TESTIMONY OF NEIL V. GETNICK
CHAIRMAN, TAXPAYERS AGAINST FRAUD EDUCATION FUND

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OVERSIGHT OF THE FALSE CLAIMS ACT

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INTRODUCTION

Good afternoon Chairman and distinguished members of the subcommittee. I am Neil Getnick. I am the managing partner of the law firm of Getnick & Getnick, LLP, based in Manhattan. I am testifying today in my capacity as the Chairman of the Taxpayers Against Fraud Education Fund.

The TAF Education Fund is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. The organization is supported by successful whistleblowers and their counsel, as well as by membership dues and foundation grants.

My testimony today attests to the extraordinary success of the Federal False Claims Act in recovering stolen tax dollars, reforming corrupt practices, and creating an unparalleled public-private partnership to protect the public fisc.

THE FALSE CLAIMS ACT: 30 YEARS OF SUCCESS

This year is the 30th anniversary of the seminal 1986 amendments to the Federal False Claims Act. And it is a good time to reflect on where we were, where we are, and where we should – and should not be – going when it comes to the False Claims Act.

First, how should we evaluate the False Claims Act? My dad would say: "Nothing succeeds like success." And, of course, the obvious metric of success to examine is the numbers; the recoveries.

By any measure, the 1986 amendments, augmented by technical changes in 2009 and 2010, have been and are a fantastic success. Prior to 1986, the Department of Justice recovered less than $50 million a year under the False Claims Act. In the ten years following 1986, the DOJ recovered $1 billion. Last year alone, DOJ recovered more than $3.5 billion, $2.8 of which came from qui tam suits. The total recoveries in the last six years was $26.4 billion, and this number does not include billions more recovered as related criminal fines and as Medicaid money returned to the states.

At a time when people question government efficiency and effectiveness, the False Claims Act has a twenty-to-one return in fighting health care fraud. What does that mean? It's very simple. For every dollar that the Federal government spends on Federal FCA health care enforcement, it recovers $20 in return. Does anyone know of any government program, Federal,

state or local, that can boast those results? That is a twenty-to-one return on investment. The False Claims Act enhances the government's defenses against fraud without increasing the size or the cost of government.

But these numbers are an incomplete measure of the False Claims Act's success, which has reformed corrupt industries, stopped unconscionable and illegal practices, and, yes, saved lives. Examples abound.

False Claims Act cases have:

* made health care safer by rooting out adulterated prescription drugs and faulty medical devices being sold to an unsuspecting public;

* stopped unnecessary medical care dished out to Medicare patients and paid for by taxpayers;

* exposed corrupt military contractors selling substandard or flawed weapons systems for our troops;

* fixed faulty bullet-proof vests;

* protected small businesses opportunities reserved for veterans and minorities;

* routed out illegal kick-backs and bribes to doctors and government officials;

* exposed illegal recruitment of vulnerable students by for-profit educational institutions; and

* obtained restitution and reform connected with the financial crisis and mortgage and securities frauds that tanked our economy in 2008.

Successful FCA cases also have ripple effects throughout particular industries. When one company gets brought up, the others look up and often straighten up to avoid a similar fate in the future.

In this way such cases also eliminate a penalty for honesty that some companies suffer when competing against businesses willing to break the rules. Government contractors that engage in bid-rigging, kickbacks, illegal subcontracting, prevailing wage violations and other schemes can obtain an unfair competitive advantage over honest competitors when vying for government contracts. The False Claims Act is a great equalizer by reducing these frauds and leveling the playing field so that honest companies can compete successfully for government contracts.

THE NEW PARADIGM

You might ask: how could a small set of barely-noticed technical amendments to the False Claims Act in 1986 have led to such wide array of cases, recoveries and corporate reforms? The 1986 amendments changed the False Claims Act in a number of ways. But the core change, the critical change, was to loosen the qui tam suit restrictions that had been put into the Act in 1943.

This one key reform created a "new paradigm" of public-private partnerships between the Department of Justice, qui tam whistleblowers, and their counsel.

Under this new paradigm, a new team of relators came forth as force multipliers for the government.

Under this new paradigm, certain United States Attorneys' offices became experts in False Claims Act cases, and made their offices national hubs dedicated to fighting specialized and particular frauds by partnering with whistleblowers.

Under this new paradigm, a new backstop was created that led both fraudsters and the government to know that cases could be pursued, and won, by whistleblowers, even when the government declined to intervene or pursue the fraud.

This last point is crucial. The private right of action contained in the qui tam provisions of the False Claims Act is an action forcing mechanism that ensures that fraud on the government will be exposed and dealt with, and is especially important when busy workloads, limited budgets or bureaucratic headwinds would otherwise shield fraudsters from exposure and pursuit. Historically, inaction by government bureaucracies has enabled fraud and abuse to drain the public fisc and the qui tam provision of the False Claims Act is, by far, the best remedy for such inaction.

While most successful whistleblower cases are joined by the government, billions of dollars have been returned to U.S. taxpayers in FCA cases that have not been joined by the Federal government.

Pleas by industry lobbyists to weaken and eliminate the private right of action in the False Claims Act are fundamentally misguided. And, sorry to say, these pleas are often accompanied with misleading statistics and false descriptions of the qui tam landscape. For example, lobbyists for government contractors always dish out statistics purporting to demonstrate that only a small percentage of non-intervened cases result in a recovery. This is factually inaccurate and misses the point. A significant number of successful intervened cases only come about because of the prospect, and often the reality, of the relator pursuing the case after an initial decision by the Department of Justice not to intervene.

Sometimes the relator is pursuing a novel theory, or the road ahead looks rough for an agency already strapped for resources. The False Claims Act empowers the relator to take the laboring oar, reviewing documents, taking depositions, or prevailing in litigating a motion to dismiss. Relators and their counsel often make huge financial investments in these cases, and proceed without government intervention, only because they are confident that the case has merit and should be pursued to protect the public. Often the hard work and effort done by relators causes DOJ to take a second look, and cases that begin as non-intervened actions become intervened successes. Yet these actions are counted among the intervened settlements for statistical purposes.

In fact, the text of the False Claims Act itself anticipates this sequence by specifically allowing the government to intervene in a qui tam at any time after an initial declination.

It is thus fundamental to the continued success of the False Claims Act for Congress to protect, if not strengthen, the private right of action contained in the statute. The California False Claims Act, for example, offers relators up to a fifty percent share for successful cases that never see an intervention. And the result has not been a flood of non-intervened litigation in that state.

It is true that there are occasions when a relator goes forward with a qui tam case and the action ends up unproven, or the case gets dismissed for one reason or another. (This happens in intervened cases too, by the way). Of course, *any* statute allowing lawsuits results in unsuccessful and dismissed actions.

But the False Claims Act provides more safeguards and oversight to protect against frivolous or ill-advised lawsuits than just about any other civil enforcement statute in the Federal code.

Not only does the FCA specifically provide for penalties for frivolous and vexatious litigation, but these penalties are very rare because there are so many "filters against folly" when it comes to pursuing a weak case without much chance of winning.

First, many qui tam actions end when DOJ decides not to intervene. Typically, the government shares information previously unknown to the relator that causes the relator to reassess the likelihood of success. That is the nature of the government-relator partnership.

Second, because FCA lawyers typically must work on a contingency basis, lawyers and whistleblowers are only incentivized to develop, bring and persist with meritorious cases they think will be successful. A declination thus serves as a caution light on many qui tams, but it in no way means that all declined cases lack merit. As the United States recently said in oral argument before the United States Supreme Court, the decision to decline may have nothing to do with an assessment of the merits. It might be that the government thinks the dollar amount is small, or that they think that the relator or relator's counsel is capable of handling the case, or because they don't know whether the facts could be proved easily.

Third, qui tam cases involve close interactions between relators and government prosecutors. If a relator ever were to knowingly lie to accuse a company of a false claim, or make up a story about a company shredding documents in the context of his or her FCA case, he or she could easily find themselves criminally investigated or indicted for felonious conduct.

Fourth, whistleblowers put their careers, relationships, and sometimes lives, at stake when they file a case — a decision that I can say from personal experience, few potential whistleblowers take lightly. And, unfortunately, Federal whistleblowers can be identified even after a case gets declined.

Fifth, and most important, in the event the other checks and balances fail to deter questionable qui tam actions, the Department of Justice has the power to dismiss qui tam cases at any time and practically for any reason. Sometimes it is pointed out that only a few reported qui tam actions

have been dismissed by the Department. However, again, this misses the point. A mere threat by prosecutors to dismiss the action is enough to make most relators withdraw their actions.

It is, in fact, because of these filters, that there has been no systemic qui tam abuse in FCA practice, and there is no need to weaken the successful public-private partnership of the FCA.

New fraud schemes are being created every day, and they often involve dizzying complexity. If fraud were easy for government programs to detect and prevent, it wouldn't be so lucrative. Empowering and incentivizing whistleblowers with either inside information or expertise in an industry to point out frauds is common sense.

THE INTENDED CONSEQUENCES OF WEAKENING THE FCA

Most FCA defendants are very big companies that participate in large government funded programs or compete for big government contracts. A handful of companies (mostly in the health care industry) are repeat players with the False Claims Act, with more than a few facing liability for new or continuing frauds even as they are operating under corporate integrity agreements.

It is not surprising that these types of contractors and their lobbyists consistently push to weaken the False Claims Act by, among other things, restricting the private right of action and disabling public-private partnerships that flow from qui tam cases.

Among other things, this hearing addresses the "unintended consequences" of the False Claims Act. But industry lobbyists really have intended consequences. Their intended consequences are to use the occasional story of a defense verdict, or an investigation that negatively impacted a small business, as a pretext to gut the False Claims Act that has resulted time after time in corporate defendants paying restitution to the government for repeated, fraudulent, harmful schemes.

The posturing of this pretext is transparent - and should be rejected.

The main proposal advanced by these lobbyists is to require corporate whistleblowers to report frauds internally before filing qui tams. Relatedly, they seek to eliminate or narrow False Claims Act liability for corporations that adopt a so-called gold standard or certified, corporate compliance program.

It is unclear how these requirements would protect anybody but government contractors that have repeatedly defrauded taxpayers. As United States Senator Chuck Grassley stated in 2014:

> They talk about a 'gold-standard compliance certification program,' but it's just a pie-in-the-sky idea with no specifics. They are vague on who would create the program, who would enforce the program – basically, everything about it. But they want you to believe that once this pipe dream is in place, it will magically increase the amount of taxpayer dollars the government recovers.

> In exchange for this castle in the air … they want to eliminate the use of exclusion or debarment, surrendering one of the government's strongest tools for deterring fraud. They want to lower the damages multiplier for those who self-report. And they repackage a detrimental proposal to whistleblowers that has been recycled again and again.
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> Large corporations have long argued that whistleblowers should be forced to report wrongdoing internally before going to the government. Yet when whistleblowers try to do exactly that and get retaliated against, these large corporations change their stance in court and argue that whistleblowers only have protection if they report externally. Those kinds of inconsistent positions make it hard to believe that either argument is made in good faith. . . .

No one could have said that better.

To be clear, corporate compliance programs do have a vital role to play in fighting fraud and corruption. Such programs need to exist in tandem with effective public-private partnerships under the False Claims Act.

In fact, there is an inherent flaw with linking the threat of False Claims Act liability to a corporation's adoption of a so-called "model" compliance program. This is the flaw of 'law-driven' compliance programs as opposed to 'business driven' integrity programs.

'Law driven' compliance programs are those that meet certain predefined benchmarks, and are adopted to avoid punishment. In many cases, law-driven programs are only grudgingly tolerated by executives and employees. Corporations adopt them without developing a deeply rooted culture of integrity. It will result in corporate lawyers telling corporate executives how to design a compliance program that meets some set of objective tests so that they can enjoy the benefit of reduced liability.

By contrast, 'business-driven' integrity programs are much more likely to prove effective because business people from the top down (not just the legal department) embrace and promote them as essential to the long-term success of the enterprise. A business-driven program is viewed throughout the company as a profit center and a competitive advantage, rather than a cost center, an obstacle, or a get-out-of-jail (or get-out-of-liability) card. Companies that are serious about developing and maintaining a culture of integrity and compliance do so from the top down. These companies may naturally use compliance programs because they truly desire for employees at every level to get the message that the company's senior leadership will not tolerate anything less than integrity and compliance. Companies with such a culture know that it is the best defense against employees doing things that will get the company in trouble.

Allowing companies to escape or face reduced liability from FCA actions because they have "checked the boxes" on how to establish a compliance program is doomed to fail. It will merely encourage companies to game this new compliance regime the same way they game contract and regulatory requirements. Such gaming does not reduce fraud; it enables fraud.

Finally, I will note that the False Claims Act already contains a provision that allows corporations to reduce their liability by one third if they self-report a fraud within thirty days of becoming aware of it. This is a rarely used provision, and repeat FCA scofflaws abound.

In the end, the overriding goal should be the reform of corrupt industries and markets, not just individual companies. That goal can be achieved only by combining powerful business-driven integrity programs with effective law enforcement. Diluting the False Claims Act will merely reduce the deterrent effect that sanctions have on fraudulent corporate conduct.

IMPROVEMENTS TO THE FCA

Let me conclude by stepping back and saying that since 1986 over 29 states have followed the Federal government in adopting False Claims Acts based on those amendments. These acts have been passed in "red states" and "blue states." And they have worked under Republican and Democrat Attorneys General.

The fact that this widespread proliferation of False Claims Acts has failed to result in any systemic or widespread abuses - or parade of horribles – at the state level proves, by example after example, the basic success of the Federal False Claims Act. The Federal False Claims Act, and the success of its qui tam provisions, has provided a superb example for the states to follow so that today, fraud and abuse in government programs is also being fought at the state and local level. Indeed some states, such as New York and California, have adopted additional provisions to improve and expand their false claims acts and particularly the qui tam provisions.

The success of the Federal False Claims Act should not lead us to avoid further improvements to the Act, so long as they strengthen, and do not weaken, the essential qui tam provisions. There are some "unintended consequences" of the Federal False Claims Act that we would support addressing, with amendments, in the spirit of protecting taxpayers and whistleblowers. Here are some reforms all of which have been incorporated into the New York State False Claims Act that have been proven successful and are worthy of emulating nationally:

> **Attorneys' fees should be recoverable not only by relators, but also the Government.** Providing this remedy to private relators and not the Government was almost surely unintended. Fourteen states, in addition to New York, also have included such a provision. The United States should also be able to recover its legal, administrative, and investigative costs when FCA cases are settled or adjudicated to conclusion.
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> **The False Claims Act, and its qui tam provisions, should apply to tax fraud.** The unintended consequence of the IRS whistleblower program, lacking an action-forcing mechanism allowing citizens to advance these claims, has resulted in a largely ineffective and underperforming program. In six years, New York State has collected millions of dollars under a tax qui tam provision applying only to large-scale tax frauds.

Information obtained by using the Freedom of Information Act should be encouraged not prohibited. The current disincentive for citizens to use the FOIA to expose corruption is an unintended consequence of the Federal FCA.

"Damages" should be defined, for purposes of trebling, as "gross damages," as opposed to "net damages." The contrary interpretation by some Federal courts was an unintended consequence of the term "damages" not being defined in the Federal FCA.

CONCLUSION

The 30 years since the Federal False Claims Act 1986 amendments have revealed unexpected benefits:

The ever increasing recoveries have exceeded all expectations (from less than $50 million annually prior to the 1986 amendments to $3.5 billion last year alone).

The provision allowing relators to pursue declined cases has resulted in billions of dollars of recoveries that would have otherwise been lost and, even more importantly, has served as an action-forcing mechanism encouraging Government to actively pursue the fraud, waste, and abuse of taxpayer dollars.

The Federal Government's return on investment in the health care area alone is 20:1 (That is, for every Government dollar expended twenty dollars is recovered in return).

The success of the Federal False Claims Act has resulted in over 29 states passing such laws of their own extending the benefits of public-private partnerships to protect the public fisc far and wide.

The Federal False Claims Act stands as a bipartisan triumph that America needs and of which America can be proud.

Yes, my dad would say, "Nothing succeeds like success." And, to that I now add: Don't tamper with success.