\textsuperscript{83} In Main, the relator once again was a recruiter who
claimed he was paid on a contingent basis. While the recruiter was being paid on a contingent basis, the university was submitting applications to establish eligibility for federal funding under the HEA and thus making misstatements because the school was in violation of the HEA. The Seventh Circuit looked at the causal relationship between the false statement and payment from the government in the form of student loans rather than the temporal relationship. The court examined the student loan application process in phases, stating that phase one consisted of the application to establish the institution's eligibility to receive federal funding (through the PPA), and phase two consisted of the application for specific grants, loans, and scholarships (in this case, the FAFSA).

Prior to the Seventh Circuit's review, the district court had dismissed the relator's claim on the pleadings, holding that false statements in the phase-one application did not violate the FCA because it was simply a declaration of eligibility and not a request of payment from the Treasury. This reasoning was in line with Graves and Gay. The district court determined that the phase two applications, which involved direct requests for payment of grants, loans, and scholarships, were covered by the FCA, but in this case there was no violation of the FCA because the university did not state in the phase-two application that it was complying with the rule against paying recruiters on a contingent basis.

The Seventh Circuit, however, rejected this line of reasoning, holding that the university relied on its phase-one application when it made a phase-two application for payment. The court reasoned that the phase-two application contained a false claim because the school represented that the student was enrolled in an institution eligible to receive federal funding, which was not true due to violation of the statute regarding contingent fee payments. The court stated that when "a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork."
Shortly after the *Main* decision, liability under the FCA was extended to include the false certifications made by a university during the accreditation process.\(^{93}\) In 2006, a the U.S. District Court for the Central District of California followed the two-tiered approach set out by the Seventh Circuit in *Main* to deny Chapman University’s motion to dismiss a relator’s FCA claim in *United States v. Chapman University*.\(^{94}\) Here, the relators alleged that the university falsely certified that over the ten-year period preceding the filing of the lawsuit, the university met the minimum clock-hour requirements for classroom instruction in compliance with federal provisions.\(^{95}\) The relators claimed that as a result of these false certifications, the university received hundreds of millions of dollars in state and federal funding through student scholarships, grants, and loans.\(^{96}\) Specifically, the relators contended that the university, through its president, falsely certified in written reports to the regional accreditation agency that the school was in compliance with the accreditation standards relating to minimum-hour requirements in the Marriage and Family Therapist (MFT) program, supervision of the MFT program, and adequate support for satellite campuses.\(^{97}\) These false certifications, the relators alleged, led to regional accreditation that would otherwise not have been granted.\(^{98}\) The regional accreditation, in turn, was a “material and fundamental condition of payment of government funds for tuition loan[s] and grants.”\(^{99}\)

The university argued that the relators had failed to state a claim upon which relief could be granted because the PPAs themselves did not contain “an affirmative certification of compliance with the [regional] accreditation requirements.”\(^{100}\) The university also tried to differentiate the case from *Main*, stating that it had not violated any statutory requirements for eligibility as had been done in *Main*.\(^{101}\) The court, however, rejected this argument, finding it to be irrelevant that the accreditation agency’s standards did not have the force of a statute.\(^{102}\) The court followed the *Main* decision and denied the school’s motion to dismiss the relator’s claim, reasoning that the

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94. Id.
95. Id. at *1.
96. Id.
97. Id. at *4.
98. Id.
99. Id. at *5.
100. Id. at *6.
101. See id. at *3.
102. Id.
school's false certifications to the accreditation agency were phase one in the two-phase process of submitting a claim to the government for funds, and therefore the allegations could not be dismissed merely because the relators did not allege government payment as a result of false certifications to the accreditation agency.\textsuperscript{103}

That same year, the Ninth Circuit Court of Appeals also followed the Seventh Circuit's \textit{Main} decision, reversing the district court's grant of the University of Phoenix's motion to dismiss the relator's claim in \textit{United States ex rel. Hendow v. University of Phoenix}.\textsuperscript{104} This case once again involved relators who were school enrollment counselors claiming that they were paid on a contingent-fee basis in violation of the incentive compensation ban required to receive Title IV funds.\textsuperscript{105} The relators contended that the university violated the incentive-compensation ban by compensating employees based directly on enrollment activities and by trying to hide these activities by creating "fake" employment records to provide to the Department of Education, which contained performance reviews based on legitimate factors rather than the quantitative factors actually used.\textsuperscript{106} As with the aforementioned cases, the relators contended that false claims were made to the government via the PPAs that the university submitted to establish eligibility for Title IV funding.\textsuperscript{107} The Ninth Circuit held that the relators had properly stated a claim under the FCA because they had properly alleged (1) a false statement (2) made with scienter (3) that was material and (4) caused the government to pay money.\textsuperscript{108} The court concluded that the plaintiffs properly pled that the school had made a false claim because the relators had alleged specific instances of the university establishing policies violating the incentive-ban requirement and knowingly encouraged employees to violate it.\textsuperscript{109} The court determined that the relators had properly alleged scienter, the second element, because they claimed that the university officials "openly bragged about perpetrating a fraud," developed a system of keeping fake records to deceive the government, and repeatedly changed policies to cover the fraud.\textsuperscript{110} The court focused on evaluating the materiality of the false statement and its relation to the

\textsuperscript{103.} See id.

\textsuperscript{104.} United States \textit{ex rel. Hendow v. Univ. of Phx.}, 461 F.3d 1166, 1168 (9th Cir. 2006).

\textsuperscript{105.} Id. at 1169.

\textsuperscript{106.} Id.

\textsuperscript{107.} Id. at 1169–70.

\textsuperscript{108.} Id. at 1177–78.

\textsuperscript{109.} Id. at 1175.

\textsuperscript{110.} Id.
government's decision to provide federal funding. The court found that the false statement was material because Title IV funding was explicitly conditioned on compliance with the incentive compensation ban found in the federal statute, federal regulation, and the PPA itself, which stated that "the execution of this Agreement by the Institution and the Secretary is a prerequisite to the Institution's initial or continued participation in any Title IV, [federal loan] program." While the university argued that the ban was a condition of participation rather than a condition of payment, the court rejected the distinction. As to the fourth and final element—presentment to the government for payment—the court referenced Main and wrote, "All that matters is whether the false statement or course of conduct causes the government to 'pay out money or to forfeit moneys due.'"

E. The 2009 Federal False Claims Act Amendments

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act (FERA). The purpose of FERA is to "improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs, for the recovery of funds lost to these frauds." FERA significantly expands the FCA. First, the FCA no longer requires that false claims for payment be made directly to an officer or employee of the U.S. government or member of the U.S. Armed Forces. Additionally, the statute now has a revised "con-
spicary” provision.\textsuperscript{119} Previously, the statute imposed liability when a party “conspire[d] to defraud the Government by getting a false or fraudulent claim allowed or paid.”\textsuperscript{120} The amended statute, however, removes the requirement that the conspiracy have the purpose of getting a false claim paid or approved.\textsuperscript{121} The current statute states that liability may be imposed on a person who “conspires to commit a violation of [any part of the Act].”\textsuperscript{122}

Perhaps an even more significant amendment is the removal of the intent requirement in the submission of false claims to the government.\textsuperscript{123} The prior language of the statute required a person to “knowingly make . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government.”\textsuperscript{124} The current language, however, imposes liability when a person “knowingly makes . . . a false record or statement material to a false or fraudulent claim.”\textsuperscript{125} “Material” is now defined in the statute as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”\textsuperscript{126} Thus, the amendments change the focus of the inquiry from the purpose of the defendant’s false certifications to the impact false statements have on the government’s payment decision.\textsuperscript{127} This marks a drastic change in the analysis employed by the Supreme Court in \textit{Allison Engine Co. v. United States ex rel. Sanders}, in which the Court limited the application of the FCA to cases involving intent “to defraud the government.”\textsuperscript{128}

\section*{F. Pending Bills}

Currently, bills are pending in both the House of Representatives and the Senate that could further expand a private citizen’s ability to bring a qui tam action under the FCA. The False Claims Act Clarification Act of 2009 was introduced in the Senate on February 24,
2009. The False Claims Act Correction Act of 2009 was introduced on March 30, 2009, in the House. Few key provisions in each of these bills would, if passed, substantially affect the future of FCA qui tam actions against institutions of higher education.

House Bill 1788 would reduce the heightened pleading requirements under Federal Rule of Civil Procedure 9(b) for claims of fraud. Under current Rule 9(b), "the circumstances constituting [the] fraud or mistake" must be set forth "with particularity." The purpose of the heightened pleading requirement is to ensure that the defendant has enough information to be put on notice of the misconduct and formulate a defense. Hence, when a plaintiff alleges fraud, "mere conclusory allegations of fraud are insufficient." However, House Bill 1788 seeks to change the general fraud pleading requirements by providing that when a party brings a qui tam action, the relator will not have to identify specific claims that resulted from the alleged misconduct "if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made." Thus, if passed, this bill would drastically reduce the procedural hurdles that FCA qui tam relators currently face by allowing relators to plead fraud generally without specific knowledge of a precise instance of fraudulent behavior.

Both the Senate and House bills also propose to eliminate a defendant's ability to raise a defense when there has been public disclosure of the false claim or when the relator is not the "original source" of the information, as is currently required under the FCA to bring a qui tam action. "Original source" is currently defined in the FCA as

130. False Claims Act Correction Act of 2009, H.R. 1788, 111th Cong. 1. The bill seeks to "amend the provisions of title 31, United States Code, relating to false claims to clarify and make technical amendments to those provisions." Id.
131. FED. R. CIV. P. 9(b).
132. Id.
134. Id. (citing Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)).
135. H.R. 1788.

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
"an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 137 The House bill, however, removes language about an original source and states instead that an action will be dismissed only when "allegations relating to all essential elements of liability of the action or claim are based exclusively on the public disclosure." 138 Further, the bill states that "[a]n action or claim is 'based on' a public disclosure only if the person bringing the action derived the person's knowledge of all essential elements of liability of the action or claim alleged in the complaint from the public disclosure." 139 The Senate bill also seeks to remove the "original source" language, stating instead that an action will be dismissed when substantially the same matters as alleged in the action or complaint were contained in various public disclosures. 140 Additionally, the bill states that an action may be dismissed when

[any new information provided by the person does not add substantial grounds for additional recovery beyond those encompassed within the Government's existing criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit; and . . . the Government's existing . . . investigation was not initiated or published after the Government's receipt of information about substantially the same matters voluntarily brought by the person to the Government. 141

Thus, under each bill the relator would still be prevented from bringing an action based on claims that have already been disclosed to the government but would have the ability to bring a claim under the FCA when the relator is not the "original source" of the information. This would expand the number of potential relators with the ability to bring FCA actions against institutions of higher education.

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137. § 3730(e)(4)(B).
138. H.R. 1788.
139. Id.
140. False Claims Act Clarification Act of 2009, S. 458, 111th Cong. Specifically, the allegations cannot be based upon (i) a filed criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit; or (ii) a news media report, or public congressional hearing, report, or investigation, if within 90 days after the issuance or completion of such news media report or congressional hearing, report, or investigation, the Department of Justice or an Office of Inspector General opened a fraud investigation or audit of the facts contained in such news media report or congressional hearing, report, or investigation as a result of learning about the public report . . . .
141. Id.
III. Analysis

There is little doubt that the 2009 Fraud Enforcement and Recovery Act (FERA) has significantly expanded liability under the FCA. While the intention of FERA was to protect the government against fraud associated with the Troubled Asset Relief Program funds and the economic stimulus package, FERA ignores the undesired consequences that such a dramatic expansion of liability under the FCA may have on higher education institutions. Institutions of higher education are decentralized, making it difficult, if not impossible, for one party to monitor all of the programs and activities within the organization. The accreditation process for institutions of higher education thus requires a high degree of specialized determinations rather than black and white judgments based on these numerous activities and programs within the institution. Educational institutions must promise the accreditation agencies that the school is complying with the agency’s standards. The expansion of the scope of FCA liability, the large number of programs offered at universities, the individualized nature of the accreditation process, and the growing number of plaintiffs’ attorneys actively recruiting “whistle-blowers to pursue FCA claims” create a higher risk that institutions of higher education will be subject to a growing number of FCA claims, regardless of whether the claims have merit.

Section A of this analysis discusses how the reasoning employed by the courts in Graves and Gay, in which the courts granted the defendant schools’ motions to dismiss, was in line with the ultimate

142. The recent amendments have drawn a significant amount of attention and commentary about the expansion of FCA liability. See, e.g., New Compliance Challenges: False Claims Act Amendments-FERA with More Pending, The Metropolitan Corporate Counsel, July 22, 2009, at 22 (“[A]ny business that is directly or indirectly the recipient of federal money may now be exposed to qui tam actions as a result of FERA. Although well intentioned, it opens the door for disgruntled employees and disappointed competitors to bring qui tam actions.” (quoting Sheryl J. Willert, managing director and member of Williams Kastner)).

143. Id.

144. Braceras & Bell, supra note 28, at 8-33 (“A university may have dozens, if not hundreds, of separate departments, professors, or students engaged in federally funded projects at any given time, and each such project presents a potential FCA claim. A university’s difficulty in managing such projects, however, is no excuse or defense to an FCA lawsuit.”).

145. See ACE Amicus Brief, supra note 2, at 14–15.

146. See Commission on Institutes of Higher Education: New England Association of Schools and Colleges, Standards for Accreditation 2 (2005), available at http://cihe.neasc.org/standards_policies/standards (noting that institutions have to engage in a self-review process directed toward demonstrating that they meet the accreditation agency’s standards, and that such process requires an “honest and forthright assessment of institutional strengths and weaknesses”).

147. Braceras & Bell, supra note 28, at 8-33.

goal of the FCA.\textsuperscript{150} Section B discusses how the reasoning employed by the courts in \textit{Main},\textsuperscript{151} \textit{Hendow},\textsuperscript{152} and \textit{Chapman},\textsuperscript{153} in which the courts denied the defendant schools’ motions to dismiss, was inappropriate because it ignored the original purpose of the FCA.\textsuperscript{154} Section C discusses how FERA, when applied to institutions of higher education, will have potentially disastrous consequences because the legislation will open a floodgate of litigation related to promises institutions make as part of the accreditation process and will ultimately benefit relators more than it will help the government combat fraud.\textsuperscript{155} Section D discusses how the proposed FCA legislation will lead to a further increase in litigation and cost institutions of higher education a significant amount of money to either defend or settle these claims.\textsuperscript{156}

\textbf{A. The Courts Had It Right in Graves and Gay}

The FCA was intended to “combat and to deter fraud.”\textsuperscript{157} When the FCA was amended in 1986, Congress wanted to ensure a “coordinated effort” between the government and private citizens acting as relators, to protect the U.S. Treasury and “enhance the Government's ability to recover losses sustained as a result of fraud against the Government.”\textsuperscript{158} However, the Supreme Court has stated that “the False Claims Act was not designed to reach every kind of fraud practiced on the government.”\textsuperscript{159}

Since the 1986 amendments, the number of FCA actions initiated by qui tam relators has grown dramatically.\textsuperscript{160} The increase in relator-initiated FCA claims is the result of lower hurdles for qui tam relators


\textsuperscript{150} See \textit{infra} notes 157–64 and accompanying text.

\textsuperscript{151} United States \textit{ex rel.} Main v. Oakland City Univ., 426 F.3d 914 (7th Cir. 2005).

\textsuperscript{152} United States \textit{ex rel.} Hendow v. Univ. of Phx., 461 F.3d 1166 (9th Cir. 2006).


\textsuperscript{154} See \textit{infra} notes 165–80 and accompanying text.

\textsuperscript{155} See \textit{infra} notes 181–96 and accompanying text.

\textsuperscript{156} See \textit{infra} notes 197–202 and accompanying text.

\textsuperscript{157} United States \textit{ex rel.} Roby v. Boeing Co., 302 F.3d 637, 645 (6th Cir. 2002).


\textsuperscript{160} Taxpayers Against Fraud Education Fund, The 1986 False Claims Act Amendments: A Retrospective Look at Twenty Years of Effective Fraud Fighting in America, at 6, available at http://www.taf.org/retrospective.pdf ("While the total number of new FCA actions has remained relatively constant (e.g., 427 in 1987, 513 in 1995, 494 in 2005), there has been a significant shift from government-filed suits to whistleblower-filed suits. Only 15% of all new FCA actions filed in 1987 were whistleblower suits. . . . [In 2005], nearly 80% of all new FCA actions were filed by whistleblowers.").
as well as greater incentives to bring FCA claims. While the increase in litigation following the 1986 amendments allowed the government to recover a significant amount of money,\textsuperscript{161} it is important for the government to ensure that these recoveries serve to punish only those institutions that have profited from defrauding the government. The decisions in both Graves and Gay enforced this principle by refusing to impose FCA liability when there was no false statement made directly to the government to obtain federal funding.

The line of reasoning in both Graves and Gay correctly took into account the importance of requiring a false certification as a condition of payment.\textsuperscript{162} By requiring that the false certification directly relate to the government's decision to make a payment, these courts refused to expand the reach of the FCA when the relationship between the false certification and payment was too attenuated.\textsuperscript{163} Furthermore, requiring a proximate relationship between the alleged false claim and payment from the federal government is appropriate because it ensures that liability under the FCA only applies to cases that the statute was originally intended to reach. While "but for" the alleged misstatement, the schools in both Gay and Graves had a possibility of not being eligible to receive federal financial aid funding, it would have been inappropriate for the courts to automatically assume that the alleged misstatements made the institutions wholly ineligible for the federal funds. The effect of these decisions therefore did not encroach on the authority of administrative agencies, such as accreditation agencies, to make judgments based on their own experience and expertise.\textsuperscript{164} Accordingly, these courts correctly refused to impose a bright-line rule that any misstatement in a PPA would constitute a false claim under the FCA. Imposing such a bright-line standard would do little to further the FCA's goals of combating and deterring fraud against the federal government. An institution making immate-

\textsuperscript{161} Id. at 7 ("[T]he total yearly recoveries have dramatically increased, jumping from an average of $368 million from 1987 to 1996, to an average of over $1.25 billion from 1997 to 2005."). The largest FCA settlements have ranged from $26 million (Conoco Inc. in March of 2000) to $1 billion (Pfizer in September of 2009). See Top False Claims Act Cases by Award Amount, Taxpayers Against Fraud Education Fund, http://www.taf.org/top100fca.htm (last visited Feb. 25, 2011).


\textsuperscript{163} See Graves, 284 F. Supp. 2d at 500; see also Gay, 2003 WL 22474586, at *4.

\textsuperscript{164} See Braceras & Bell, supra note 28, at 8-30 (citing Athol Mem'l Hosp. v. Comm'r of the Div. of Med. Assistance, 772 N.E.2d 569, 574 n.9 (Mass. 2002) ("The doctrine of primary jurisdiction precludes judicial consideration of a matter where administrative proceedings have not yet begun.").
rial misstatements on its PPA is unquestionably distinguishable from a contractor selling the government faulty goods at outrageous prices.

**B. The Courts Had It Wrong in Main, Hendow, and Chapman**

When *Main, Hendow, and Chapman* were decided, the courts began significantly expanding FCA liability in order to cover claims that arguably were never intended to be covered by the FCA. After these decisions, in fact, many courts rejected the reasoning employed by the *Main, Hendow, and Chapman* courts and continued to require a significant causal relationship between the false certification and the payment claim. By greatly expanding the scope of the FCA, these decisions "expose[d] postsecondary institutions to crushing financial liability under the FCA for any knowing violation of any Title IV statute or regulation, no matter how minor or technical the violation." Expanding the reach of the FCA will result in educational institutions expending a lot of money to defend qui tam actions whether or not they are meritorious.

These decisions also open the door for FCA claims based on a knowing violation of any number of regulatory requirements "no matter how perfunctory or minor" so long as the violation involves a condition of eligibility to obtain federal funding. This exposes

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165. See id. ("[W]hile perhaps well-intentioned, the expansion of FCA liability to representations made by schools during the accreditation or participation process is an unnecessary intrusion into the affairs of universities. Universities do not need further monitoring and regulation of their internal affairs through the FCA.").

166. See, e.g., United States *ex rel.* Gross v. AIDS Research Alliance-Chi., 415 F.3d 601, 605 (7th Cir. 2005) (stating that the certification must be "a condition of payment of government money" in order to be actionable); United States *ex rel.* Conner v. Salina Reg'l Health Ctr., Inc., 459 F. Supp. 2d 1081, 1086 (D. Kan. 2006) ("A legally false certification of compliance with a statute or regulation cannot form a viable FCA cause of action unless payment is expressly conditioned on that certification."); United States *ex rel.* Rocha v. Am. Transitional Hosps., Inc., No. H-97-2699, 2005 U.S. Dist. LEXIS 38892, at *17 (S.D. Tex. Dec. 14, 2005) (declaring that the relators had alleged that the defendants made certifications of compliance with particular regulations on which payment was conditioned).

167. Brief for the Career College Association as Amicus Curiae Supporting Petitioner at 2, Univ. of Phx. v. United States *ex rel.* Hendow, 461 F.3d 1166 (9th Cir. 2006) (No. 06-1006), 2007 WL 935020 [hereinafter CCA Amicus Brief].

168. *Id.* at 3 ("Because this potential for draconian FCA liability far exceeds the ability of even the largest school, college, or university to withstand, the Ninth Circuit's holding [in Hendow] creates tremendous pressure to expend exorbitant sums to either dispute or settle meritless claims based on a so-called condition of eligibility."). It is further noted that the courts of appeal are irreconcilably split as to whether FCA liability attaches when an alleged false statement is made in connection with a so-called condition of eligibility, rather than a condition of payment. The lack of a uniform interpretation of the reach of FCA liability creates an intolerable state of affairs . . . .

169. *Id.* at 6.
institutions of higher education to tremendous liability for something that could be a very insubstantial and inconsequential violation of an applicable regulatory requirement.  

While many scholars have feared that these decisions will lead to a floodgate of litigation, some have argued that this is an overreaction. One scholar rejecting the arguments of critics of the Main, Chapman, and Hendow cases notes that critics overlook the crucial fact that only fraudulent behavior exposes institutions of higher education to FCA liability. Another skeptic of the critics of the reasoning in Main, Chapman, and Hendow notes that “[FCA liability] applies only where there is a material breach of a condition of payment, and it’s flagrant.” He elaborates that “[t]he only colleges that face trouble are those that are not obeying the law and the material accreditation standards that underlie their getting loans and grants.”

These arguments, while perhaps persuasive before the passage of FERA, are no longer applicable because they hinge on the distinction between “broken promises and intentional fraud.” FERA removed the language requiring claims to be made “to get a false or fraudulent claim paid” and instead requires only that the false statement have the “natural tendency to influence the payment or receipt of money.” The revised statute no longer focuses on the intent to defraud the government, and therefore this line of reasoning suggesting that there will not be a floodgate of litigation, while perhaps previously persuasive, is no longer a reasonable argument.

Aside from the expansion of FCA liability and the potential flood of new litigation as a result of these decisions, the decisions also impose a black-and-white standard for determining whether or not an

170. See id.
171. See Perkins, supra note 15, at 765 (“Critics of the Main ruling are concerned that there will be a drastic increase in the number of frivolous FCA suits against colleges and universities.”). Perkins additionally notes that these same critics warned of a “break down [of] communication lines between federal agencies and the colleges and universities.” Id.
172. Id. at 768.
174. Id. at 769.
175. Id. (“[C]ourts have been distinguishing between broken promises and intentional fraud, and it is reasonable to expect them to do so in the future. FCA liability will attach only when the institution knew it was lying to the government about its past behavior or current intentions in order to get federal money. The primary effect of Main was to hold private institutions of higher learning as accountable as other groups that get federal financial support.”).
institution is eligible to receive federal funding. The Secretary of Education "is expressly charged in the statutory scheme with determining eligibility." When the Secretary has determined that an institution is not eligible to receive federal funding, the Secretary should be afforded great discretion regarding what action to take. The result of these three decisions thus sets up bright-line standards and imposes significant liability on educational institutions for potentially insignificant misstatements relating to Title IV eligibility. For instance, the Secretary could still determine that an institution should be accredited even with the false statement, but the court takes this decision out of the Secretary's hands and imposes liability. The bright-line rules coupled with the removal of the Secretary's power of discretionary judgment places institutions of higher education in a position where they are at risk for FCA qui tam litigation in a wide range of circumstances with little chance of getting the claims dismissed. The FCA was originally intended to punish those who committed fraud against the government, but educational institutions are generally not-for-profit entities and therefore are not profiting from submitting false claims to the government. If found liable under the FCA, these institutions could face bankruptcy, which would primarily hurt the students who attend these institutions. Thus, the bright-line liability created by these decisions moves away from the original intent of the FCA and causes innocent parties to suffer the consequences of any false statement made relating to institutional eligibility to receive Title IV funding.

178. CCA Amicus Brief, supra note 167, at 12. This brief notes that under the Medicare statute, there are certain provisions that expressly prohibit payment in certain circumstances, but that such provisions are not present in the Higher Education Act. Id. It is also noted that the federal regulations specifically prescribe the secretary's discretion in eligibility matters. See 34 C.F.R. § 600.41(a) (2008) (noting that "[i]f the Secretary believes that a previously designated eligible institution as a whole, or at one or more of its locations, does not satisfy the statutory or regulatory requirements that define that institution as an eligible institution, the Secretary may" take one or more of the various administrative actions against the institution delineated).

179. Sistema Universitario Ana G. Mendez v. Riley, 234 F.3d 772, 779 (1st Cir. 2000).

180. Id. (Secretary held that "in accordance with my discretionary authority" College would not be required to pay back any Title IV funds disbursed to students in an ineligible program."); In re Mary Holmes Coll., Dkt. No. 94-32-SP, U.S. Dep't of Ed. (March 30, 1995) (Certified as Final Decision by the Secretary Sept. 18, 1995) ("When violation of Title IV is deemed only technical in nature, the extreme remedy of declaring the program to be ineligible is unwarranted, absent other aggravating circumstances.").
C. FERA Will Allow Courts to Inappropriately Step into the Shoes of Accreditation Agencies

FERA has now essentially eliminated the need for courts to engage in the two-tiered inquiry first introduced by the Seventh Circuit in Main, as the statute no longer requires that a claim be presented “to an officer or employee of the United States Government or a member of the Armed Forces of the United States.”\(^{181}\) The revised statute now only requires that the party make a false statement and that the natural consequence of such a statement is payment by the government.\(^{182}\) As numerous promises are made by educational institutions to accreditation agencies, there is a great opportunity for qui tam relators to bring FCA claims against educational institutions related to such statements. Holding educational institutions liable under the FCA for these statements, however, would improperly substitute the court’s bright-line standard for the judgment of the accreditation agency.

Courts should not second-guess an accreditor’s judgment because they are not equipped to stand in the shoes of an accreditation agency.\(^{183}\) Accordingly, in the past, courts have typically given great deference to educational judgments.\(^{184}\) One of the most important educational judgments that courts should give deference to is accreditation decisions.\(^{185}\) Courts simply do not have the capability to make the highly individualized and fact-specific accreditation decisions made by accreditation agencies.\(^{186}\) Courts themselves have recognized that accrediting agencies “are better suited than are courts to

\(^{183}\) See ACE Amicus Brief, supra note 2, at 3 (“To subject the accreditation of colleges and universities to judicial reconstruction would conflict with courts’ recognition that accreditation in higher education entails paradigmatic educational judgment.”); see also Braceras & Bell, supra note 28, at 8-30 (“Courts and qui tam relators simply do not have the expertise, experience, or discretion to monitor and enforce collegiate rules and regulations.”).
\(^{184}\) See J. Peter Byrne, Academic Freedom: “A Special Concern of the First Amendment,” 99 YALE L.J. 251, 323 (1989) (“Yet the consistency of result and invocation of the need for judicial restraint whenever internal university decisions are challenged by an unhappy student or professor has been sufficiently impressive that a competent practitioner today would advise such a student or professor that her chances of success are low or nil.”).
\(^{185}\) See ACE Amicus Brief, supra note 2, at 10.

“A certain amount of flexibility in fashioning accrediting standards long has been recognized as a virtue . . . . This makes perfect sense: after all, benchmarks for accreditation are not intended as reference points for laymen. To the contrary, their raison d’etre is to guide professionals in a particular field of endeavor (here, education).”

\(^{186}\) See id. at 9.
evaluate the effectiveness of a residency program."

Furthermore, courts have not required accrediting agencies to maintain strict standards in the accreditation process.

As previously discussed, the accreditation process involves several steps: (1) the accreditation agency sets standards for accreditation; (2) the institution seeking accreditation performs a self-study to measure its performance against the accreditation standards; (3) a team selected by the accreditation agency performs an on-site evaluation to determine if the institution is meeting accreditation standards; (4) the accreditation agency publishes a list of accredited institutions in an official publication; (5) the accreditation agency monitors the accredited schools to ensure that the institution continues to meet the agency's standards; and (6) the accreditation agency conducts a periodic re-evaluation to ensure that the institution has continued to meet accreditation standards. Furthermore, the types of higher education institutions in the United States are numerous, spanning from small liberal arts colleges to specialized schools and institutions. In order to accommodate the wide range of institutions and programs offered by schools, higher education accreditation is decentralized and diverse. Accreditation agencies are charged with reviewing an educational institution's performance on critical matters such as "faculty composition ('who may teach'), curricula ('what may be taught'), modes of instruction ('how it shall be taught'), and composition of the student body ('who may be admitted to study')." Accreditation decisions, therefore, require the judgment of individuals trained for the task. Court decisions such as Chapman impose an unworkable bright-line standard for accreditation due to the number of individual-


188. See Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schs., 817 F.2d 1310, 1314 (8th Cir. 1987) ("Strict guidelines would strip from [accrediting agency] officials the discretion necessary to adequately assess the multitude of variables presented by different schools."); see also Parsons Coll. v. N. Cent. Ass'n of Colls. & Secondary Schs., 271 F. Supp. 65, 73 (N.D. Ill. 1967) (noting that accreditation standards "are not guides for the layman but for professionals in the field of education. Definiteness may prove, in another view, to be arbitrariness.").


190. See ACE Amicus Brief, supra note 2, at 6.

191. See id.

192. Id. at 8.

ized judgments accreditation agencies make. Holding an educational institution liable under the FCA for statements made to accreditation agencies is essentially equivalent to courts determining that these institutions are not accredited. By imposing FCA liability on universities based on claims made to accreditation agencies, the courts would essentially be “supplant[ing] the remedies already provided for accreditation or regulatory noncompliance.”

Although accreditation agencies do have various standards that universities must meet in order to obtain accreditation, it would not be accurate to state that any form of noncompliance with accreditation standards would lead an accreditation agency to revoke the accredited status of a university. Leaving accreditation decisions to the appropriate agencies is essential to academic freedom. While courts have traditionally recognized that agencies should be given deference to make their own decisions, it is unclear if courts will eventually find the same in this context because no case has yet been decided on its merits.

**D. The Proposed Legislation Will Create Disastrous Consequences for Educational Institutions**

The proposed amendments to the FCA will undoubtedly allow many more claims against colleges and universities to survive a motion to dismiss, whether or not such claims are meritorious. Removing the requirement of Federal Rule of Civil Procedure 9(b) that requires fraud be pled with particularity will likely encourage individual

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195. See ACE Amicus Brief, supra note 2, at 8.  
196. Of the cases previously discussed, which held that universities could face potential FCA liability even though they did not directly present a claim for payment to the government, *United States ex rel. Main v. Oakland City University* was settled in July of 2007 for $5.3 million, with $1.4 million of the settlement going to the qui tam relator. *See Oakland City Will Pay Multi-Million Dollar Fine, Courier Press Online* (July 30, 2007, 6:43 PM), http://www.courierpress.com/news/2007/jul/30/oakland-city-will-pay-multi-million-dollar-fine/. In *United States v. Chapman University*, the district court granted summary judgment in Chapman’s favor in 2007. No. SACV 0401256, 2007 WL 5998110 (C.D. Cal. Oct. 23, 2007). On appeal, the case was dismissed without a decision due to the timeline for appeal of FCA decisions. *See Chapman University Accreditation Case Dismissed, American Council on Education* (June 23, 2009), http://www.acenet.edu/AM/Template.cfm?Section=home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=32973. Finally, in *United States ex rel. Hendow v. University of Phoenix*, the Supreme Court denied the university’s petition for certiorari on April 23, 2007. 550 U.S. 903, 903 (2007). The trial court then denied the university’s motion to dismiss on May 18, 2009. *Id.* Finally, on September 30, 2009, the university and the plaintiffs filed a joint request for stay of all proceedings. *Id.* It remains to be seen what the ultimate outcome will be when cases presenting similar issues to these three cases are decided on their merits.  
uals to engage in "fishing expeditions," filing claims against universities absent actual knowledge of a precise instance of fraud.\textsuperscript{198} Qui tam relators could thus plead the alleged fraud generally, and hope to find enough information via the discovery process to proceed with the case or compel the institution to settle the case.\textsuperscript{199} This will force educational institutions to expend funds defending or settling what could be completely non-meritorious claims.

The removal of the requirements of Rule 9(b) coupled with the removal of the requirement that the relator be the "original source" of the information\textsuperscript{200} provides an incredible opportunity for FCA qui tam actions to survive a motion to dismiss.\textsuperscript{201} Additionally, given the current state of the economy, many more people may find FCA qui tam actions an attractive option due to the large rewards and insubstantial bar to bringing an FCA claim against an institution.\textsuperscript{202}

Unfortunately, the natural consequence of these proposed amendments is to create an opportunity for individuals to bring frivolous FCA claims against various institutions, forcing institutions to waste both time and resources to defend them. With the number of promises made by educational institutions to accreditation agencies via PPAs between the school and the Department of Education, there are numerous possible FCA claims for potential relators to bring, and a flood of litigation against educational institutions would be an inevitable consequence.

\section*{IV. Impact}

Universities will likely face a dramatic increase in FCA litigation relating to the accreditation process. As intent to defraud the government is no longer necessary for an FCA action,\textsuperscript{203} it will be much easier for qui tam relators to bring a claim against an institution for a misrepresentation made during the accreditation process. The number of promises an institution makes during the accreditation process allows for many instances in which an institution may make an immaterial mistake that is inconsequential to whether it would receive ac-

\textsuperscript{198} See, e.g., New Compliance Challenges, supra note 142, at 22 ("Relators will hope to obtain through discovery either enough facts to proceed with the case or to achieve a settlement based on the defendant's desire to avoid the costs of discovery.").

\textsuperscript{199} Id.

\textsuperscript{200} See S. 458, 111th Cong. (2009); see also H.R. 1788, 111th Cong. (2009).

\textsuperscript{201} See New Compliance Challenges, supra note 142.

\textsuperscript{202} Id.

\textsuperscript{203} 31 U.S.C.A. § 3729(a)(1)(b)(4) (West 2009). The statute now only requires that the statement have a natural tendency to influence the payment or receipt of money or property from the government. Id.
creditation. For instance, an accreditation agency may have a requirement imposing an obligation on an institution to file reports regarding athletic-related student financial aid by July 1 every year as a condition of eligibility. If the institution then executed its PPA on, for instance, June 1, knowing that these reports would not in fact be filed by the July 1 deadline, the institution could be at risk for an FCA claim. Such a violation could lead to damages equal to, double, or triple all of the Title IV aid it disbursed, which would be hundreds of millions of dollars for some higher education institutions, or even billions for others. Penalties of this size have the potential to bankrupt even the largest universities. When viewed in this light, it becomes apparent that colleges and universities may be at risk for a party such as a disgruntled employee or student to bring an FCA action against the institution for something that has no bearing on the quality of the organization as an educational institution. Moreover, these immaterial types of misstatements to an accreditation agency would be unlikely to result in an accreditation agency revoking a university’s accredited status. Essentially, the FCA will allow parties to bring an action against an educational institution for a matter that would not result in the institution losing accreditation status but will still cause the institution to incur extensive costs in defending, settling, or paying a judgment on an FCA claim.

The increase in litigation will in turn lead to increased costs to universities in order to defend or settle FCA claims. Universities that are already operating on a tight financial structure will have to bear the costs of FCA litigation, much of which is likely to be without merit. Universities will thus need to pass these costs off somehow, and will likely increase tuition rates in order to cover such expenses. Because most students require federal financial assistance to cover the costs to attend college, the increased tuition rates will lead to students taking out more federal funding to finance the cost of their education.

204. CCA Amicus Brief, supra note 167, at 9.
205. Id.
206. Id.
207. See Kevin Dougherty, Financing Higher Education in the United States: Structure, Trends, and Issues 7 (unpublished address 2004), available at http://www.tc.columbia.edu/centers/coc/pdf_files/e9.pdf. The primary sources of financing of nonprofit institutions of higher education are tuition (19% for public, 30% for private), federal government (11% for public, 10% for private), state government (36% for public, 1% for private), sales and services (22% for public, 17% for private), and private gifts and grants (5% for public, 15% for private). Id.
208. See Fast Facts, IES NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/fastfacts/ (last visited Jan. 31, 2011) (noting that 47% percent of undergraduate students received federal student financial aid in the school year 2007–08). It is also noted that 66% of all undergraduate students received some sort of financial aid to finance their education in 2007–08. Id.
This places a huge burden on the students when it comes to repayment, especially given the current state of the economy, which has left many students without employment and defaulting on their student loans. In fiscal year 2007, the national default rate on federally guaranteed student loans was 6.7%, the highest rate of default since 1998. Similar results were seen in the private loan sector for student loans in fiscal year 2007. This situation adversely affects the government, educational institutions, students, and student financial aid lenders alike. The trickle-down effect of FCA litigation will thus adversely affect innocent parties, as well as the U.S. government itself, which is ultimately the party that the FCA was intended to protect.

All of this is evidenced by the recent settlement in the Hendow case. The University of Phoenix settled its FCA lawsuit for $67.5 million, with $19 million going to the qui tam relators. Although the University of Phoenix is a for-profit institution, this is nevertheless a very large settlement for an educational institution to bear. How the university handles this cost remains to be seen, but this case serves as an example of the extraordinary amount of money that universities may be at risk of losing when faced with FCA claims.

Furthermore, if the proposed amendments to the FCA become law, there will be a vast increase in “fishing expeditions” in which a relator can state a generalized claim of fraud and hope to find something during the discovery process. The increased litigation from fishing expeditions will place an additional financial burden on institutions of higher education that will have to settle or defend these claims. Once again, these costs will need to be pushed down to the students and the same cycle will continue to occur in which the government is ultimately worse off from the FCA claims due to an increased amount of loans and corresponding increase in default rates.

209. See Anne Marie Chaker, Student Loans: Default Rates Are Soaring, WALL ST. J. ONLINE (Apr. 21, 2009), available at http://online.wsj.com/article/SB12402760001437467.html (“Defaults on student loans are skyrocketing amid a weak job market for graduates and steadily rising tuition costs.”).


211. Chaker, supra note 209.

212. Id.


214. Id.

215. New Compliance Challenges, supra note 142, at 22.
The complexity of the accreditation process and the broad reach of the FCA will ultimately entice private parties to bring qui tam actions against educational institutions. These FCA actions will in turn affect the students who attend the universities as well as government and private lenders of student financial aid. The government will have to pay out more money in federal student financial aid with a greater risk that it will not be repaid. If successful, the qui tam relator and the plaintiff's attorney will be the only parties that truly benefit from these qui tam actions.

V. CONCLUSION

The federal False Claims Act was enacted in order to combat and deter fraud against the federal government, and the qui tam provision of the FCA has assisted the government in recovering billions of dollars. While originally intended to punish parties who profit from defrauding the government, recent court interpretations and legislative expansion of the FCA have expanded the reach of the statute in a manner that will ultimately benefit only one party in the educational institution context: the qui tam relator. The monetary incentive to bring a qui tam action as well as the decrease in procedural hurdles for a qui tam relator to bring an FCA action caused by these court interpretations and FCA amendments will likely result in a drastic increase in qui tam litigation against institutions of higher education.

Educational institutions will become a target for FCA litigation especially in the area of accreditation because of the complex and specific nature of the accreditation process. The number of promises that an educational institution makes to an accreditation agency has the potential to give a qui tam relator numerous opportunities to bring an FCA action against the institution for those promises that go unfulfilled, no matter how inconsequential they are. The increase in litigation will defeat the overall purpose of the FCA because it will result in higher costs to educational institutions to defend or settle the FCA claims, and these costs will ultimately have to be passed on to the students in the form of higher tuition rates. Higher tuition rates will

217. Braceras & Bell, supra note 28, at 8-6.
220. See United States ex rel. Hendow v. Univ. of Phx., 461 F.3d 1166 (9th Cir. 2006); United States ex rel. Main v. Oakland City Univ., 426 F.3d 914 (7th Cir. 2005); United States v. Chapman Univ., No. SAVC 04-1256JVSRCX, 2006 WL 1562231 (C.D. Cal. May 23, 2006).
ultimately lead these students to have to take out a larger amount of federal loan money in order to cover the cost of increased tuition. Higher loan amounts in turn increase the risk of default, causing huge losses to the government.

The increased litigation also has the possibility of bankrupting educational institutions if found guilty of violating the FCA because the institution would have to pay out three times the amount of money it distributed to its students in the form of federal financial aid. Ultimately, educational institutions and the students who attend them will be the parties to suffer from an increase in FCA litigation, and the qui tam relator will be the sole party to benefit, which is not the goal of the FCA.

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222. CCA Amicus Brief, supra note 167, at 9.
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