OVERSIGHT OF THE FALSE CLAIMS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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OVERSIGHT OF THE FALSE CLAIMS ACT

THURSDAY, APRIL 28, 2016

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 4:34 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, King, Jordan, Cohen, and Conyers.

Staff Present: (Majority) John Coleman, Counsel; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; Veronica Eligan, Professional Staff Member; and Matthew Morgan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order.

And, without objection, the Chair is authorized to declare recesses of the Committee at any time.

I want to welcome you all for being here. The False Claims Act is the Federal Government's primary tool for combatting fraud in federally funded programs. In each of the last 6 years, the government has recovered over $3 billion under the FCA and over 3.5 billion for their fourth consecutive year.

Since the significant 1986 amendments to the FCA, the Federal Government has recovered over $45 billion under the act. These numbers show that the FCA has been successful legislation. However, despite its success, the act still fails to prevent massive losses of taxpayer dollars. According to a 2015 study by the General Accountability Office, over $120 billion in taxpayer money was lost in 2014 to improper payments by the Federal Government, which indicates the government is recovering only a fraction of what it loses to false claims every year.

This requires examination, considering Congress has amended the FCA three times in the past 7 years to expand its coverage, and enhance the ability of whistleblowers to bring suit. Today's hearing will, in part, address what could more be done.

Some experts who have studied the act, for example, suggest that the answer is providing incentives and encouraging those best able to detect and prevent false claims—government contractors and government program beneficiaries—to self-police and self-report po-

tential FCA violations. Indeed, FCA violations or violators who self-report generally receive the same penalties and face the same damages as those who are caught violating the act and settle out of court with government.

I think this makes very little sense. The FCA has been successful because it's provided whistleblowers with a tremendous financial incentive for uncovering and disclosing false claims. It should be possible to complement the current incentives for whistleblowers in the act with financial incentives for self-disclosure to uncover even more waste, fraud, and abuse of Federal taxpayer money.

We need to examine ways to give those that do business with the government meaningful incentives to detect wrongdoing and self-report it to the government and thereby return to the taxpayers more money than is currently recovered under the FCA.

The Justice Department itself has acknowledged the limitations of the act as currently written. According to the head of the division at DOJ in charge of enforcing the FCA, the Justice Department is, quote, well aware of the fact that litigation can only plausibly reach a fraction of the fraud committed against U.S. Government programs, which likewise makes the prevention of fraud a more potent tool for protecting the interest of the United States in efforts to undo the damage of completed schemes. Litigation to recover the cost of fraud is far inferior as an option to prevent fraud in the first place.

I hope, through this hearing, we can begin to discuss ways to prevent violations of the False Claims Act from occurring in the first place. The Federal Government has benefitted greatly from the increased accountability that has resulted from the False Claims Act and the invaluable aid it has received from current whistleblowers. My hope is that today's hearing provides additional insight into how we can detect and prevent even more false claims that deplete the vital resources that taxpayers have entrusted to this Nation.

And I certainly look forward to the witnesses' testimony and yield to the Ranking Member now for 5 minutes for his opening statement.

Mr. COHEN. Thank you, Mr. Chair.

The False Claims Act is one of the most potent weapons in the fight against fraud and is a vital means of protecting taxpayer dollars.

According to the Justice Department, from '87 through 2015, False Claims Act has been responsible for over $48 billion in recoveries from corporations that cheated the American taxpayer—$48 billion from corporations that cheated the American taxpayers who we are now thinking are going to just self-report and give themselves up and give them some incentive to do that. You know, it wasn't a great idea to tell Jesse James to tell us what you're going to do, and we'll give you some money and go back to St. Joseph, Missouri. You catch the crooks. That's what you do.

Of that number, more than $33 billion resulted from litigation initiated by *qui tam* plaintiffs, many of whom are employees of corporate wrongdoers who are in the best position to know of fraudulent activity and to bring it to light.

In 2009, Congress adopted amendments that further strengthened the act. These amendments sponsored by my former colleague, the beloved and congressionally late Representative Howard Berman of blessed memory, and championed by noted *qui tam* lawyer John Phillips, now residing, I think, in Italy, where he takes care of our interests there, resulted in recoveries since 2009 of almost $27 billion for taxpayers, with more than 19.5 billion resulting from *qui tam* complaints.

The fact that almost 70 percent of recoveries since '87 and more than 70 percent since 2009 stem from *qui tam* suits, highlights the central role that the *qui tam* plaintiffs play in the False Claims Act's enforcement regime in the fight against fraud.

Whistleblower-initiated action was responsible for the government's $2 billion recovery from GlaxoSmithKline for paying kickbacks, doctoring scientific research, and illegally promoting certain prescription drugs. Last month, Olympus Corporation agreed to pay $646 million, including 310.8 million in various False Claims Act claims. Olympus put profits before people, among other things, refusing to disclose to U.S. regulators potential contamination from its duodenoscopes, despite doing so to European regulators, given that the U.S. was its largest market for duodenoscopes.

And just yesterday, Pfizer settled whistleblower-initiated cases for $784 million for overcharging Medicaid in a matter that the government had initially declined to intervene in.

These private attorney generals, *qui tam* lawyers do a great deal of good for the United States in seeking out fraud and bringing in moneys to our Treasury that was ungainfully garnered. We need only look at the state of the False Claims Act prior to 1987 to get a sense of how weak *qui tam*-related progressions can undermine False Claim Act's purposes.

Before '86, the act contained strong disincentives for whistleblowers to pursue litigation on behalf of the government and bring fraud to light. As a result, the number of false claim *qui tam* suits declined dramatically and fraud against the government ran rampant.

The 1986 amendments to the act, spearheaded by Senator Charles Grassley and Representative Berman, dramatically strengthened incentives for the pursuit of *qui tam* actions and greatly enhanced the act's effectiveness.

It is perhaps no surprise then that those who are the target of fraud allegations are now seeking to undermine what Grassley and Berman did with the False Claims Act and, particularly, its *qui tam* and penalty provisions.

In 2013, the U.S. Chamber of Commerce recommended changes to the act that were solutions in search of a problem, unless one defines the problem as an effective False Claims Act regime, which gets at fraud and abuse.

For instance, it proposed limiting the share of damages that *qui tam* plaintiffs are able to recover in False Claims Act cases, weakening a major incentive for whistleblowers to come forward. Further weakening the incentives for whistleblowers are proposals to bar *qui tam* actions under several circumstances. One proposal would bar those actions by an employee of a corporate wrongdoer

if the employee did not report the fraud internally to his or her employer within 180 days prior to filing suit.

This proposal almost invites the corporate wrongdoer to intimidate or retaliate against the potential whistleblower employee, gives the company the opportunity to further hide the fraud. Great idea. You got to go tell your boss that he's a crook, and he's going to be caught and exposed, and if you do it, you're going to false retaliation, and who knows what's going to happen to you. Well, that's a great way to inhibit the people from coming forward, quieting the whistle.

Another proposed change would reduce the availability of treble damages based on so-called gold standard certifications of a company's compliance program done by third parties in a process where it would be in the interests of the certifying entity, itself a profit-making business, to give the necessary certification with no way of verifying the accuracy of said certification.

Finally, corporate wrongdoers have proposed making it substantially harder for any plaintiff, whether a *qui tam* relator or the government, to prevail in a False Claims Act case by amending the act to impose the very high clear and convincing standard of proof to demonstrate any violation of the act, rather than current preponderance of the evidence standard.

We should be very wary of any attempts to undermine the effectiveness of the False Claims Act. And of—the idea that we're going to be able to successfully do it by asking the wrongdoers to self-report, that hadn't worked, and many other things—I don't know that it ever works. As the old saying goes: If it ain't broke, don't fix it.

I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman. It seems like, in Congress vernacular: If it ain't broke, break it.

I want to thank the Ranking Member, and without objection, other Members' opening statements will be made part of the record. And before I—okay. Before I introduce the witnesses, I would first like to submit for the record the statement of the Honorable John Conyers, the Ranking Member of the full Committee.

And I'd also like to introduce, for the record, the prepared statement of the Chairman of the Senate Judiciary Committee, Senator Grassley. Senator Grassley was the lead Senate author of the 1986 amendments to the False Claims Act and has been a tireless advocate for whistleblowers and eliminating false claims for taxpayer money.

I appreciate his dedication to the False Claims Act and his input on the issues raised in today's hearing.

Without objection, his statement will also be entered into the record.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr. for the Hearing on "Oversight of the False Claims Act" Before the Subcommittee on the Constitution and Civil Justice

Thursday, April 28, 2016, at 4:00 p.m.
2141 Rayburn House Office Building

The False Claims Act is a longstanding and vital tool for ferreting out fraud against the government and, ultimately, protecting taxpayer dollars.

Since the enactment of the 1986 amendments to this law, more than $48.3 billion has been recovered from those that defrauded the American people, including some large pharmaceutical companies, hospitals, and defense contractors. In fact, there was $3.6 billion in recoveries in fiscal year 2015 alone.

While no system is perfect, the False Claims Act has worked well, particularly in light of the 1986 amendments.

These amendments, among other things, re-vitalized the Act's *qui tam* provisions. The Act was further strengthened with clarifications to its liability provisions that were enacted in 2009.

As we consider the state of the False Claims Act, we should keep the following points in mind.

To begin with, *qui tam* actions are a critical component of the False Claims Act's enforcement scheme.

Qui tam actions – which allow private parties to sue a defendant on behalf of the United States – are central to the government's efforts to fight fraud.

Qui tam plaintiffs are often company insiders who can produce evidence critical to establishing liability under the Act.

These insiders are generally in the best position to know about fraud that would otherwise be hidden from the government.

Fraudulent activity by its very nature is concealed. Without the help of insiders, who can provide the government documents and other hard evidence of the fraud, it would be extremely difficult for the government to detect and prosecute the fraud.

For example, of the more than $48 billion in recoveries from fiscal year 1987 to fiscal year 2015, more than $33 billion of that amount resulted from litigation initiated by *qui tam* plaintiffs.

While the False Claims Act's *qui tam* provisions are important, they would be ineffective if the Act had weak incentives for *qui tam* plaintiffs to file suit.

After all, such individuals often take on tremendous personal risk in revealing the fraud.

Disincentives that potential plaintiffs face include job loss or other retaliation by their current or former employers and difficulty finding new employment thereafter.

They also often bear the emotional and psychological stress of being under attack by the defendant and former colleagues.

Prior to 1986, the Act disincentivized *qui tam* suits, leading to a dramatic reduction in the government's recovery of taxpayer money. The 1986 amendments were, in part, a response to that trend by putting in place important incentives for plaintiffs.

Without these kinds of incentives, few would risk filing *qui tam* suits, which, in turn, would undermine the effectiveness of the False Claims Act, as was the case prior to enactment of the 1986 amendments.

Therefore, I oppose efforts to weaken the False Claims Act, and especially its *qui tam* provisions.

The U.S. Chamber Institute for Legal Reform, among others, has proposed numerous amendments to the False Claims Act that, in my view, would undermine the fight against fraud.

The Chamber's proposals can generally be characterized as weakening the False Claims Act's various incentives for *qui tam* plaintiffs to file suit.

By and large, the False Claims Act serves as an important tool to fight fraud and we should resist attempts to weaken it.

[The prepared statement of Senator Grassley follows:]

U.S. Senator Chuck Grassley • Iowa
Chairman • Senate Judiciary Committee
http://grassley.senate.gov

Prepared Statement of Senator Charles E. Grassley
Chairman, United States Senate Committee on the Judiciary
Hearing Before the House Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
"Oversight of the False Claims Act"
Thursday, April 28, 2016

Two years ago, I testified at a hearing before this subcommittee, also entitled "Oversight of the False Claims Act." Coincidentally, that hearing took place on July 30, National Whistleblower Appreciation Day, marking the anniversary of a resolution passed by the Continental Congress in 1778 stating:

Resolved,

> That it is the duty of all persons in the service of the United States . . . to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.

That resolution recognizes the responsibility of Congress to safeguard the public trust. That includes the public fisc.

One of the smartest things Congress has ever done is to empower whistleblowers to help the government combat fraud. They get results. Without whistleblowers, the government simply does not have the capability to identify and prosecute the ever-expanding and creative schemes to bilk the taxpayers. That is not rhetoric. That is history.

In 1943, Congress bowed to pressure to undo the Act's crucial qui tam provisions and essentially block private actions. Congress assumed that the Justice Department could do a good job prosecuting fraud all by itself. They were wrong. In the words of a 1981 report by the Government Accountability Office, "For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . . The sad truth is that crime against the Government often does pay." The GAO was right.

By the time I was working on the 1986 False Claims Act amendments, government and taxpayer-funded programs had ballooned, and so did the fraudsters' targets. Taxpayer dollars became easier and easier to scam, and fraud on the government had skyrocketed. The

Department of Justice estimated at that time that fraud was a drain on 1 to 10 percent of the entire Federal budget. In 1985, that meant fraudulent activity was costing taxpayers $10 billion to $100 billion every year.

The 1986 amendments once again empowered whistleblowers to help the government combat fraud. Thirty years' worth of recoveries shows that we did the right thing. The False Claims Act is, hands down, the most effective tool the government has to fight fraud against the taxpayers. In Fiscal Year 2015 alone, the federal Government recovered more than $3.5 billion under the Act. That makes more than $26 billion since January 2009, and more than $48 billion since 1986. These recoveries represent victories across a wide array of industries and government programs, including Medicare and Medicaid, defense contracts, mortgage insurance, crop insurance, and federal student aid. According to the Justice Department, whistleblowers accounted for $2.8 billion of the $3.5 billion in recoveries in Fiscal Year 2015. As Principal Deputy Assistant Attorney General Mizer has said: "Many of the recoveries obtained under the False Claims Act result from courageous men and women who come forward to blow the whistle on fraud they are often uniquely positioned to expose."

The facts speak for themselves. The False Claims Act works.

One of most significant areas of False Claims Act success is in the healthcare industry. From 1987 to 2015, the government has recovered more than $31.1 billion in healthcare-related False Claims Act actions. It is not surprising that such a large portion of recoveries derive from the healthcare industry, which has seen an explosion in the size of its government-funded programs—and in the fraud against them.

When we revitalized the False Claims Act in 1986, healthcare fraud was definitely on our minds. In a 1985 report to Congress by the Economic Crime Council—an advisory body to the DOJ established by the Attorney General—the Council established health care programs as an "area[] of national significance relating to economic crime." Since then, healthcare fraud has only increased. Recently, the Inspector General for the Department of Health and Human Services reported a 134% increase in complaints against Medicare Part D in the last five years. Clearly, fraud expands in proportion to the size of government spending. The False Claims Act must be as strong as the schemes against the taxpayers are creative.

That is the reason why the 2009 amendments to the Act clarified erroneous interpretations of the law that permitted subcontractors to "escape responsibility for proven frauds" in government funded programs like Medicare and expressly applied the Act to knowing and improper retention of overpayments to which contractors have never been entitled. The massive opportunity for fraud under Obamacare fueled Congress's efforts to recognize in the Affordable Care Act that violations of the Anti-Kickback Law are violations of the False Claims Act. The Administration has also launched task forces designed to investigate and prosecute fraud on these programs, and, with the help of whistleblowers, achieved crucial recoveries for violations of the Stark Law, the Anti-Kickback Law, and other fraudulent schemes. Those schemes include efforts to improperly induce referrals, obtain unlawfully high reimbursements, and bill for medically unnecessary

services at nursing homes. Overall since 2009, the government has recovered $16.5 billion lost to fraud in the healthcare industry.

Again, the facts show that the False Claims Act is working. One of the ways it works is by requiring the filing of cases under seal. The seal protects the parties in the case, including the defendant, while investigators review allegations in a responsible way and without unnecessary damage to a company's reputation. After reviewing the facts, the government may decide not to pursue the case. That is how the Act is supposed to work. It is also the sort of decision investigators and prosecutors make all the time, in civil and criminal cases alike. Even when the government declines to continue or to intervene, however, it is crucial to safeguard a whistleblower's ability to bring the case on his or her own initiative. To deny a qui tam relator the right to pursue a False Claims Act case in the event that the government does not intervene contravenes the basic, essential purpose of the Act, which is to empower private citizens to help the government fight fraud. History shows that the government simply cannot do so on its own. Such a change would also deny the taxpayers the ability to recover funds in meritorious cases. The Department of Justice has made clear that the decision not to intervene is not itself an indication that government does not believe the case has merit. There may be numerous reasons in any given case to decline intervention, including resource constraints, and courts are clear that such a decision does not bear on the merits. Notably, in Fiscal Year 2015, approximately 32% of total recoveries derived from whistleblower suits where the government did not intervene. That is $1.1 billion that the taxpayers would never have recovered.

Whistleblowers are the indisputable key to protecting taxpayer money against fraud. They must be protected. They will not be protected if they are required to report internally before making any protected external disclosure. This is one of several topics I covered at length at the 2014 hearing. Like numerous other proposals I have heard over and over again to "strengthen" or "fix" the False Claims Act, this one is just as nonsensical today as it has always been.

In a perfect world, organizations would value input from their employees, work to fix the problems they identify, and go about their business. We do not live in a perfect world.

For every allegation of a potentially overzealous plaintiff, there is a whistleblower threatened with severe retaliation for raising concerns. These kinds of toxic environments do not magically disappear in the face of the almighty compliance program. The $256 million case of U.S. v. Millenium Health is one example. In this case, the United States alleged the company was engaged in a scheme to bill federal programs for medically unnecessary testing, give kickbacks to doctors, and keep employees from complaining. The complaint gives a taste of the toxic environment existing in that company, stating that during a company presentation on, ironically, the topic of compliance, the company's general counsel displayed slides showing just what the company would do to an employee who raises concerns: the slides show pictures of a shooting range, a former company employee that the company had sued riddled with photo-shopped bullet holes, and a line of body bags labeled with the names of company competitors and the former employee. As stated in the complaint, the speaker notes for this compliance presentation read:

> Don't be a weasel. . . . I don't want to be on the other side of litigation from any of you. I hope you don't want to be on the other side of litigation with Millennium. There is no amount of time or resources we won't spend to hold our employees accountable. . . . [W]e will protect this company.

What employee in their right mind would disclose anything to anyone about this company without a real incentive and assurance of adequate protection? Whistleblowers need to be able to disclose wrongdoing outside of their organizations. They need strong protections regardless of who first receives their complaint. Protecting internal reporting is important, but requiring it only discourages many would-be whistleblowers with evidence of actual wrongdoing from coming forward. Moreover, when they do, they are often subjected to the hostility of the ill-intentioned manager or worse, as in the case of Millenium Health, the company lawyers. Whistleblowers need their jobs to be safe or they will not come forward.

Indeed, if Congress required internal reporting, the evidence shows that companies would wield it as a weapon against whistleblowers. Companies have argued repeatedly in court that internal reports are not protected. Many have used non-disclosure agreements to muzzle whistleblowers. Such practices are rightfully drawing the ire of regulators. In May of last year, the SEC settled charges against KBR for using improperly restrictive language in its non-disclosure agreements. The gag orders threatened discipline and even termination for talking with anyone outside the company without first getting the go-ahead from KBR's lawyers. In a more recent case, a company, Vanguard, is trying to argue that its former in-house attorney cannot benefit from whistleblower protection because he did not first raise concerns externally with the SEC until after he was fired. The SEC has intervened, rightly arguing that whistleblowers are not required to first report wrongdoing to the SEC, but are equally protected for reporting internally and externally.

Moreover, the data shows that equal protections for internal and external disclosures do not dissuade whistleblowers from reporting internally, where they feel comfortable doing so, even if they do have a strong qui tam case. A 2012 report by the National Whistleblower Center found that 89.7% of employees who would eventually file a qui tam case initially reported their concerns internally, either to supervisors or compliance departments.

Requiring internal reporting therefore is not only highly detrimental to whistleblowers and ineffective at uncovering fraud, it is just not necessary.

Companies and industry groups, many of whom either have or represent those who have defrauded the government, also insist that their "gold standard" compliance programs should give them a free pass. As I testified in 2014, compliance programs are wonderful things. When they are implemented effectively and run by the right people, they can flag a lot of potential problems. However, they do not fix everything.

Since I first began working with whistleblowers, I have done everything I can to make sure there are laws and rules in place to protect them. As I have said time and again, the evidence shows that without whistleblowers, significant wrongdoing in the public and private sectors would never be discovered or remedied. However, just as strong laws are not a substitute for oversight,

good compliance programs are not a substitute for accountability. Whatever the rules in place, without a culture committed to compliance and protecting whistleblowers, wrongdoing can still flourish.

A culture of compliance needs to be more than an ever-evolving set of nonspecific best practices that are more empty words than substance. That much is evident in the big-business funded white papers that tout ethics principles but offer no real specifics or helpful examples, and no insight from whistleblowers who, as I have already discussed, often have targets painted on their backs *because* they tried to use these so-called compliance programs. The Department of Justice understands all of this, and is, rightly, not just taking companies at their word that they have a top notch program. As Assistant Attorney General Caldwell has emphasized over and over again in Foreign Corrupt Practices Act cases, the Department is making compliance culture a top priority. The Department understands, as well as everyone here, that culture is not something that can be measured just by checking all the right boxes on a form, or even by claiming adherence to the vague, in-vogue compliance concepts of the moment. Using a so-called "gold standard" program as a shield against liability would not strengthen compliance. It would only create perverse incentives by decreasing the pressure on companies to maintain a truly sustainable compliance culture at all levels of their organization. Simply put, it would reduce accountability to a paperwork exercise.

There are many other wrong-headed proposals and arguments purportedly designed to "fix" the False Claims Act. In the interest of time, I will mention just one more. Last week, the Supreme Court heard oral arguments in the *Universal Health* case. The petitioner in that case, along with a slew of amici largely representing the same interests funding the pie-in-the-sky "gold-standard compliance program" campaign, actually argued that the False Claims Act was only meant to address claims accompanied by express false certifications. That is nonsense. I filed my own amicus brief in that case, showing that nothing, in the text or in the very long history of the False Claims Act, can support that argument. Under the petitioner's interpretation, contractors could escape liability for providing defective or substandard goods and services the government did not bargain for, as long as they did not outright lie about it. As I wrote in my amicus brief, requiring an express false certification for liability would not protect the taxpayer. It would severely weaken the False Claims Act and unduly hamper the government's ability to recover funds lost to fraud.

The modern-day False Claims Act is now 30 years old. It is the most successful piece of anti-fraud legislation in U.S. history, and it has always enjoyed strong bipartisan support. That is because it works, by nurturing that public-private partnership with whistleblowers and by incentivizing integrity.

Upon close inspection, it seems that the heart of many proposals to "fix" the False Claims Act are merely complaints about the strong, necessary penalties it imposes. However, the reality is that the damages provision of the False Claims Act helps the government offset costs without making the government bigger. Moreover, many of these significant fraudulent schemes involve repeat players and very large companies that lobby the government for fat contracts. It makes

perfect sense that Congress has made a determination that companies like that who defraud the taxpayers *should* face steep consequences.

There is necessarily a higher standard that comes into play in government contracting. As Justice Homes once observed, citizens must "turn square corners when they deal with the Government." That is because when citizens contract with the government, they contract with the taxpayers. When they cheat the government, they cheat the taxpayers. Why does this matter so much? It matters because fraud on the government costs much more than money. A Government Accountability Office report we reviewed as we wrote the 1986 amendments put it best: "[F]raud erodes public confidence in the Government's ability to efficiently and effectively manage its programs." I urge my colleagues to fight for the public's trust that the laws we pass and the programs they pay for actually work as intended. We cannot do that without the False Claims Act.

Mr. FRANKS. So now let me introduce our witnesses.

First of all, thank you all for being here. Our first witness is Dennis Burke. Mr. Burke is president and CEO of the Good Shepherd Health Care System in Hermiston, Oregon.

Our second witness is Larry Thompson. Mr. Thompson is the John A. Sibley Professor in Corporate and Business Law at the University of Georgia School of Law.

Our third witness is Neil Getnick. Mr. Getnick is the managing partner at Getnick & Getnick, LLP, in New York City.

Our fourth and final witness is Jonathan Diesenhaus. Did I get that pretty close?

Mr. DIESENHAUS. Got it.

Mr. FRANKS. Yes, sir. Mr. Diesenhaus is a partner at the D.C. office of Hogan Lovells.

Each of the witnesses' written statements will be entered into the record in its entirety, and I ask that each witness summarize his or her testimony in 5 minutes or less.

To help you stay within that time, there's a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates the witness' 5 minutes have expired.

And before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So if you'd please stand to be sworn.

Do you solemnly swear that the testimony that you're about to give will be the truth, the whole truth, and nothing but the truth so help you God?

You may be seated, and let the record reflect that the witnesses answered in the affirmative.

And, again, I want to recognize all of you in the audience, and I would now recognize our first witness, Mr. Burke. And if you will turn your microphone on before beginning. Get closer. Thank you, sir.

TESTIMONY OF DENNIS E. BURKE, PRESIDENT & CEO, GOOD SHEPHERD HEALTH CARE SYSTEM

Mr. BURKE. Thank you. Good afternoon, Mr. Chairman, Members of the Constitution and Civil Justice Subcommittee. As introduced, my name is Dennis Burke. I am president and CEO of Good Shepherd Health Care System in Hermiston, Oregon, where I have had the pleasure of serving for the past 27 years.

I appreciate this opportunity to share our experience with the False Claims Act. It is my hope that in some small way our experience will shed light on some of the consequences of the False Claims Act that I am sure were never intended by Members of Congress.

First, I would like to make it clear that my board and I strongly support antifraud statutes, active government programs that seek to identify and eliminate fraudulent activity, and whistleblowers who have legitimate allegations. Fraud harms all of us, reduces limited resources for bona fide healthcare purposes. I will be brief today, but it's my hope that you'll find an opportunity to read the more detailed written account of our experience as outlined in the

letter attached to my statement addressed to Senator Ron Wyden, dated August 23 of 2006.

We were victims of a disgruntled former employee who returned relator. Having said that, we could just as easily have been the victims of a rogue employee who intentionally violated our policies and procedures. The process would have been the same.

Sadly, the FCA makes no distinction between organizations that are victims of false allegations and those that have proper antifraud measures in place but fall victim to rogue employees, just as it makes no distinction between organizations that are doing everything they can and should do to prevent fraud and those organizations that take minimum precautions.

What happened to us is what I would call an overreaction, an overreaction that cost us dearly in terms of both reputation, dollars, and cents. In the end, it was determined that we had not defrauded the government, and the Department of Justice dropped its investigation. This is what happened.

In 2003, agents from the FBI and the Oregon Medicaid Fraud Unit visited our hospital asking questions about our billing practices. A few weeks later, we were raided by a team of agents who came to the hospital at night, took records.

Our hospital counsel was openly able to ascertain that a *qui tam* case had been filed against us, but we were—but was sealed so that we were unaware of the nature of the investigation.

A Federal court in Portland, Oregon, made the FBI affidavit for the raid public. Our local newspaper and The Oregonian featured all the allegations of the complaint. These stories were extremely damaging to our hospital's reputation. We even had a visiting physician clinic threaten to discontinue the relationship with the hospital.

The *qui tam* relator's allegation included every fraud hot button at the time. This included lab unbundling, physician kickbacks, 3-day window billing violations, upcoding, billing for services not rendered, and others.

Due to the nature and scope of the allegations, the investigation was heightened from a criminal—from a civil to a criminal investigation. At the time of the raid, I was told by an agent that if even part of these allegations were true, someone was going to jail.

During the course of the investigation, the government began to discover significant differences between the relator's allegations and actual hospital practice. In a matter of weeks, the government scaled the investigation back to a civil investigation.

Over the course of 2½ years, the majority of the allegations were dismissed outright. However, the investigation did reveal that we had some irregularities associated with our emergency room billings. We had installed a new computer system, and the department manager had inadvertently programmed the billing system such that the emergency room medical director's name appeared on all of our billing forms as the treating physician and the treating physician's name appeared as the consulting physician.

Because of this error, the Department of Justice requested that we perform an extensive audit, at our expense, through an independent third-party reviewer recommended by the Department of Justice. The results of the audit showed that all services were pro-

vided by qualified physicians and that services were appropriately coded. In fact, the audit revealed that Medicare and Medicaid was actually slightly underbilled vis-a-vis the level of coding that could have been supported by the documentation. Following the results of this audit, the State Medicaid Fraud Unit and the Department of Justice dropped their investigation.

In its entirety, we were subjected to a humiliating raid and an investigation by the Federal Government due to a disgruntled former employee. The relator took advantage of the law's protections to, in essence, throw everything on the wall to see if anything might stick.

We experienced a 3-year investigation, which consumed hundreds of internal man hours and well over $1 million in attorney fees, consultation fees, and undeserved settlement costs, not to mention the significant harm to our reputation. Having experienced what we considered to be a frivolous complaint of false allegations and an expensive investigation, here are our observations.

Relators should be required to demonstrate that they have brought their concerns to the attention of the targeted organization before they bring the matter to the government. Without being required to make specific allegations, it is not fair that targeted organizations like ours are subject to over $1 million expenses, and in the end, the accuser is able to just walk away and say: Oops, I guess we were wrong.

The penalty provisions of the False Claims Act are astronomical. As such, the financial risks posed by the law, in most cases, cause a hospital like ours to avoid the uncertainty of a trial and instead choose the safer, more predictable route of settlement.

The Department of Justice offered a 750,000 rough justice settlement that was very tempting to my board, but we knew the claims were unjustified and decided to take a stand. Unfortunately, not everyone is in the position to take the same leap of faith due to the risks they face for doing so. That is our experience in an abridged telling.

[The prepared statement of Mr. Burke follows:]

TESTIMONY

of
Dennis E. Burke, President & CEO
Good Shepherd Health Care System
Hermiston, Oregon

before the

House Judiciary Subcommittee on the Constitution and Civil Justice

on

OVERSIGHT OF THE FALSE CLAIMS ACT

April 28, 2016

Testimony of Dennis E. Burke, President & CEO
Good Shepherd Health Care System
Hermiston, Oregon
April 28, 2016

Good afternoon. Mr. Chairman and Members of the Constitution and Civil Justice Subcommittee, my name is Dennis Burke. I am the President and CEO of Good Shepherd Health Care System in Hermiston, Oregon, where I have had the pleasure of serving for the past 27 years. I appreciate this opportunity to share our experience with the False Claims Act. It is my hope that – in some small way – our experience will shed light on some of the consequences of the FCA, that I am sure were never intended by Members of Congress.

First, I would like to make it clear that my Board of Directors and I strongly support anti-fraud statutes, active government programs that seek to identify and eliminate fraudulent activity and whistleblowers who have legitimate allegations. Fraud harms all of us and reduces limited resources for **bona fide** healthcare purposes. I will be brief today but it is my hope that you will find an opportunity to read the more detailed, written account of our experience, as outlined in the letter attached to my statement, addressed to Senator Wyden, dated August 23, 2006.

Let me say from the outset that it was our intent to comply with the law and we felt we were in full compliance. We were not and we are not perfect BUT we were not intentionally violating any law. We were the victim of a disgruntled former employee who turned relator. Having said that, we could just as easily have been the victim of a rogue employee who intentionally violated our policies and procedures. The ensuing

process would have been the same. Sadly, the FCA makes no distinction between organizations that are victims of false allegations and those that have proper anti-fraud measures in place but fall victim to rogue employees, just as it makes no distinction between organizations that are doing everything they can and should do to prevent fraud and those organizations that take minimum precautions.

What happened to us is what I will call an overreaction…an overreaction that cost us dearly in terms of both reputation and dollars and cents. In the end, it was determined that **we had not defrauded the government** and the DOJ dropped its investigation. This is what happened….

In 2003, agents from the FBI and the Oregon Medicaid Fraud Unit visited our hospital, asking questions about our billing practices. A few weeks later, we were raided by a team of agents who came to the hospital at night. They combed through our records, taking boxes of billings, financial documents, contracts, medical records and other information. Our hospital counsel was ultimately able to ascertain that a *qui tam* case had been filed against us. But it was "sealed", so we were unaware of the nature of the investigation.

The federal court in Portland, Oregon made the FBI affidavit for the raid public. Our local newspaper and *The Oregonian* (a Portland, Oregon newspaper) featured all of the allegations in the complaint. These stories were extremely damaging to our hospital's reputation. We even had a visiting physician clinic threaten to discontinue its relationship with our hospital.

The *qui tam* relator's allegations included every fraud "hot button" at that time. This included:

- lab unbundling
- physician kick-backs
- three-day window billing violations
- upcoding
- billing for services not rendered
- misrepresentation of physician credentials
- cost report irregularities, etc.

Due to the nature and scope of the allegations, the investigation was heightened from a civil to a criminal investigation. At the time of the raid, I was told by an agent that "if even a part of these allegations are true, someone is going to jail".

During the course of the investigation, the government began discovering significant differences between the allegations and actual hospital practices. In a matter of weeks, the government scaled the investigation back to a civil investigation.

Over the course of two-and-a-half years the majority of the allegations were dismissed outright. However, the investigation did reveal that we had some irregularities associated with our Emergency Room billings. We had installed a new computer system and the department manager had – inadvertently – programmed the billing system such that the Emergency Room medical director's name appeared on all of our billing forms as the treating physician and the treating physician's name appeared as the consulting physician. Because of this error, the Department of Justice requested that we perform an extensive

audit (at our expense) through an independent third party reviewer recommended by the Department of Justice.

The results of the audit showed that all services were provided by qualified physicians and that services were appropriately coded. In fact, the audit revealed that Medicare and Medicaid were actually slightly under-billed vis-a-vis the level of coding that could be supported by the documentation. Following the results of this audit, the State Medicaid Fraud Unit and the Department of Justice dropped their investigation.

In its entirety, we were subject to a humiliating raid and an investigation by the federal government due to a disgruntled former employee. The relator took advantage of the law's protections to, in essence, "throw everything on the wall to see if anything might stick." We experienced a three-year investigation, which consumed hundreds of internal man-hours and well over $1 million in attorney fees, consultation fees and undeserved settlement costs, not to mention the significant harm to our reputation.

Having experienced what we consider to be a frivolous complaint of false allegations and an expensive investigation, we would like to share our concerns and perceptions of the law as it currently exists – hopefully to protect our hospital and others against future unintended consequences of a well-meaning law:

- Relators should be required to demonstrate that they have brought their concerns to the attention of the target organization (or hospital) before they bring the matter to the government.
- Without being required to make specific allegations, is not fair that targeted organizations like ours, are subject to over $1 million in expenses and in the end, the accuser is able to just walk away and say "oops, I guess we were (I was) wrong."

- The penalty provisions in the False Claims Act are astronomical. As such, the financial risks posed by the laws, in most cases, cause hospitals like ours to avoid the uncertainty of a trial and instead choose the safer, more predictable route of settlement. DOJ offered us a $750,000 "rough justice" settlement which was very tempting to my board. But we knew the claims were unjustified and decided to take a stand – unfortunately not everyone is in the position to take the same leap of faith due to the risks they face for doing so.

That is our experience in an abridged telling. I urge you to read the full account in the letter attached to my statement. We hope our experience will not continue to be acceptable under the law. I greatly appreciate this opportunity and look forward to any questions you might have. Thank you.

Mr. FRANKS. Well, thank you, Mr. Thompson.

And I would now recognize our second witness. I'm sorry. I got that wrong, didn't I, Mr. Burke?

I now recognize our second witness, Mr. Thompson, please.

TESTIMONY OF LARRY D. THOMPSON, PROFESSOR IN CORPORATE AND BUSINESS LAW, UNIVERSITY OF GEORGIA SCHOOL OF LAW

Mr. THOMPSON. Chairman Franks, Ranking Member Cohen, Members of the Subcommittee, I am Larry Thompson.

Mr. FRANKS. I forgot to ask you to pull that microphone toward you.

Mr. THOMPSON. Oh, I'm sorry.

Mr. FRANKS. There we go.

Mr. THOMPSON. May I just repeat?

Mr. FRANKS. Yes, sir.

Mr. THOMPSON. Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, I am Larry Thompson. I appreciate the opportunity to testify before you this afternoon on the False Claims Act and how we can possibly continue to prevent fraud, which is so harmful to the public, consumers, the government, and shareholders of public companies.

I practiced law for 42 years, and during this time period, I have handled scores of fraud cases and investigations, both as a Federal prosecutor and as a defense counsel. I've also served as a general counsel of a large public company, where I was responsible for implementing and administering what we strive to have as a world-class high-quality ethics and compliance program.

The False Claims Act is probably the most important antifraud tool the government has but, I think, perhaps, when coupled with more focused informed enhancements, can play an even more important and effective role in preventing fraud, as the Chairman mentioned.

I really believe we can do an even better job of focusing on prevention, which allows the government to use its limited resources more in dealing with the very bad actors that are out there. My written testimony focuses on the work of the Ethics & Compliance Initiatives' blue ribbon panel.

Mr. Chairman, when I was asked to participate in the panel, I was delighted to do so because a great deal of my career in both the public and private sectors has been spent on ethics and compliance issues. The panel brought together a group of super people and experts who set out to determine what really are the perimeters of a high-quality ethics and compliance program. I am very pleased with our work product as set forth in my written testimony.

To be clear, Mr. Chairman, I recognize that the widespread development and implementation of high-quality compliance and ethics programs is not going to happen overnight. These programs need adequate resources, dedication of time and effort to training and retraining, a commitment to consistent and transparent discipline, a commitment to investigate all reports of wrongdoing. In sum, a commitment to make ethics and compliance, doing the right thing, a core business strategy.

Simply put, in my experience, I found that high-integrity companies perform better in the marketplace than companies who do not put a premium on ethics and compliance. And I believe, quite frankly, that what the panel has recommended is very important today, especially when we see many shortsighted and short-term investors push for deeper and deeper unthinking cuts in corporate budgets.

As I said, the widespread development and implementation of a high-quality ethics and compliance program will be a marathon and not a sprint, but I do believe that their reality can be greatly accelerated by providing concrete incentives for businesses to develop authentic bona fide high-quality ethics and compliance programs. These programs will focus on prevention and self-disclosure and provide a—and provide a measure of certainty and predictability for doing so.

The public and government clearly benefit from increased self-disclosure. Of course, I'll be pleased to answer any questions you or the Members of the Committee may have, and thank you.

[The prepared statement of Mr. Thompson follows:]

Prepared Statement of Larry D. Thompson, Professor in Corporate and Business Law, University of Georgia School of Law*

Testimony of Larry D. Thompson

Chairman Franks, Ranking Member Cohen and Members of the Constitution Subcommittee. My name is Larry Thompson, John A. Sibley Professor of Law at the University of Georgia School of Law. Thank you for inviting me to testify.

* * * * * *

There is no doubt that fraud against the United States Government is a serious problem, resulting in lost taxpayer dollars and the diminished effectiveness of federal programs. The False Claims Act, as this Subcommittee well knows, is the most powerful tool at the government's disposal to fight that fraud. Through its penalties, treble damages, qui tam and other provisions, there is no comparable means of combatting fraud against the government. At the same time, it is critical for individual companies to operate with integrity—to avoid reputational harm; reduce costly investigations and litigation; and because it is the right thing to do. Companies that fail to operate with integrity should feel the full weight of the government's power, through treble damages, penalties, and criminal charges, where appropriate.

Over the course of my career, I have had the opportunity to work on False Claims Act matters from the perspective of both the government and private sector. I had the privilege to serve as the Deputy Attorney General of the United States and as a United States Attorney, charged with enforcing the False Claims Act and other anti-fraud statutes. I left the Department convinced of the importance of the False Claims Act, but also well aware that the FCA is not without its flaws, as it can lead sometimes to unfair and arbitrary results, and its provisions afford the government tremendous (and perhaps undue) leverage against private companies and individuals. Before my tenure as Deputy Attorney General, I was a law firm partner representing clients facing investigations of potential wrongdoing; after my tenure, I worked in the private

*Supplemental material submitted by this witness is not printed in this hearing record but is available at the Subcommittee and is included in the witness's statement at:
http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104871

sector as the General Counsel of a major corporation. My service in the private sector left me firmly persuaded of not only the importance of companies investing in first-class ethics and compliance programs designed to prevent and mitigate fraud and other wrongdoing, but also of the need for incentives for companies to do so. In my experience, the vast majority of companies want to do the right thing with respect to ethics and compliance, but, particularly in times of tight budgets, concrete incentives are needed for the companies to do so.

Given my work, I was very interested when the opportunity arose to participate in the Ethics & Compliance Initiative's Blue Ribbon Panel tasked with identifying the qualities that are indicative of "high quality" ethics and compliance programs. This work confirmed that most corporate Boards of Directors and management feel very strongly about complying with the law and have invested tremendous resources into developing and maintaining cultures of ethics and compliance. However, there is a gap of practical guidance for organizations seeking to implement or improve their compliance programs. There is also a perception that effective compliance programs cannot be quantified. We hope that the ECI Report has addressed these issues, at least in part, without creating another set of check-the-box guidelines. I have included our Final Report as an appendix to this testimony for your convenience. I have set forth below the primary findings of the Blue Ribbon Panel, as well as some thoughts about how those findings may be useful to the Subcommittee in your oversight of the FCA.

My decades of experience have persuaded me that the best way forward in terms of preventing and mitigating fraud is to focus on the development of first-class ethics and compliance programs across industries. We should preserve the core features of the False Claims Act, but think creatively about whether it can be improved in terms of preventing, not just punishing, fraud. I believe the work of the Blue Ribbon Panel can provide some direction

moving forward, and I appreciate the opportunity to provide these views to the Subcommittee here and in my oral testimony.

I. ECI Blue Ribbon Panel

Each of the members of the blue ribbon panel share the belief that first-rate ethics and compliance programs are critical to well-functioning organizations. Our task was to contribute to the development of these programs in a concrete way. The development of the report began with an examination of the available literature (including from the practitioner and research community as well as from regulators); included panel discussions of research materials, best practice examples, and drafts of the report; and concluded with request for public comment, panel review of submitted public comments, and review of the final report. In the Final Report, the ECI Blue Ribbon Panel identified the primary functions of high quality ethics and compliance programs, the fundamental principles of high quality programs, supporting objectives for each of the fundamental principles, and concrete, leading practices for each of the supporting objectives.

Although they might vary by context, the primary purpose of high quality ethics and compliance programs is largely the same across the board. These programs reduce the risk of wrongdoing; increase the likelihood that wrongdoing will be discovered and brought to the attention of management; increase the likelihood of an appropriate response to the wrongdoing; and maintain integrity in the company's performance and reputation.

When compliance programs are effectively implemented, they accomplish their purpose. Based on the research we reviewed, misconduct has been shown to be reduced by as much as 66 percent in organizations with effective programs, and reporting of wrongdoing to management

increases by 88 percent. These are critical findings that speak to what I believe all parties to this dialogue would consider common ground. To be effective, ethics and compliance programs should encourage reporting of misconduct; protect those who identify wrongdoing (whistleblowers); and facilitate timely responses that remediate misconduct in the event it is reported.

Effective programs, however, must consist of more than simply a set of guidelines or lists of items to check off; in addition, they must be supported through leadership commitment and quality implementation. We also determined that "high quality" ethics and compliance programs are ones that are operating well beyond a minimum framework for compliance. These programs not only meet the legal minimums, but also integrate thinking about ethics and compliance into the everyday operation of an organization. These high quality programs result in assessment of risk mitigation, and prioritize the creation of a culture where concerns can be raised. Accountability—both internally and externally—is another hallmark of these high quality programs. And, finally, these programs implement dynamic anti-fraud strategies that are continually documented, objectively measured, evaluated, and improved.

The Report sets forth the detailed findings for each of our conclusions, providing what we hope will be helpful guidance to companies looking to institute or improve their own programs. For purposes of this hearing, I would like to focus on one aspect of high quality programs: accountability. The necessary governing principle we identified for high quality programs is that an organization takes action and holds itself accountable when wrongdoing occurs. Within this notion, we identified as necessary: a commitment by leaders at all levels throughout an organization to be ultimately accountable for the identification and mitigation of risks; day-to-day priority given to ethics and compliance as part of an organization's efforts to

build and maintain a culture of ethics and compliance; and continuous improvement in terms of identifying and allocating resources to emerging priorities, activities and risk.

When misconduct occurs, and it will occur even within companies that operate high quality ethics and compliance programs, these companies respond quickly and responsibly. Investigations are timely, neutral, thorough, competent, and consistent. Wrongdoing is taken very seriously, with appropriate consequences regardless of the level of the violator, but investigations are conducted fairly. The company also holds itself accountable as an entity, maximizing learning from substantiated cases; acknowledging issues and corresponding mitigation; and reinforcing that integrity matters to senior management. In addition, as appropriate, these companies disclose issues early, transparently, and thoroughly to appropriate regulatory and government authorities, and work cooperatively to respond to legal and regulatory concerns. Finally, these companies have well-developed systems for escalation of issues—which can arise and accelerate quickly—with regular testing to ensure that companies respond consistently with their core values.

More specifically, we have identified supporting objectives and specific leading best practices in companies that demonstrate the accountability value, as set forth in the box below.

Supporting Objective:

The organization regularly communicates that individuals who violate organizational standards or the law will be disciplined.

Leading Practices:

- The code of conduct makes clear that there are consequences for violations.
- Each incident of substantiated misconduct is evaluated to determine how it should be communicated, internally and externally, based on the seriousness of the issue, the level of the subject and the need for and appropriateness of public disclosure.
- The ethics and compliance (E&C) program regularly communicates with key stakeholders about its internal monitoring efforts, including enforcement officials (where applicable), investors, donors and/or consumers.

Supporting Objective:

The organization maintains investigative excellence.[1]

Leading Practices:

- Thorough, timely, neutral, competent and consistent investigations are conducted and the organization maximizes learning from every substantiated matter.
- E&C or other appropriate personnel ensure neutrality in investigations through careful oversight and selection of who investigates any matter.
- The E&C office (or appropriate party) is provided access to all relevant information related to the investigation, and the organization supports the investigative effort.
- The organization is transparent about how investigations are conducted, including roles and procedures, timing, quality standards, conflict-of-interest protections, training of investigative personnel, confidentiality and anti-retaliation protections.
- Leaders are briefed on investigatory requirements and support investigative neutrality and confidentiality in their interactions.
- Respectful and proper personal debriefing and closure of the issue with the reporting party, if known, is required in every case.
- Investigations focus on the facts and the underlying concern rather than on defending against the allegation.
- Each investigation includes a discussion of potential root causes. E&C or other personnel, as appropriate, consider whether the incident could have been avoided and ensure that follow-up action is considered and executed.

[1] This supporting objective presumes continuing and proper consultation with counsel to balance privilege and privacy considerations with transparency.

Supporting Objective:

Disciplinary action is consistently taken when violations are substantiated.

Leading Practices:

- E&C ensures that proper consequences result from violations, including convening disciplinary review committees for significant violations.
- Metrics are kept on disciplinary consequences of violations and are periodically reviewed for trends and potential inconsistencies by topic, location and level of employee.

Supporting Objective:

Systems for escalation and response are well-developed and regularly tested, and leaders are held accountable for compliance.

Leading Practices:

- Clear policy is in place regarding the escalation and response of significant matters.
- Escalation and crisis management systems are regularly tested via exercises or audits.

Supporting Objective:

Appropriate disclosures are made to regulatory or other government authorities.

Leading Practices;

- Leaders support responsible, timely disclosure to regulators.
- Leaders ensure robust discussion of the most appropriate avenue for disclosure and promote appropriate transparency regarding failures or violations.
- Escalation procedures ensure that potentially disclosable matters are efficiently and promptly escalated for review and there are consequences for failure to escalate.
- Appropriate processes are in place to ensure relevant senior personnel and E&C consultation on questions about proper disclosure.
- Employees are trained on proper procedures in cooperating with government inquiries and consequences for noncompliance.
- When appropriate, cases are publicized after closure and follow-up action to deter future misconduct.

In sum, my work with ECI and the Blue Ribbon Panel confirmed that companies can and should build first-class compliance and ethics programs. The beneficial impacts of these programs are real and are increasingly quantifiable. Moreover, the components of a state-of-the-art program—one that goes beyond what is adequate and reaches what is excellent—are identifiable.

II. Looking Forward and Incentivizing Top-Notch Compliance Programs

I believe that the work of the ECI Blue Ribbon Panel may also assist this Subcommittee in your oversight of the False Claims Act, by providing us with a way to identify and incentivize high quality ethics and compliance programs. Both the company and the public benefit from incentivizing investment in ethics and compliance: prevention increases; wrongdoing is more likely to be identified, stopped, and disclosed; and the government can focus its efforts on the truly bad actors that are not committed to first-class compliance.

From a company's perspective, misconduct is increasingly expensive. For example, over just a two year period (2012-2014), the average total of monetary resolutions in corporate Foreign Corrupt Practices Act enforcement actions rose from $22 million to $157 million. So as a business matter, not just a moral and legal imperative, preventing wrongdoing is in the interests of a company. Moreover, the public benefits from less wrongdoing, whether it is a bribe that results in an uneven playing field, or fraud that takes funds directly from the public fisc.

At the same time, effective compliance programs allow the government to focus their resources and efforts on the bad actors—and there are bad actors. As noted above, one component of a high quality ethics and compliance program is that it encourages accountability—both internally and externally. In other words, a company with an effective

ethics and compliance program is more likely to appropriately disclose wrongdoing to the government. This benefit allows the government to identify and investigate companies that do not demonstrate a commitment to "doing the right thing," and to levy commensurate penalties.

But this shared commitment to prevention and incentivizing investment in compliance is not the current reality. Instead, enforcement agencies rely more on post-hoc enforcement—leveraging significant penalties largely irrespective of a company's investment in compliance and prevention on the front end. The government comes into investigations and enforcement negotiations with tremendous power. Companies often face potentially astronomical penalties; debarment from contracting with the United States; exclusion from federal health care programs; present responsibility determinations that effectively function as a regulatory regime; or criminal indictments that can by themselves destroy a company. Companies are rarely, if ever, in a position to risk fighting the charges in court given the potential consequences (and the immediate reputational harms that occur when and if an investigation or allegation is made public), leaving the decision-making as to the appropriateness or fairness of a particular outcome in the hands of only one party—the government.

The relationship between the government and industry has become unduly adversarial as a result of this emphasis on post-hoc enforcement, which is regrettable. This approach can also lead to an antagonistic relationship between a company and its employees, which can undermine efforts over time to identify and remediate misconduct. There are also basic fairness concerns implicated in the current approach, which makes no distinction between companies that have detected, stopped and self-disclosed violations, and companies that in no way seek to do the right thing. Perhaps worse, the failure to put heads together to see if there is a better way—a

prevention-based way—represents a missed opportunity to increase ethics, compliance and prevention across the board, rather than at specific companies under the microscope.

That said, I welcome recent signs that the Government may recognize the need for greater creativity to incentivize ethics and compliance. Earlier this month, the Department of Justice announced a new pilot program aimed at targeting foreign corruption. Pursuant to this pilot program, if companies self-disclose wrongdoing to the government; cooperate with the government; remediate the misconduct; and satisfy the requirements of the Yates Memorandum (which, in turn, sets forth conditions for obtaining credit for cooperation with the Department of Justice) the Department will consider up to a 50 percent penalty reduction below the low end of the guidelines as well as no requirement for a corporate monitor.

Almost a year ago, the head of the DOJ Criminal Division gave a speech emphasizing that when the Criminal Division decides whether and how to prosecute a company, the Division considers the adequacy of the company's compliance program and internal investigation. As part of this speech, she also described the characteristics of effective compliance programs for which the Department is looking. Late last year, the Department of Justice hired a full-time compliance expert in its Fraud Section, who will provide assistance to prosecutors in evaluating the adequacy of compliance programs and in developing benchmarks for evaluating corporate compliance and remediation measures as part of resolution.

For the last few years, Health and Human Services' Office of the Inspector General has had a policy of recommending to DOJ reduced penalties for companies that appropriately disclose wrongdoing. Companies with first-rate ethics and compliance programs should benefit from this program in the event of wrongdoing, as they should be well-positioned to identify, remediate, and disclose wrongdoing. In 2014 the HHS OIG indicated that they were

considering revisions to the criteria they use in deciding whether to exercise their authority to exclude entities from federal health care programs. Interesting, the OIG specifically requested comments as to whether and how OIG should consider a company's compliance program when deciding whether to exclude that company. The OIG has not yet issued any revised criteria, but I hope they are still under consideration.

But these steps, while laudable, are missing a critical feature: certainty. Concrete incentives are needed in civil as well as criminal fraud programs, and these programs still have yet to offer that. It is important for government to be clear about what constitutes a top-notch compliance program and define it in ways that are achievable. Because achieving this will require substantial investments and proactive disclosure requires leaps of faith, the beneficial consequences must be concrete and certain. I do not believe that a focus on prevention and compliance is a process that can or will happen overnight. And we will not see a greater across-the-board commitment to formalized, first-class compliance/ethics programs until the government provides concrete, predictable, incentives for companies to do so.

One approach that should be considered in providing the right incentives is represented in discussions about a Chamber of Commerce proposal on the False Claims Act, under which companies that achieve and maintain first class compliance programs could obtain reductions in penalties or other consequences when inevitable wrongdoing does occur. While not the purpose of my testimony to opine directly on that approach, I do think it is creative and, when it is combined perhaps with a requirement for self-disclosure of identified concerns, responds to the challenges in this area and so is worthy of close consideration.

* * * * * *

We are much closer today than we ever have been to identifying what constitutes a high quality ethics and compliance program, so we should also be much closer to certainty in the government's response to companies with such a program.

Mr. FRANKS. And thank you, Mr. Thompson.

And I now recognize our third witness, Mr. Getnick. And please turn that microphone on.

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

Mr. GETNICK. Thank you.

Good afternoon, Mr. Chairman, Mr. Ranking Member, distinguished Members of the Subcommittee. I am Neil Getnick. I am the managing partner of the law firm of Getnick & Getnick, based in Manhattan, and I'm 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 combatting fraud against the government and protecting public resources through public-private partnerships.

This year is the 30th anniversary of the seminal 1986 amendments to the False Claims Act. When it comes to the FCA, my dad would say, "Nothing succeeds like success," because the 1986 amendments have been and are a fantastic success. Prior to 1986, the Department of Justice recovered less than $50 million a year under the FCA. Last year alone, DOJ recovered more than $3.5 billion, and for every dollar that the government spends on Federal FCA healthcare enforcement, it recovers $20 in return.

Does anyone know of any other government program that can boast those results? But these numbers are incomplete. They are an incomplete measure of the FCA's success, which has generated cases that have reformed corrupt industries, stopped unconscionable and illegal practices, and saved lives.

The main change of the 1986 amendments was to loosen certain restrictions on *qui tam* suits. This change created a new paradigm of public-private partnerships between the Justice Department, *qui tam* whistleblowers, and their counsel. And under this new paradigm, a backstop was created that let both the government and the fraudsters know that cases could be pursued and won by whistleblowers even when the government declined to intervene or pursue the fraud.

This is crucial because this private right of action is the action-forcing mechanism that ensures that fraud on the government will be exposed and dealt with. Pleas by industry lobbyists to weaken or eliminate the private right of action are misguided, and those are often accompanied with misleading statistics purporting to demonstrate that only a small percentage of non-intervened cases result in recovery. Yet a significant number of successful cases only come about because the relator pursued the case after an initial decision of non-intervention.

Furthermore, the FCA 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. Most FCA defendants are very big companies that participate in large government-funded programs or compete for big government contracts, and a handful are repeat offenders.

Among other things, this hearing addresses the so-called unintended consequences of the FCA. But industry lobbyists for large government contractors have intended consequences. Their in-

tended consequences are to use the occasional story of a defense verdict or an investigation that negatively impacted on a small business as a pretext—a pretext—to gut the FCA that has resulted time after time in them paying restitution to the government for repeated fraudulent harmful schemes, and this posturing is transparent, and it should be rejected.

The main proposal advanced by these lobbyists is to require corporate whistleblowers to report frauds internally before filing *qui tams*. And repeatedly, they seek to eliminate or narrow FCA liability if they adopt a so-called gold standard or certified corporate compliance programs.

But allowing companies to face reduced liability from FCA action because they checked the boxes on how to establish a compliance program will merely encourage them to game this new compliance regime. That doesn't reduce fraud; it enables fraud.

In fact, and this is very important, the FCA already contains a provision that allows corporations to reduce their liability by one-third if they self-report a fraud within 30 days of becoming aware of it.

So the FCA 1986 amendments have revealed unexpected benefits. The ever-increasing recoveries have exceeded all expectations. The provision allowing relators to pursue declined cases has resulted in billions of dollars of recoveries that would otherwise have been lost and has led to reforms in critical industries.

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

[The prepared statement of Mr. Getnick follows:]

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

APRIL 28, 2016

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.
>
> 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.
>
> **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.

Mr. FRANKS. Thank you, Mr. Getnick.

And we'll now proceed to our fourth witness and final witness, Mr. Diesenhaus.

And if you turn that microphone on. Yes, sir.

TESTIMONY OF JONATHAN L. DIESENHAUS, PARTNER, HOGAN LOVELLS US LLP

Mr. DIESENHAUS. Certainly. I made it work.

Mr. Chairman, Ranking Member, distinguished Members of the Subcommittee, as you heard earlier, my name is Jonathan Diesenhaus. I'm a practitioner. I do investigations and litigation under the False Claims Act and have been doing it for 25 years. I am not the chairman in my firm, haven't had the privilege of being a general counsel or a high-ranking spot at the Justice Department, but I did have the privilege of working for Mr. Thompson as senior trial counsel in the Civil Fraud Section enforcing the False Claims Act from 1998 to 2005.

I am here today, and I appreciate the invitation, but my message is one about how we handle these cases, how they are litigated, and improving on a statute that already seems to work pretty darn well. And that's where Mr. Getnick and I disagree is that I think there can be improvements to better protect some of the defendants who get caught up in the False Claims Act food mill.

As I explained in my written testimony, over the course of my career, I've become more and more concerned about the impact of *qui tam* investigations and litigation on small businesses, small providers, all of whom we rely on for, on the one hand, employment; on the other, care. These entities operate in a complex regulatory environment, an environment often made even more complex by perhaps unintentionally vague and ambiguous terminology and regulations.

It could even be that one man's heartfelt belief that his interpretation of a regulation is correct—let's say a whistleblower's belief—happens to be incorrect. And more often than not, in healthcare cases, these types of disagreements or allegations of regulatory fraud arise when everyone agrees that high-quality care and high-quality products have been delivered to sick patients.

My concern isn't for the types of cases Mr. Getnick and others on the relators' side always point to, successes like Mr. Cohen pointed to in his opening statement. During my time at DOJ, I handled cases like those, big ones. I helped to advance new theories of law. I helped to uncover frauds. I'm proud of that time.

My concern, though, is that *qui tam* litigation itself is too blunt an instrument to be wielded as freely as it is. Today, the Justice Department leaves it to defendants to fight to dismiss unfounded *qui tam* lawsuits. Eight out of 10 cases—even after the 1986 amendments, even after the 2009 amendments—8 out of 10 cases are cases the victim of the fraud does not pick up.

There are a handful of examples, to which Mr. Getnick and his colleagues refer, which are cases where the government has continued an investigation alongside a piece of declined *qui tam* litigation, and those cases often result in significant recoveries. But that's where the partnership continues.

My main concern is for companies like the companies I've outlined in my written testimony, employers who get caught up in investigations and litigation and can't fund the defense because of how expensive litigation has become today; not for Pfizer, not for the big companies that can defend themselves, but for the small companies. The Justice Department has, as a matter of practical policy, decided not to take on those whistleblower cases but to leave it to the defendant to fight them to move to dismiss.

Those are—those are defendants. Those are targets for whom I would ask that the Subcommittee take a second look at the statute, take a second look at enforcement practices, and take a look at disclosure policies or disclosure programs like Mr. Thompson has discussed.

Before my time runs out, I want to comment on the disclosure regime. What we've heard from today and what we often hear from the relator's bar is that there's a presumption that inside cheating companies, it's always the boss who's the head cheat. The presumption isn't that the boss would like to weed it out. The presumption isn't—isn't that a disclosure program would help the boss to convince others to weed it out.

That's not my experience. My experience is different.

The Federal Government has a number of self-report programs, none of which dovetail well with the False Claims Act. Today, the Justice Department has recently announced, under the Foreign Corrupt Practices Act, that companies who are investigated or companies who have—who find problems under the Foreign Corrupt Practices Act, should come forward, make disclosures, and there are significant incentives to bring those companies forward—or to bring problems forward to the government and to cooperate in investigations.

That's just one example. There are many more where there are clear incentives and the programs are working. The False Claims Act doesn't have such an incentive, and it should.

[The prepared statement of Mr. Diesenhaus follows:]

TESTIMONY

of

Jonathan L. Diesenhaus, Partner
Hogan Lovells US LLP
Washington, D.C

before the

House Judiciary Subcommittee on the Constitution and Civil Justice

on

Oversight of the False Claims Act

April 28, 2016

Testimony of
Jonathan L. Diesenhaus, Partner
Hogan Lovells US LLP

April 28, 2016

Unintended Consequences of *Qui Tam* Litigation for Small Business

Mr. Chairman and Members of the Constitution and Civil Justice Subcommittee, good afternoon. My name is Jonathan Diesenhaus. I am a partner at the law firm of Hogan Lovells US LLP in Washington, DC. Thank you for the invitation to testify on the False Claims Act ("FCA"). My practice focuses on healthcare fraud and abuse litigation and counseling, FCA litigation, and white collar criminal defense. I have been handling investigations and litigation under federal and state False Claims Acts for nearly 25 years. From 1998 to 2005, I served as a trial attorney and then as Senior Trial Counsel in the Fraud Section of the Civil Division at the Department of Justice.

Today I am here to discuss some of the unintended consequences of the *qui tam* statute, particularly when healthcare companies are the target.

I am proud of my time at the Department, and believe strongly that the FCA and its *qui tam* provisions play an important role in protecting the federal fisc, federal programs and their beneficiaries, federal employees, and the military. I also believe that whistleblowers can and do play an important role in bringing fraud and other misconduct to light, both within corporations and to the government. However, what I've seen in recent years is abuse of the statute and the good offices of DOJ by whistleblowers with less than honorable intentions and by whistleblowers' attorneys who the statute shields from the restrictions imposed on other members of the plaintiffs' bar. The cost and burden of investigations and litigation instigated by such whistleblowers can and is doing substantial damage to small health care businesses across the country, including health care providers and innovative manufacturers of drugs, devices and other technologies. And the negative impact of these cases is felt not only by the corporations and their investors, but by their employees, and the customers and patients they serve.

The *qui tam* provisions allow whistleblowers to spur investigations of wide-ranging allegations of misconduct, with very little evidence to substantiate those allegations. The statute requires the Attorney General to investigate each such allegation. And it allows whistleblowers to pursue those allegations in litigation even when the injured party, the government, determines they lack merit or otherwise decides not to participate.

Those *qui tam* allegations that do lack merit trigger two waves of cost and disruption that, in the case of a small business, can be crippling. In the first wave, a DOJ investigation of *qui tam* allegations usually requires a company – large or small, for profit or charitable – to engage in a resource and time intensive internal investigation, the goal of which is to uncover any evidence of the alleged wrongs. When no such evidence is discovered, to defend itself, the company will engage in the costly exercise of disproving the allegations in presentations or written submissions to DOJ.

The second wave comes when the company succeeds in its defense and the government chooses not to pursue the allegations. Litigation is unpredictable and costly, and the threat of exorbitant fines,

fueled by the treble damages required under the FCA, is a gamble few small business can afford to take. And even if the company takes that gamble and wins, unless the company can prove that the whistleblower violated not only Rule 11 of the Federal Rules of Civil Procedure, but the higher "clearly frivolous" standard of the *qui tam* provisions, the company has no means to recover the costs wrongly imposed on it.

The *qui tam* statute treats all targets as if they are the most culpable fraudsters. In a health care case, when a whistleblower files a case alleging that regulatory non-compliance amounts to fraud, the organization targeted by the allegation is often an entity engaged in the low margin business of delivering health care services or supplies. Labeled a "fraudster" by a witness claiming to have inside information, the company first struggles through the disruption, diversion of resources and anxiety of a fraud investigation. With increasing regularity, employees, and especially managers, need separate counsel – counsel the company is often obligated to pay for. Thanks to the wonders of email, servers and the cloud, vast amounts of data needs to be collected and reviewed to respond to the inevitable subpoena for documents, books and records. And throughout, the organization and all its employees come to work each day and try to keep the business running and provide care to patients. And if the company is lucky enough to be among the 80 percent of defendants who DOJ decides, after investigation, not to sue, the company must turn immediately to funding the defense of costly declined *qui tam* litigation in federal court.

In *qui tam* litigation today, it doesn't matter that a defendant had independently instituted a compliance program and attempted on its own to prevent not only regulatory non-compliance, but fraud. It doesn't matter that it provides a service, drug, or device that the organization believes benefits the public. And it doesn't matter that a whistleblower makes no allegation that the services provided were medically unnecessary or of poor quality, or that the device, drug, or procedure used was unnecessary or inappropriate. Because the allegation is that the company perpetrated fraud on the government, the government, the defense attorneys and the courts treat the allegation, even an allegation of regulatory non-compliance, with the seriousness such an allegation requires.

The *qui tam* provisions shield whistleblowers and their attorneys from the risk-reward proposition that governs other litigation in federal courts. Under the *qui tam* provisions, the rewards can be extraordinary. Whistleblowers stand to gain up to 30 percent of multi-million dollar recoveries.[1] In a quirk of this statute unlike almost any other, whistleblower's attorneys, most of who take a substantial contingency from their client's recovery, *also* recover their fees and expenses from the defendant as soon as the defendant pays $1 to the government, regardless of whether the payment is made under a settlement or after a trial.[2] Further mitigating the financial risk of litigation, the *qui tam* provisions limit a defendant's pursuit of fees in frivolous cases that would otherwise violate Rule 11 to cases shown to be "clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment"[3] – a standard so high that few defendants pursue relief and few if any of those prevail.[4] While the stigma of whistleblowing can be painful personally and even derail a

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1 31 U.S.C.A. § 3730(d)(2).

2 31 U.S.C.A. § 3730(d).

3 31 U.S.C.A. § 3730(d)(4).

4 *See* Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1006-07 (9th Cir. 2002) ("The award of fees under the False Claims Act is reserved for rare and special circumstances."); *see also* United States v. Purdue Pharma L.P., No. 5:10-CV-01423, 2015 WL 2401410, at *3 (S.D. W. Va. May 20,

career, many whistleblowers are disgruntled former employees who have already been through both. Moreover, those who suffer financial loss are well-protected by the broad anti-retaliation provisions of the statute which provide a remedy even for whistleblowers who do not file a *qui tam*.[5] For those who see a *qui tam* suit as a way to win the lottery or inflict pain on a former employer, the *qui tam* provisions can be an effective weapon.

Increasingly, *qui tam* litigation is pursued solely by a whistleblower after the government, the alleged victim, has investigated the claim and declined to participate. The *qui tam* statute is structured to encourage whistleblowers to report wrongdoing to the government. In many cases, after investigating the whistleblowers' allegations, the government declines the claim, deciding that the claim lacks merit or that it does not want to pursue the claim itself. However, the statute allows a whistleblower to continue to litigate even when the government has decided not to participate, in what is known as a "declined" *qui tam*. In fact, DOJ declines to intervene in the vast majority of *qui tam* lawsuits.

Yet, since the current version of the statute was enacted in1986, the treasury has received 94% of its total *qui tam* recovery in cases where the government intervened.[6] In every year until 2015, which stands out as an anomaly, the treasury recovered ten-fold more (and in some cases up to over a hundred fold more) in FCA cases where DOJ participated than in cases where DOJ chose not to get involved.[7] DOJ's statistics show that in the past three decades only 10% of declined cases resulted in a recovery to the government while 90% of cases where the government intervened resulted in recovery. In these declined *qui tam* suits, a tremendous amount of judicial, corporate, and individual resources are expended, even though the alleged victim – the government – has investigated the allegations and elected not to pursue the claim.

Of course, the government can choose not to pursue a *qui tam* action for a host of reasons, including the vast expenditure of government resources necessary to pursue cases or a departmental judgment about what types of cases it wishes to pursue.[8] But, the government does take seriously its mandate to thoroughly investigate the claims, and has an incentive to pursue claims if they appear they have merit: under the statute, when the government chooses to pursue

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2015) (refusing to award attorneys' fees after a decade of litigation resulting in a dismissal because the suit was barred by the public disclosure bar); United States *ex rel.* Atkinson v. Pennsylvania Shipbuilding Co., 528 F. Supp. 2d 533, 547 (E.D. Pa. 2007) (refusing to award attorneys' fees in a thirteen-year litigation after defendant was successful on motion to dismiss for lack of subject matter jurisdiction because relator was not an original source).

5 31 U.S.C.A. § 3730(h)(1).

6 Dep't of Justice, Fraud Statistics – Overview (Nov. 23, 2015), *available at* http://www.justice.gov/opa/file/796866/download.

7 *Id.*

8 *See* United States' Statement of Interest as to Defendants' Opposition to Plaintiff-Relator's Motion for Leave to File a Second Amended Complaint, United States *ex rel.* Jose R. Valdez v. Aveta, Inc., No. 15-cv-1140-CCC (D.P.R., filed Oct. 16, 2015) ("The United States' decision whether to intervene in any *qui tam* action is based on many factors, including questions of resource allocation and judgments as to which types of cases it chooses to pursue at a given time.")

the claim itself, it secures a larger portion of the final pay-out.[9] With the ranks of DOJ attorneys handling these cases growing nearly every year, declinations because of lack of resources are few and far between. And, in those few cases where the government declines because of lack of resources, the government typically attempts to stay involved in a support capacity.[10]

The scope of the FCA has been gradually increasing. The Supreme Court is currently considering a case which could rein in this expansion. In recent years, several whistleblowers have stretched FCA liability using a so-called "implied false certification" theory. The theory holds that by submitting a claim to the government, the claimant is making a series of implied statements about the validity of the claim, including representations that the claimant complied with all rules, regulations, laws, and contract terms governing its business, even if the company has not explicitly agreed to do so or represented that it did. While some rules and regulations arguably do go to the heart of a transaction by, for example, defining key terms written on the claim, thousands if not millions of others do not. The question before the Court is how to distinguish compliance issues that matter from compliance issues that don't for False Claims Act purposes. Put another way, the question before the Court is how to distinguish rules and regulations that only the government can enforce from those Congress intended whistleblowers to be able to enforce through the *qui tam* statute even when the government chooses not to.

While some circuit courts have upheld this theory, others have explicitly rejected it. The Seventh Circuit stated that "it would be . . . unreasonable for us to hold that an institution's continued compliance with thousands of pages of federal statutes and regulations incorporated by reference into the [agreement with the government] are conditions of payment for purposes of liability under the FCA."[11] The Second Circuit stated that the "False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations . . . and to construe the impliedly false certification theory in an expansive fashion would improperly broaden the Act's reach."[12]

Now, the Supreme Court will decide whether the FCA, and its *qui tam* provision, can be used to enforce laws and regulations not clearly related to the transaction.[13] The Court's decision could influence not only the federal FCA, but will determine the scope of dozens of state false claims acts that closely mirror the federal statutory language.[14] It will also signal whether the Court believes that the FCA has been stretched too far to cover conduct that should not be within the statute.

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9 If the government intervenes, the whistleblower receives 15 to 25% of the judgment. If the government does not intervene, the whistleblower receives between 25% and 30% of the ultimate judgment. 31 U.S.C.A. § 3730(d).

10 *See, e.g.*, United States' Statement of Interest in Opposition to Defendant Parke-Davis' Motion for Summary Judgment, United States *ex rel.* Franklin v. Pfizer, Inc., No. 96-11651 (D. Mass., filed May, 23, 2003) (filing thirty-six page long statement of interest even after declining to participate in the case).

11 United States v. Sanford-Brown, Ltd., 788 F.3d 696, 711 (7th Cir. 2015).

12 Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001).

13 Petition for a Writ of Certiorari, Universal Health Services, Inc. v. United States *ex rel.* Escobar, 15-7 (U.S., filed Jun. 30, 2015).

14 *See* Brief of *Amicus Curiae* Catholic Charities of the Diocese of Joliet, Inc. in Support of Petition, United Health Services, Inc., v. United States *ex rel.* Escobar, No. 15-7 (U.S., filed Jan. 26, 2016).

The cost and risk of defending against *qui tam* allegations effectively deprive health care entities of the ability to challenge overzealous interpretations of government regulations. Below, I discuss three examples of organizations whose circumstances compelled them to take different paths to resolve *qui tam* allegations lodged against them. The first has become another cautionary tale that any corporate decision maker must consider before fighting either the government or a whistleblower in FCA litigation.

Tuomey Healthcare operated a hospital in a mostly rural community in South Carolina. Tuomey entered into a financial transaction with a group of physicians. A whistleblower and DOJ asserted that the agreement failed to comply with a series of complex regulatory requirements and as a result amounted essentially to a bribe or kickback. Tuomey disagreed and argued that it had acted in good faith and consulted with counsel before entering into the transaction. Tuomey chose to defend in court, and then lost at trial and on appeal. Judgment was entered against it after a decade-long litigation for $237 million in damages and penalties. And after that, Toumey faced the risk that it would be excluded from all federal health care programs because it was found liable – a virtual corporate death penalty even if the hospital had the ability to pay the judgment.

Confronted with that kind of risk, questions of regulatory interpretation that might otherwise be subject to administrative litigation simply become too expensive and too uncertain to dispute. Health care providers and small businesses without the resources of a large manufacturer aren't in the business of funding that kind of fight. They want to get back to their business. They settle, and interpretations of regulation embedded in the settlement go unchallenged.

For a small business or health care provider that is the subject of a *qui tam* action, the result is often financial distress or even ruin, regardless of guilt. The stories of three defendants make this point.

- As noted above, Tuomey Healthcare elected to challenge allegations against it in court. After two trials and an appeal, Tuomey settled out from the $237 million judgment by making a series of concessions, selling its hospital, and entering into a $72 million settlement with the government. The whistleblower, a doctor, received $18 million.

- Cylex, Inc. was a private equity-backed diagnostic life sciences company based in Columbia, Maryland that employed nearly 50 people in science related jobs there and across the country. In 2011, Cylex faced down the unfounded *qui tam* allegations of a disgruntled former Vice President of Clinical Affairs who had worked for the Company for less than ten months. Cylex's sole product was a proprietary test that transplant surgeons use to assess the health of organ transplant patients. Although the government declined to press any charges after conducting a criminal and civil investigation of the whistleblower's allegations, the investigation had a devastating financial impact, precluding the company from raising new capital and draining it of reserves earmarked for the commercial operation. Cylex was left with one option – bankruptcy and sale of its assets. In the end, Cylex's assets were sold to a European concern, Maryland lost a life science company and all but two of its employees lost their jobs. The whistleblower dismissed his *qui tam* after the government declined; the bankruptcy court refused his other claims. *(For more detailed information, see Appendix A, attached).*

- Based in Redlands Washington, Endogastric Solutions, Inc. (EGS) manufactures EsophyX, an innovative implantable device used to treat severe acid reflux. Just as new management

was making headway with regulators and insurers to secure reimbursement for the new procedure surgeons performed to implant EsophyX, a former employee's *qui tam* spurred a government investigation. With low revenue but a promising future, EGS lacked the financial resources to mount an effective response or survive the uncertainty or expense of *qui tam* litigation. EGS chose to tell DOJ its financial story, its compliance story and its plans for securing reimbursement for the new procedure and patient access to EsophyX – and to ask for special consideration. Fortunately, DOJ was willing to employ a unique ability-to-pay settlement model that enables the treasury to share in the Company's success upon the occurrence of certain milestones. Although it came at substantial cost and disruption, a leaner EGS is moving forward and is poised to bring its minimally invasive treatment option to the GERD patients. *(For more detailed information, see Appendix B, attached).*

These cases demonstrate three alternatives for a company faced with the threat of treble damages under the *qui tam* provision of the FCA and the unfortunate results: attempting to fund the investigation and declaring bankruptcy, choosing to settle to avoid the massive costs of litigation, and attempting to fight the allegations in court, resulting in exorbitant legal fees and treble damages. Any option could result in massive costs to the company, even if allegations are completely unsubstantiated, and could limit the valuable medical services the company provides to the community.

CONCLUSION

Given the cost of litigation today and the complexity of the regulatory environment in which health care businesses operate, the balance of risks and incentives Congress sought to achieve in the 1986 amendments to the *qui tam* statute no longer applies. The normal rules of litigation simply do not constrain whistleblowers and their attorneys in the same way that other plaintiffs and their attorneys are constrained. Defendants are left without a remedy when investigations, or more often declined *qui tam* litigation, come up empty. Congress can reset that balance, by (1) creating greater incentives for compliance and self-disclosure, (2) subjecting frivolous whistleblower claims to the same scrutiny as other plaintiffs under the federal rules of civil procedure, and (3) sending a clear message that Congress expects DOJ to evaluate declined *qui tams* for merit and to exercise its statutory authority to dismiss cases that would unjustifiably burden the courts, federal agencies, innovators, small businesses and health care providers.

Appendix A

United States *ex rel.* Paradis v. Cylex, Inc., No. 10-11608 (D. Mass, filed Sept. 21, 2010)

Cylex developed and commercialized *ImmuKnow*, an important technological advance for transplant physicians and their patients. Cylex was a venture-backed diagnostic life sciences company headquartered in Columbia, Maryland. Cylex's primary product, ImmuKnow, was a clinical assay used to measure markers of the immune system associated with the risk of adverse events following organ transplantation. It was the only FDA-cleared test for post-transplant monitoring. As clinical research continued to validate the utility of ImmuKnow data, Cylex was poised for growth. In 2007, the Company was preparing to increase production and its work force.

Employment disputes emerged and the inevitable *qui tam* followed. In late 2007, Cylex hired a Vice President of Clinical Affairs and Chief Medical Officer. The new hire wasn't up to the task. During his nine-month tenure, he neglected his duties and inappropriately delegated his work. Cylex terminated him for abandoning his position and refused to pay the substantial severance payment he demanded. In September 2010, while purportedly negotiating a settlement of his wrongful termination claims, the terminated Vice President secretly filed a *qui tam* complaint accusing Cylex of promoting ImmuKnow for off-label uses and, significantly, alleging that ImmuKnow didn't work and that patients would be harmed if treating physicians relied on the data it produced to adjust immunosuppressive therapies in transplant patients.[15]

Cylex cooperated fully with a government investigation, depleting its cash reserves. DOJ opened a criminal and civil investigation, hitting Cylex with a subpoena in July 2011. Cylex cooperated fully, producing documents under the subpoena, paying for attorneys to represent workers in DOJ interviews, coordinating with counsel for its investors, who also received subpoenas, and making substantive presentations, through counsel, to the government. The Company incurred half a million dollars in legal fees and costs.

Cylex filed for bankruptcy. With its investors' relationships apparently under a DOJ microscope and the uncertainty of an open apparently broad investigation, Cylex struggled to raise enough capital even to sustain its operations. The Company had no choice but to encourage employees to find other jobs. Despite these cuts, Cylex projected that it would run out of cash by early 2013. The Company was forced to sell its assets to the highest bidder in bankruptcy, including its most valuable asset, ImmuKnow. Shortly after Cylex filed for bankruptcy, the government closed the criminal investigation and declined the *qui tam*.[16] The whistleblower later dismissed the *qui tam* voluntarily.[17]

The bankruptcy sale closed, the buyer moved Cylex's operations outside of Maryland and the Company's remaining Maryland employees lost their jobs and still, the whistleblower unsuccessfully tried to extract money from Cylex in bankruptcy court. Even after the government declined and the Company filed for bankruptcy, the whistleblower pressed the bankruptcy estate for money. As with the imaginary conspiracy he alleged in the *qui tam*, he argued that unconsummated settlement negotiations surrounding his termination entitled him to a share of the proceeds of the bankruptcy sale, a bankruptcy triggered by his unfounded allegations. The

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15 Complaint, U.S. *ex rel.* Paradis v. Cylex, Inc. (filed Sept. 2010).

16 Government's Election to Decline, U.S. *ex rel.* Paradis v. Cylex, Inc. (filed Dec. 21, 2012).

17 Order of Dismissal, United States *ex rel.* Paradis v. Cylex, Inc. (filed May 30, 2013).

bankruptcy court rejected his claim. Ultimately, Cylex settled his appeal of that decision for a fraction of his demand.

Recent clinical trial data demonstrates the product Cylex developed in Maryland significantly improves clinical outcomes. In 2015, published results from a rigorous clinical trial showed that one-year survival rates among liver transplant patients whose physicians adjusted immunosuppression therapies in reliance on ImmuKnow data were 13 percent higher than survival rates of patients in the control group, liver transplant patients whose physicians didn't use ImmuKnow.[18] The study soundly disproves the whistleblower's core allegation – that ImmuKnow was a worthless in vitro test. But proving, or even debating, that value proposition in the context of an FCA investigation is impossible and, as a result, neither Cylex's employees nor its investors, will have the opportunity to benefit from their effort.

[18] Ravaioli, et al., "Immunosuppression Modifications Based on an Immune Response Assay: Results of a Randomized, Controlled Trial," *Transplantation* (March 2015).

Appendix B

U.S. *ex rel.* Schmasow v. Endogastric Solutions, Inc., No. 1:12-cv-00078 (D. Mont. 2012)

Endogastric Solutions, Inc. (EGS) developed an innovative technology to treat acid reflux at far less cost to patients and insurers than traditional therapies. EGS is a privately-held company headquartered in Washington. EGS markets one platform of products, the EsophyX, an implantable device developed to repair an anatomical cause of chronic acid reflux that presents in patients diagnosed with Chronic Gastroesophageal Reflux Disease (GERD). Surgeons and gastroenterologists use a new form of minimally invasive surgery, Transoral Incisionless Fundoplication (TIF), to implant the device. TIF is a less complex, lower cost alternative to other surgical solutions and cheaper for patients than daily medication regimens that treat the symptoms rather than the cause.

Prior to the publication guidance specific to TIF in December 2011, EGS provided customers with information on procedure codes potentially available to bill for the procedure. Medical procedures are reimbursed using Current Procedural Terminology (CPT) codes developed and published by the American Medical Association (AMA). The code assigned to each procedure ties to a reimbursement rate set by insurers and government programs. When EGS launched EsophyX in 2007, there was no clear AMA guidance on the code to use for TIF. EGS shared information with physicians about two codes, one an existing code for a similar, but more complex procedure and the other an "unlisted" code which triggered an insurer review on a claim-by-claim basis and slower, albeit sometimes higher, payment. In December 2011, the AMA issued guidance stating that TIF should be coded (and therefore billed) under the "unlisted" code until it issued a specific code. Shortly thereafter, EGS distributed the new guidance to its existing customers and trained its sales force not to discuss alternatives.

EGS completely restructured the Company to focus on reimbursement and a new CPT code. In 2011, after recognizing that predictable and timely reimbursement would be essential to broader utilization of EsophyX and TIF, EGS hired a new CEO to guide the Company through a transition. The new CEO dramatically reduced the Company's focus on sales and shifted resources to collecting data to prove the value of EsophyX and support a new CPT code for TIF. While the Company knew sales would be limited until a final code was adopted, it implemented a strategy to conserve resources in the interim.

Government investigation of *qui tam* allegations depleted EGS's reserves. In June 2012, a former sales representative, who had worked for EGS for only three months, filed a *qui tam*.[19] The government began investigating the claims, and in December 2015 issued a civil subpoena requesting information, documents and electronic data from EGS. Through counsel, EGS cooperated fully and provided thousands of documents, responded to written interrogatories, and interacted frequently with DOJ. Soon, the cost of complying with the government's requests for data proved unsustainable. In mid-2013, EGS began a reduction in force that brought its workforce to a mere 56 employees (from a high of over 120 in 2010). In June 2013, the CFO recommended that his own position be eliminated, as the leaner company no longer needed both a controller and a

[19] Complaint, United States *ex rel.* Schmasow v. Endogastric Solutions, Inc. (filed June 26, 2012).

CFO. Shortly thereafter, EGS informed the government that it no longer had the financial resources necessary to aid the government in its investigation.

EGS cried "uncle". EGS asked DOJ to consider disposing of the *qui tam* under an ability-to-pay settlement – a framework that shifts the analysis from an evidence-based assessment of liability to a financial analysis of payments a defendant can afford to make over time. Even though EGS faced unsubstantiated allegations of fraud – allegations which had nothing at all to do with the effectiveness or safety of its product, and had clear defenses to the *qui tam* allegations, EGS could no longer fund the defense and would be unable to pay litigation expenses. Facing a risk of treble damages and penalties, and costly litigation, EGS chose to move on and to take steps to preserve resources.

DOJ adopted an innovative settlement model. Given EGS's precarious financial situation, even a traditional settlement agreement could have been fatal to the Company. Apparently recognizing the potential value of EsophyX and EGS's planned path to profitability, DOJ implemented a novel framework form of structured settlement – scaling the amount of the fine to be paid overtime to the Company's achievement of certain milestones.[20] The arrangement gave EGS the ability to maintain its operations, retain over 50 employees, and develop the information necessary to support the need for a CPT code. It also gave the whistleblower a "reward" that could approach $1 million.

EGS is on a compliant path to success. DOJ's decision to implement a novel framework form of structured settlement appears likely to have had the desired impact on EGS. Shortly after guiding the Company through the settlement, EGS's CEO resigned and served as a consultant to the Board. Under a new CEO since May 2014, whose charge was to ensure that EGS fully incorporated compliance into its core DNA, the Company focused a vast majority of its limited resources on product iterations (R&D) and building robust clinical evidence in order to gain medical society support for and sponsorship of a reimbursement code. In the last 18 months, EGS has published three randomized clinical trials and numerous peer reviewed studies, earned a Category 1 CPT code (effective January 1, 2016) and received FDA clearance on two new device iterations. The Company is now positioned to offer their minimally invasive TIF treatment option to a subset of GERD patients who will benefit from this procedure.

[20] Settlement Agreement, United States *ex rel.* Schmasow v. Endogastric Solutions, Inc. (filed Feb. 25, 2014).

Mr. FRANKS. And I thank you, Mr. Diesenhaus.

And we will now begin questions, and I will begin by recognizing myself for 5 minutes.

Mr. Burke, you had mentioned in your testimony that you had been offered a settlement from the Department of Justice, and I guess the first question is, what was the process that caused you to answer that question "no"? I mean, why did you reject that settlement? And in the end, wouldn't it have been—you know, the question occurs, would it have been cheaper for you to accept the offer, given the man hours used in the investigation and the overall legal costs?

Mr. BURKE. Well, thank you for that question. Yes, we were offered a settlement, and it came probably sort of mid in the investigation where some of the—I think there was a understanding of generally what was involved, but the fine details had not really been arrived at. We were offered a $750,000—and their term—rough justice settlement.

Our decision was a hard one. In fact, it was very tempting. We had board members that felt that this was the way to go and—but we had others that, as we looked at what we did, we thought, you know: This is not right, because there is a stigma that goes with a settlement. And, frankly, if we had settled, I wouldn't be here testifying today. We would be another check in the success column of the FCA and with no ability to really tell our story and what the issue was.

And so we chose not to. We chose to go forward, even though it probably cost us an extra $250,000 in legal fees in order to continue the process to get to the point where both the Department of Justice and the State Medicaid Fraud Unit dismissed the claim.

Mr. FRANKS. Thank you, Mr. Burke.

Mr. Thompson, if organizations are given some type of benefit or incentive for having a high-quality ethics and compliance program in place, when an FCA violation is identified, how then would DOJ distinguish between those that simply implement a program and those who seek to make the program an ongoing priority?

Mr. THOMPSON. I'll turn this on this time.

Thank you, Mr. Chairman. I want to compliment the Department of Justice. The Criminal Division has recognized that having an effective compliance program can play an important role in making a prosecuting decision, and they have brought in a person who is an expert in compliance programs, and to look at whether or not, from the collateral consequence standpoint, or even from the standpoint of making a decision, if a company has a bona fide terrific gold-plated compliance program, then it shouldn't be excessively punished because of the acts of one bad employee. The Criminal Division recognizes this.

And I—what I want to focus on is prevention. If you have a bona fide high-quality compliance program—and that was the purpose of the blue ribbon panel—you can make a terrific difference in prevention, and prevention should be something, whatever side of the aisle you're on, everyone would benefit from prevention: the public, the government, consumers, and shareholders. And I think that's the kind of incentive, especially when you get to matters like self-disclosure.

I'm concerned about the collateral consequences more than the damages. It's the collateral consequences which turn a very good compliance program that, as our panel found, is business-specific, and I think we all would recognize that a business-specific program is better than a program that the government or some agency can come in and impose upon a company after the fact.

So I think this is a very good incentive for this Committee to look at, and it will do more to prevent fraud than anything else.

Mr. FRANKS. Well, thank you, sir.

Mr. Diesenhaus, I wonder if you could explain how the current penalty structure in the False Claims Act might coerce certain defendants to settle even those nonmeritorious FCA cases that are brought against them.

Mr. DIESENHAUS. Thank you, Mr. Chairman. False Claims Act provides for treble damages plus per-claim penalties of 5,500 to 11,000 per claim. That's likely to go up by—there's an—there's a provision that provides for—excuse me—statute provides for an inflation increase, and I think it's due to reset within the next year.

In addition, in the Medicaid case, many States have False Claims Acts as well, so that would double the amount of the penalty. So you'd be looking at, in the Medicaid case, for each $100 dentist bill, you'd be looking at a $300 damage recovery for the government and 11,000 to 22,000 per claim.

For an entity the size of Mr. Burke's hospital or some of my smaller clients, that risk, especially when you've incurred cost and spent the money to deliver the healthcare services, it's too great to take, and often the Department will compromise to a much smaller number than you'd be exposed to at trial.

Mr. FRANKS. Well, thank you all.

My 5 minutes have expired, and I will now recognize the Ranking Member for his questions, 5 minutes.

Mr. COHEN. Thank you, sir.

Mr. Burke, I don't know about your case, and I do notice in your testimony you say, in the end, you know, you were found not to have—the Justice Department surrendered, gave up, and didn't go further.

Do you know if there was a rule 11 filed for sanctions? The attorney files a rule 11 saying the other counsel had no basis for the action. Do you know if your attorneys filed a rule 11 request?

Mr. BURKE. I don't believe that they did.

Mr. COHEN. Do you know if they filed a motion to dismiss for failure to state a claim of action?

Mr. BURKE. I don't believe that they did.

Mr. COHEN. Mr. Getnick, wouldn't that have been the appropriate thing for an attorney representing his company to have done if it was not a claim that had any basis?

Mr. GETNICK. I can't speak to the specific case, but I think, as a general rule, what you're pointing out is that the False Claims Act is replete with protective mechanisms, and you have mentioned two.

Rule 11 is a rule that applies generally that if a matter is not well thought through, if it's not subject to proper due diligence, both the party and the lawyer are subject to sanction.

Then, in addition to that, rule 9 provides an even higher standard because these cases are found in fraud and require specificity and particularity, which would give rise to, as you point out, a potential motion to dismiss.

But there are even greater protections under this statute because the Department of Justice has the ability to move to dismiss a case if it believes it is not one that has appropriate validity.

And, finally, the defendant, under 31 U.S.C. 2730 can seek further penalties from the relator if the matter is found to be clearly frivolous, vexatious, or primarily for the purpose of harassment. So this multifaceted regime is a tremendous bulwark against abuse.

Mr. COHEN. So while you don't know the facts of this case, and as I don't either, the fact in Mr. Burke's statement, he says, "In the end, it was determined we had not defrauded the government," could it then determine that there wasn't sufficient proof to rise to the level necessary, that the government felt they couldn't get to the degree of proof they needed, that it may be some proof was missing, a witness was missing, or that just the standard was not sufficient, but that there was probable cause?

Mr. GETNICK. There could be any number of reasons why the case did not proceed. And, you know, I have heard what Mr. Burke has to say today. And, frankly, it concerns me that he and his company had that experience, and I think it's something worth taking into consideration, and it's worth being concerned about. I'm concerned about it.

Mr. COHEN. And I am, too. And Mr. Diesenhaus mentions that sometimes the powerful parties got so much money and that the other side can't afford go forward, and that happens a lot with usually corporations having to be on the power side and not necessarily the government.

Is there something where Mr. Diesenhaus talks—he talks about the smaller corporations who can't afford the litigation; they might have to settle—is there a place that you all could come to a meeting of the minds to find some way to improve the statute?

Mr. GETNICK. What concerns me is hearing that there are only a handful of examples of declined cases that go on to be successful. And while I'm concerned about what I've heard from Mr. Burke, I also recognize that that's a case that took place 10 years ago. And so if we need to reach back 10 years to find that type of situation, that should tell us that this is not a matter of great frequency.

On the other hand, we only have to reach back to yesterday to see how declined cases play a very specific and important role. One of cases you pointed out in your opening remarks was the Wyeth/Pfizer/Protonix case. That case settled yesterday for $750 million after an initial Department of Justice declination and 14 years of work. It's very important to realize that.

The Department of Justice, at some point, declined, but because this action-forcing mechanism took place, the relator and the relator's counsel were able to continue investigating the case, continue to advance the case and prove it up. Then the Department of Justice said, "Wait a moment. This is a case we have to become involved in," and then we see that yesterday that Wyeth/Pfizer is going to pay $413 million to the United States; the participating States, $371 million. And those companies are not denying the gov-

ernment's allegations of alleged illegal bundling and pricing violations.

So that case was successfully defended on a motion to dismiss, and zero dollars would have come out without the whistleblowers and their lawyers pursuing that case after DOJ declined.

Mr. COHEN. Thank you. Let me ask one last question. Is the Getnick in Getnick & Getnick your father, your brother, your wife, your son?

Mr. GETNICK. Well, that's an interesting question. It's very much my father, who I spoke about.

Mr. COHEN. Okay.

Mr. GETNICK. But my brother, Michael Getnick, is counsel to the firm, and my wife, Margaret Finerty, is also a partner in the law firm.

Mr. COHEN. Family affair.

Mr. FRANKS. That keeps it in the family, yes, sir.

I now recognize the Ranking Member of the full Committee, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I appreciate the witnesses here. Let me start off with Mr. Thompson. Shouldn't Congress preserve strong *qui tam* provisions as a core feature of the False Claims Act because it incentivizes uncovering fraud?

Mr. THOMPSON. Good afternoon, Congressman.

Mr. CONYERS. Greetings.

Mr. THOMPSON. It's good to be here, and it's been a pleasure working with you all these many years.

I think that Congress should make certain that the False Claims Act remains a strong Act. As I said in my—as I said in my opening statement, the False Claims Act is a very important antifraud tool. But what we talked about with Mr. Cohen's questions about the protective mechanisms and Mr. Getnick's responses, the concern that I have when we're dealing with collateral consequences to business—businesses, present responsibility determinations, corporate integrity agreements, there is absolutely no protective measures for companies who are mistreated or run roughshod over by the government. These decisions are made ad hoc.

All the leverage is with the government. There is—it's virtually impossible for a business to challenge a collateral consequence determination by a government agency, so we need these protections. I think we can—Congressman, I think we can have those protections, and I think the False Claims Act can remain a very effective and important antifraud tool.

Mr. CONYERS. Okay.

Mr. Getnick, let me throw the same consideration to you. What do you think about preserving strong *qui tam* provisions?

Mr. GETNICK. Thank you, Congressman.

I don't think that there is any mutual exclusivity, if you will, between encouraging business-driven integrity and a strong False Claims Act. In fact, if business-driven integrity is creating compliance within companies, then there won't be False Claims Act violations leading to liability and damages.

I don't think the problem is with companies that have serious business-driven integrity programs of the type that Mr. Thompson

is talking about today. The problem is companies that have what I would describe as law-driven compliance programs, which are meeting certain predefined benchmarks, but they're adopted to avoid punishment, and they're only grudgingly tolerated by executives and employees. And if the company doesn't develop a deeply rooted culture of integrity, then it results 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 benefits of reduced liability.

But what Mr. Thompson and I think what Mr. Diesenhaus is talking about, frankly, is a potentially better world where we have business-driven integrity programs that are much likely to prove more effective. And I probably should take a moment and say I identified myself as testifying in the capacity as chairman of Taxpayers Against Fraud Education Fund, but I'm also the managing partner of Getnick & Getnick, and our firm has a dedicated business-integrity counseling side in addition to our antifraud litigation side.

So this is very near and dear to me, because if you can encourage business driven integrity, then you have something that may prove more effective because business people from the top down, not just the legal department, I'm talking the C suite, the chairman, they embrace and promote that program as essential to the long-term success of the enterprise, and then it can be viewed throughout the company as a profit center and a competitive advantage.

Mr. CONYERS. Mr. Getnick, let me just ask you: If the Federal legislature were to weaken *qui tam* provisions in the False Claims Act, what do you think—what kind of result would we have there?

Mr. GETNICK. Look, it would be awful. It's just that simple. Because a program that is producing violations has to be judged on its results, not that some list of checkmarks took place where somebody says: Hey, I met the standard.

In the end, the standard is: Are you defrauding the government, or are you not defrauding the government? And if you're defrauding the government, you need a powerful False Claims Act that does it best.

Mr. CONYERS. Do you agree, Mr. Thompson?

Mr. THOMPSON. Yes. As I said, I think we should have a powerful and effective False Claims Act, but we need to focus on predictability and certainty when it comes to these collateral consequences that businesses come into play when there's a False Claims Act issue. This is completely—completely, in a way, different than the False Claims Act in the sense that it follows the False Claims Act and it needs to be addressed because we need to do a better job at prevention, Congressman.

Mr. GETNICK. May I just add one thing to that? So I teach a whistleblower law class at Cornell, and this Monday was the session on compliance. And, actually, I was hoping that Mr. Thompson would have been our guest lecturer. Due to a conflict, the students had to have the weak substitute of my speaking to them instead.

And I completely concur with this approach of encouraging companies to get it right because the alternative is to have the government come in with a deferred prosecution agreement and a monitoring program that is a nightmare. And, in fact, when we teach

the class, we start out and say: Look at what a monitoring agreement looks like and be lawyers who are ready to show that to your client and to convince them they don't want a monitoring agreement. What they want is a business-driven integrity program that gets it right coming from a culture of integrity and understands that, by doing good, you can do well and that good conduct is good business.

And if you read the testimony of Mr. Thompson, you will see that is precisely the conclusions that he and his colleagues have come to and which I share.

Mr. CONYERS. Thank you, Mr. Chairman.

Thanks to the witnesses very much.

Mr. FRANKS. Let me also add my thanks to the witnesses and to the audience for being here. This is always one of the more enlightening venues because you have people on different sides that really know what they're talking about, so it's been very enlightening testimony, and I appreciate it.

And this concludes today's hearing.

Mr. COHEN. Mr. Chair, before you finish.

Mr. FRANKS. Please.

Mr. COHEN. Can I ask, without objection, that we have some hearing oversight on the False Claims Act testimony by Mr. Stephen Kohn, K-o-h-n, executive director of National Whistleblowers Center, into the record?

Mr. FRANKS. Without objection.

[The material referred to follows:]

UNITED STATES HOUSE OF REPRESENATIVES
COMMITTEE ON THE JUDICARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

"Hearing: Oversight of the False Claims Act"

Testimony of Stephen M. Kohn[1]
Executive Director, National Whistleblower Center
www.whistleblowers.org

April 28, 2016

Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee:

Thank you for this opportunity to submit written testimony regarding the False Claims Act.

The False Claims Act is the most successful anti-corruption/whistleblower protection law. It was visionary legislation, originally signed by President Abraham Lincoln on March 2, 1863, and modernized by Congress under the leadership of Iowa Senator Charles Grassley in 1986. Over the years it has enjoyed strong bi-partisan support.

Congress should celebrate the achievements of one of its most important success stories. The False Claims Act empowers and incentivizes citizens to report frauds against the government, and works with astounding success in recovering billions of dollars every year from corrupt fraudsters.[2] But these recoveries are dwarfed by the cultural impact of the law. Many government contractors are far more vigilant today than they were back in the old days when they sold Union troops saw dust instead of gunpowder, or in recent history when they sold hammers for $500 under the most despicable contracting agreements.

Since 1987, under the False Claims Act, taxpayers have recovered over $33.230 billion from civil penalties alone. Whistleblower disclosures have resulted in 69% of all successful civil fraud recoveries from government contractors who tried to rip off the taxpayer. *See* Attachments 1 and 2.

The Chamber of Commerce and the large government contractors it lobbies on the behalf of want a return to the bad old days.[3] This Subcommittee should strongly opposed these efforts.

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[1] Stephen M. Kohn is the author of seven books on whistleblower law, including, *The Whistleblower's Handbook: A Step-by-Step Guide to Doing the Right Thing and Protecting Yourself* (Lyons Press 2013, 3rd ed.). You may email him at contact@whistleblowers,org.

[2] See Department of Justice, "Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015," December 3, 2015.

[3] The attacks on the False Claims Act advocated by the U.S. Chamber of Commerce, were fully debunked in the National Whistleblowers Center's report, *"Saving America's 'Most Important Tool to Uncover and Punish Fraud,* published at http://www.whistleblowers.org/storage/documents/RebuttalDocs/final%20fca%20report.pdf.

THE CHAMBER'S POSITION ON CORPORATE COMPLIANCE PROGRAMS

The Chamber of Commerce endorses corporate compliance programs structured as part of a company's legal department. Under the pretext of attorney-client privilege, companies use these programs to hide fraud and gag the ability of employees to blow the whistle. For example, the largest Iraq War defense contractor, Kellog-Brown & Root ("KBR"), claimed that its compliance program was secret, and evidence it collected documenting widespread fraud could not be disclosed to either the public or government investigators.[4] This position was upheld by the U.S. Court of Appeals in D.C., and the compliance records were kept secret.

In the KBR case, a U.S. District Court Judge reviewed the company documents *in camera* (i.e. secretly and not on the public record). The judge found that these documents contained evidence of fraud:

> "KBR's documents are filled with evidence that certain KBR employees steered contracts to Daoud [KBR's subcontractor]; are filled with evidence that Daoud gave lousy and late contract performance; and are filled with evidence that KBR nevertheless overpaid Daoud with United States funds."[5]

Despite these findings, the public and the government was never able to learn about how they were robbed during the War in Iraq. This is the type of secrecy the Chamber of Commerce and its allies want to enforce nation-wide.

Corporate compliance programs advocated by the Chamber are so anti-whistleblower that they are required to give "warnings" to any employee who contact them,[6] although most programs fail to disclosure their numerous conflicts of interest.[7]

Chamber/KBR endorsed compliance programs are a trap for whistleblowers.

The False Claims Act creates a safe, effective, and highly successful method for employees to disclose fraud in government programs to the appropriate authorities.

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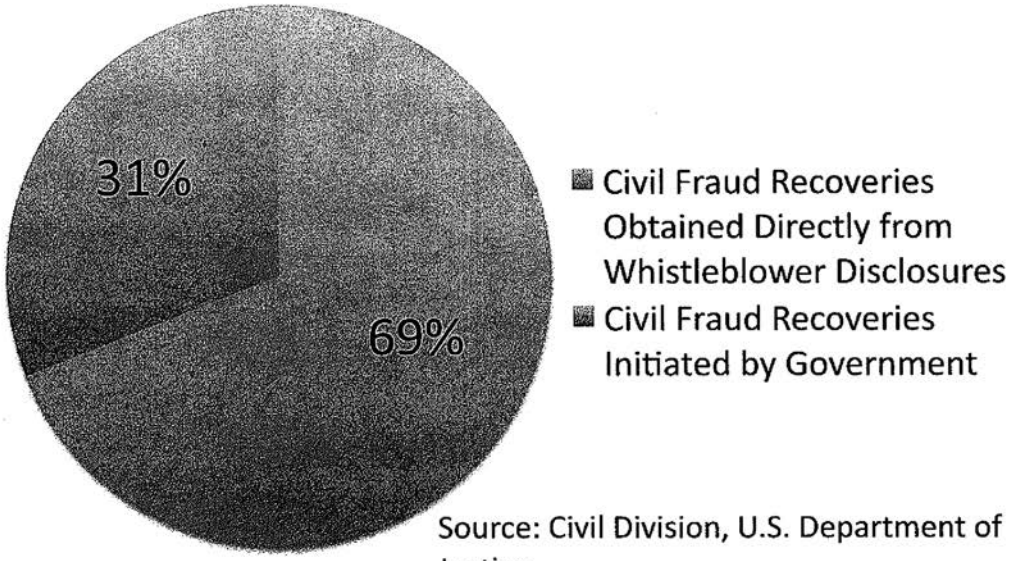
[4] *In re Kellogg Brown & Root, Inc.*, No. 14-5055 (D.C. Cir. June 27, 2014).
[5] December 18, 2014 Opinion and Order, Case No. 1:05-CV-1276 (D.C. Dist. Court), available online at http://bit.ly/1WRJi3P, overturned by *In re Kellogg Brown & Root, Inc.*
[6] *See U.S. v. Int'l Broth. Of Teamsters*, 119 F.3d 210, 217 (2nd Cir. 1997) ("attorneys in all cases are required to clarify exactly whom they represent, and to highlight potential conflicts of interest to all concerned as early as possible"); *Also see,* "Avoiding the Perils and Pitfalls of Internal Corporate Investigations: Proper Use of *Upjohn* Warnings," ABA Section of Litigation (Feb. 11-14, 2010).
[7] The "warning" recommended by the New York Bar states as follows, "I want to caution you that I am an attorney for the Company and not for you or other employees. . . . I do advise you to seek your own counsel, however, as your interests and the Company's may differ. Having said this, I would be happy to listen to your complaint, etc." The National Whistleblower Center is not aware of one company that follows this New York Bar advice.

The False Claims Act Works

Fraud Statistics Overview

October 1, 1987 - September 30, 2015



Source: Civil Division, U.S. Department of Justice

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FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
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			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	343	30	86,479,949	0	0	0	86,479,949	0	0	0
1988	210	43	173,287,663	2,309,354	33,750	2,343,104	175,630,767	88,750	8,438	97,188
1989	224	87	197,202,180	15,111,719	1,681	15,113,400	212,315,580	1,446,770	200	1,446,970
1990	243	72	189,564,367	40,483,367	75,000	40,558,367	230,122,734	6,590,936	20,670	6,611,606
1991	234	84	270,530,467	70,384,431	69,500	70,453,931	340,984,398	10,667,537	18,750	10,686,287
1992	285	114	137,958,206	133,949,447	994,456	134,943,903	272,902,109	24,121,648	259,784	24,381,432
1993	304	138	181,945,576	183,643,787	6,603,000	190,246,787	372,192,363	27,576,235	1,766,902	29,343,137
1994	280	218	706,022,897	379,018,205	2,822,323	381,840,528	1,087,863,425	69,453,350	838,897	70,292,246
1995	233	269	269,989,642	239,024,292	1,635,000	240,659,292	510,648,934	45,162,296	465,800	45,628,096
1996	185	341	247,357,271	124,361,203	13,522,433	137,883,636	385,240,908	22,119,619	3,731,978	25,851,597
1997	186	547	465,568,061	621,919,274	6,021,200	627,940,474	1,093,508,535	65,857,419	1,658,485	67,515,904
1998	120	468	151,435,794	438,834,846	30,248,075	469,082,921	620,518,715	70,264,372	8,486,645	78,751,017
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	693,382,773	63,018,064	1,374,487	64,392,552
2000	95	363	367,887,197	1,208,370,688	1,688,957	1,210,059,645	1,577,946,841	183,679,377	375,143	184,054,520
2001	85	311	494,496,974	1,215,525,916	128,587,151	1,344,113,067	1,838,610,042	187,550,470	30,701,881	218,252,350
2002	61	318	119,598,292	1,078,174,023	25,786,140	1,103,960,162	1,223,558,454	161,377,822	4,582,319	165,960,141
2003	92	334	708,098,299	1,534,862,352	5,185,911	1,540,048,263	2,248,146,563	337,307,857	1,382,741	338,690,598
2004	105	432	115,656,023	561,717,502	9,261,879	570,979,382	686,635,404	110,224,220	2,376,128	112,600,348
2005	105	406	276,914,983	1,149,047,524	7,481,593	1,156,529,117	1,433,444,099	168,580,543	2,031,695	170,612,237
2006	71	385	1,712,459,257	1,490,562,444	22,661,363	1,513,223,807	3,225,683,064	219,876,072	5,647,836	225,523,908
2007	129	365	564,826,844	1,246,291,003	160,246,894	1,406,537,897	1,971,364,741	192,767,871	4,616,899	197,384,770

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FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2008	161	379	319,283,480	1,042,270,369	12,678,936	1,054,949,306	1,374,232,786	201,286,679	2,997,615	204,284,294
2009	132	433	469,334,681	1,959,281,256	33,776,480	1,993,057,735	2,462,392,417	249,469,385	9,684,147	259,153,532
2010	140	576	639,462,785	2,280,378,123	106,740,899	2,387,119,023	3,026,581,808	363,349,351	30,167,177	393,516,528
2011	125	635	241,365,995	2,646,695,115	173,888,703	2,820,583,818	3,061,949,813	510,406,604	49,041,606	559,448,210
2012	145	652	1,608,112,862	3,296,594,634	44,973,343	3,341,567,978	4,949,680,840	423,398,430	12,640,243	436,038,673
2013	100	754	833,491,768	2,883,439,485	125,823,056	3,009,262,541	3,842,754,309	382,141,978	14,031,379	396,173,357
2014	96	714	2,725,589,226	2,975,800,958	80,525,631	3,056,326,588	5,781,915,814	429,831,609	14,622,854	444,454,464
2015	105	632	670,783,021	1,763,475,930	1,149,557,117	2,913,033,047	3,583,816,068	262,968,424	334,642,108	597,610,533
TOTAL	4,734	10,593	15,140,094,246	31,074,452,032	2,155,957,974	33,230,410,007	48,370,504,253	4,790,583,689	538,172,805	5,328,756,494

NOTES:

1. "New Matters" refers to newly received referrals, investigations, and qui tam actions.
2. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. § 3730(h).

Mr. FRANKS. So now this concludes today's hearing, and I want to again, thank you all for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I thank the witnesses. I thank the Members, and I thank the audience. And this hearing is adjourned.

[Whereupon, at 5:28 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Prepared statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice

Statement of the Honorable Steve Cohen for the Hearing on "Oversight of the False Claims Act" Before the Subcommittee on the Constitution and Civil Justice

Thursday, April 28, 2016 at 4:00 p.m.
2141 Rayburn House Office Building

The False Claims Act is one of the most potent weapons in the fight against fraud and is a vital means of protecting taxpayer dollars.

According to the Justice Department, from fiscal years 1987 through 2015, the False Claims Act has been responsible for over $48 billion in recoveries from corporations that cheated the American taxpayer.

Of that number, more than $33 billion resulted from litigation initiated by *qui tam* plaintiffs, many of whom are employees of corporate wrongdoers who are in the best position to know of fraudulent activity and to bring it to light.

In 2009, Congress adopted amendments that further strengthened the Act.

These amendments, which were sponsored by our former colleague Representative Howard Berman and championed by noted *qui tam* lawyer John Phillips, resulted in recoveries since 2009 of almost $27 billion for taxpayers, with more than $19.5 billion resulting from *qui tam* complaints.

The fact that almost 70 percent of recoveries since 1987, and *more than* 70 percent since 2009, stemmed from *qui tam* suits highlights the central role that *qui tam* plaintiffs play in the False Claims Act's enforcement regime and in the fight against fraud.

Whistleblower-initiated action was responsible for the government's $2 billion recovery from GlaxoSmithKline for paying kickbacks, doctoring scientific research, and illegally promoting certain prescription drugs.

Last month, Olympus Corporation agreed to pay $646 million, including $310.8 million in various False Claims Act claims. Olympus put profits before people by, among other things, refusing to disclose to U.S. regulators potential contamination from its duodenoscopes, despite doing so to European regulators, given that the U.S. was its largest market for duodenoscopes.

And just yesterday, Pfizer settled whistleblower-initiated cases for $784.6 million for overcharging Medicaid in a matter that the government had initially declined to intervene in.

We need only look at the state of the False Claims Act prior to 1986 to get a sense of how weak *qui tam*-related provisions can undermine the False Claims Act's purpose.

Before 1986, the Act contained strong disincentives for whistleblowers to pursue litigation on behalf of the government and bring fraud to light.

As a result, the number of False Claims Act *qui tam* suits declined dramatically and fraud against the government ran rampant.

The 1986 amendments to the Act, spearheaded by Senator Charles Grassley and Representative Berman, dramatically strengthened incentives for the pursuit of *qui tam* actions and greatly enhanced the Act's effectiveness.

It is perhaps no surprise, then, that those who are the target of fraud allegations are now seeking to undermine the False Claims Act, and, in particular, its *qui tam* and penalty provisions.

In 2013, U.S. Chamber of Commerce recommended changes to the Act that were solutions in search of a problem, unless one defines the "problem" as an effective False Claims Act regime.

For instance, it proposed limiting the share of damages that *qui tam* plaintiffs are able to recover in False Claims Act cases, weakening a major incentive for whistleblowers to come forward.

Further weakening the incentives for whistleblowers are proposals to bar *qui tam* actions under several circumstances.

One proposal would bar *qui tam* actions by an employee of a corporate wrongdoer if the employee did not report the fraud internally to his or her employer within 180 days prior to filing suit.

This proposal almost invites a corporate wrongdoer to intimidate or retaliate against the potential whistleblower employee and gives the company the opportunity to further hide the fraud.

Another proposed change would reduce the availability of treble damages based on so-called "gold standard" certifications of a company's compliance program done by third parties, in a process where it would be in the interests of the certifying entity – itself a profit-making business – to give the necessary certification, with no way of verifying the accuracy of the certification.

Finally, corporate wrongdoers have proposed making it substantially harder for any plaintiff, whether a *qui tam* relator or the government, to prevail in a False Claims Act case by amending the Act to impose the very high "clear and convincing" standard of proof to demonstrate any violation of the Act, rather than the current "preponderance of the evidence" standard.

We should be very wary of any attempts to undermine the effectiveness of the False Claims Act. As the old saying goes, "If it ain't broke, don't fix it."

Addendum to the testimony of Dennis E. Burke, President & CEO, Good Shepherd Health Care System

GOOD SHEPHERD
HEALTH CARE SYSTEM
MEDICAL CENTER

610 N.W. 11TH
HERMISTON, OR 97838
(541) 667-3400

May 25, 2016

Chairman Trent Franks
House Judiciary Subcommittee on the
Constitution and Civil Justice
Sent via Email

Dear Chairman Franks,

This additional written testimony is a follow-up to my oral testimony provided April 28, 2016 before Members of the House Judiciary Subcommittee on the Constitution and Civil Justice regarding oversight of the False Claims Act. It is also supplemental to my written testimony previously submitted.

I appreciate the opportunity to address comments by other panelists providing testimony before the committee, and add additional comment.

I would like to begin by touching on a point that was not addressed within the oral or written testimony before the committee regarding the reach of the act. The False Claims Act (particularly "False Claims") is a very broad concept. In our case, we had a programming error that placed the wrong physician's name in the wrong physician box in our ER billing forms. Our system replicated this error several thousand times. We felt, because this was a relatively simple programming error with no monetary consequence, it surely wouldn't be considered an attempt to defraud. Our counsel cautioned us that we couldn't be so sure. They pointed out that under the FCA, this error could be determined to be a "false claim". We could not assume that a judge or jury would automatically dismiss the error. If the act was limited to monetary and/or value defraudment, it would narrow its focus. But "false claims" is a very broad net, in which any error (even those without monetary or value impact) may result in a false claim determination with its ensuing penalties and fines.

In the hearing, I was asked a question by Representative Franks "Why we did not accept the $750,000 settlement offer by the Department of Justice and wouldn't it have been cheaper for you to accept the offer given the man hours used in the investigation and the overall legal costs?" We weighed the option of settlement carefully. And yes, from a strictly dollars and cents perspective, it would have been cheaper. But there are other "costs" beyond monetary considerations. In our case, we were greatly concerned at the implications and stigma of a settlement. Everyone acknowledges that a settlement implies guilt. And, while we made mistakes (a programming error that placed physician names in the wrong boxes in our ER billing forms), we did not feel that our errors constituted fraud. Any settlement would have created an assumption of guilt, casting a shadow on the hospital's reputation – an intangible cost that we felt outweighed the monetary savings of an unjust but economical settlement. Settlements are considered False Claims Act "wins". In some cases, the "win" is justifiable. But I would also submit that there are a significant number of other cases where the facts supporting fraud are not as clear and/or in which there may be no monetary defraudment. And yet, the determination of a claim being "false" with its immense statutory fines and penalties can be so daunting that a defendant feels their only secure and predictable path is acceptance of a settlement.

Mr. Cohen asked a two-part question – "If a Rule 11 request was filed by our counsel? And, "If our counsel filed a motion to dismiss for failure to state a claim of action?" Because of the breadth of allegations, the Department of Justice and State Medicaid Fraud Unit took a considerable period of time investigating each claim. We, too, had to spend considerable time investigating the allegations of which we had been made aware (remember, the complaint is sealed). A motion to dismiss requires the court to treat the factual allegations of the complaint as true, and we would not have been in a position to file a Rule 11 motion until the investigation had shown that there was not material basis for the allegations of fraud. This investigation took several years. While the case was eventually dismissed, the costs of the extensive investigation (including our attorney fees and staff time) are what constituted the damages that we incurred.

In Mr. Getnick's testimony, he states that "the FCA 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". Our counsel was quite clear that the government is reticent to take any action (big or small)

against a *qui tam* relator that would, in any way discourage or disincentivize a whistleblower from coming forward – irrespective of the merits of their claim. There are very few cases where the government has allowed an action to be brought against a whistleblower, even when their claim(s) turned out to be ill-advised, meritless, disingenuous, retaliatory, and/or motivated by greed. As a practical matter, the protections cited by Mr. Getnick in the law have not been rigorously offered or applied - nor do defendants in *qui tam* cases have effective standing to actively pursue these protections. That was our experience.

In Mr. Getnick's written testimony, he shares Taxpayers United's belief that the government should be allowed to collect their attorney fees in cases where the government prevails and/or there is a settlement. We believe that "this door should swing both directions".

Mr. Getnick's written testimony implies that, when a *qui tam* case is investigated and ultimately dismissed by the government, the issue is over. In other words, "all's well that ends well". In our case, we ended up with over $1 million in legal fees and other costs, as well as hundreds of man hours involved in the investigation. These were not costs created through actions we initiated, but were very real expenses that had to be paid. We reject any premise that a certain amount of "collateral damage" in fraud investigation actions, such as we experienced, is OK. We were repeatedly told by our counsel that we could not pursue a cause of action against the *qui tam* relator (including recouping our legal fees), as these are protections that a relator is afforded by law. As a small hospital, our only alternative to recoup these unjustified costs was through higher charges to the sick and injured that came to our facility for care – an outcome we do not believe to be fair.

The False Claims Act, as it exists, serves as a powerful tool on behalf of the United States Government and states in combating fraud. Unfortunately, as it exists, the law can also be used as a powerful weapon in the hands of an unscrupulous relator, motivated by retaliation or greed. It is our hope that our experience sets in motion changes to the law – providing for greater precision in identifying and rooting out fraud, while providing greater protections, predictability and rational judicial relief in those cases in which defraudment was clearly not the intent.

I always remain willing to answer questions or provide any clarification regarding my comments. Please don't hesitate to contact me at (541) 667-3409 or at dennisb@gshealth.org. Thank you.

Sincerely,

Dennis E. Burke,
President & CEO

DB/slm

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FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

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2001	85	311	494,496,974	1,215,525,916	128,587,151	1,344,113,067	1,838,610,042	187,550,470	30,701,881	218,252,350
2002	61	318	119,598,292	1,078,174,023	25,786,140	1,103,960,162	1,223,558,454	161,377,822	4,582,319	165,960,141
2003	92	334	708,098,299	1,534,862,352	5,185,911	1,540,048,263	2,248,146,563	337,307,857	1,382,741	338,690,598
2004	105	432	115,656,023	561,717,502	9,261,879	570,979,382	686,635,404	110,224,220	2,376,128	112,600,348
2005	105	406	276,914,983	1,149,047,524	7,481,593	1,156,529,117	1,433,444,099	168,580,543	2,031,695	170,612,237
2006	71	385	1,712,459,257	1,490,562,444	22,661,363	1,513,223,807	3,225,683,064	219,876,072	5,647,836	225,523,908
2007	129	365	564,826,844	1,246,291,003	160,246,894	1,406,537,897	1,971,364,741	192,767,871	4,616,899	197,384,770

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FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS [1]		SETTLEMENTS AND JUDGMENTS [2]					RELATOR SHARE AWARDS [3]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM			
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL		WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
2008	161	379	319,283,480	1,042,270,369	12,678,936	1,054,949,306	1,374,232,786	201,286,679	2,997,615	204,284,294
2009	132	433	469,334,681	1,959,281,256	33,776,480	1,993,057,735	2,462,392,417	249,469,385	9,684,147	259,153,532
2010	140	576	639,462,785	2,280,378,123	106,740,899	2,387,119,023	3,026,581,808	363,349,351	30,167,177	393,516,528
2011	125	635	241,365,995	2,646,695,115	173,888,703	2,820,583,818	3,061,949,813	510,406,604	49,041,606	559,448,210
2012	145	652	1,608,112,862	3,296,594,634	44,973,343	3,341,567,978	4,949,680,840	423,398,430	12,640,243	436,038,673
2013	100	754	833,491,768	2,883,439,485	125,823,056	3,009,262,541	3,842,754,309	382,141,978	14,031,379	396,173,357
2014	96	714	2,725,589,226	2,975,800,958	80,525,631	3,056,326,588	5,781,915,814	429,831,609	14,622,854	444,454,464
2015	105	632	670,783,021	1,763,475,930	1,149,557,117	2,913,033,047	3,583,816,068	262,968,424	334,642,108	597,610,533
TOTAL	4,734	10,593	15,140,094,246	31,074,452,032	2,155,957,974	33,230,410,007	48,370,504,253	4,790,583,689	538,172,805	5,328,756,494

NOTES:

1. "New Matters" refers to newly received referrals, investigations, and qui tam actions.
2. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. § 3730(h).

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FRAUD STATISTICS - HEALTH AND HUMAN SERVICES[1]

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	12	3	11,361,826	0	0	0	11,361,826	0	0	0
1988	7	5	2,182,675	355,000	0	355,000	2,537,675	88,750	0	88,750
1989	19	16	350,460	5,099,661	0	5,099,661	5,450,121	50,000	0	50,000
1990	27	11	10,327,500	903,158	0	903,158	11,230,658	119,474	0	119,474
1991	19	12	8,670,735	5,420,000	0	5,420,000	14,090,735	861,401	0	861,401
1992	26	15	9,821,640	2,192,478	0	2,192,478	12,014,118	446,648	0	446,648
1993	22	38	12,523,165	151,760,404	0	151,760,404	164,283,569	22,946,101	0	22,946,101
1994	43	76	381,470,015	6,280,815	240,000	6,520,815	387,990,830	1,113,597	72,000	1,185,597
1995	27	87	96,290,779	84,061,789	1,620,000	85,681,789	181,972,568	14,337,982	465,800	14,803,782
1996	20	177	63,059,873	49,236,698	2,340,000	51,576,698	114,636,572	8,707,168	667,400	9,374,568
1997	48	269	351,440,027	578,987,081	92,500	579,079,581	930,519,608	58,852,605	20,250	58,872,855
1998	35	276	40,107,920	251,824,167	2,526,075	254,350,242	294,458,162	46,863,357	187,015	47,050,372
1999	27	315	38,000,792	406,761,680	1,366,699	408,128,379	446,129,171	45,174,556	317,829	45,492,385
2000	35	212	208,899,015	723,152,746	333,457	723,486,203	932,385,218	115,397,403	87,343	115,484,746
2001	34	178	435,849,179	931,262,922	14,991,554	946,254,475	1,382,103,654	143,864,700	3,735,501	147,600,200
2002	22	193	74,454,427	937,841,186	23,407,571	961,248,757	1,035,703,184	150,280,717	4,008,686	154,289,403
2003	26	215	541,929,810	1,304,920,314	2,880,785	1,307,801,099	1,849,730,909	284,074,368	722,233	284,796,601
2004	28	273	34,816,447	470,335,081	5,775,062	476,110,142	510,926,589	95,920,149	1,625,129	97,545,278
2005	34	270	204,821,548	906,656,836	6,671,593	913,328,429	1,118,149,977	120,989,298	1,900,095	122,889,393
2006	18	216	1,050,520,714	1,227,114,221	16,229,540	1,243,343,761	2,293,864,475	163,167,984	3,921,996	167,089,981
2007	25	199	465,052,993	928,365,846	152,456,640	1,080,822,486	1,545,875,480	156,165,282	2,497,177	158,662,458

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FRAUD STATISTICS - HEALTH AND HUMAN SERVICES[1]

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM			
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL		WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
2008	60	231	162,972,022	962,461,088	6,852,571	969,313,659	1,132,285,682	185,933,162	1,522,164	187,455,327
2009	34	279	238,061,424	1,364,336,522	30,283,452	1,394,619,974	1,632,681,398	155,342,800	8,669,822	164,012,622
2010	42	385	539,043,024	1,955,805,336	13,328,518	1,969,133,854	2,508,176,879	335,084,132	3,890,989	338,975,121
2011	38	417	178,287,545	2,182,785,375	88,291,393	2,271,076,768	2,449,364,313	446,646,645	24,055,563	470,702,208
2012	26	415	557,273,967	2,503,475,429	37,563,668	2,541,039,098	3,098,313,065	280,685,548	10,527,293	291,212,841
2013	27	503	61,354,329	2,523,689,075	118,835,369	2,642,524,443	2,703,878,773	312,657,313	12,396,643	325,053,956
2014	31	470	88,054,490	2,247,536,093	66,202,446	2,313,738,539	2,401,793,029	345,081,567	10,841,222	355,922,790
2015	25	423	134,339,491	1,362,775,981	468,433,118	1,831,209,099	1,965,548,590	199,345,993	131,047,572	330,393,564
TOTAL	837	6,179	6,001,337,833	24,075,396,983	1,060,722,010	25,136,118,993	31,137,456,826	3,690,198,698	223,179,721	3,913,378,419

NOTES:

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. § 3730(h).

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FRAUD STATISTICS - DEPARTMENT OF DEFENSE[1]

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	237	20	27,897,128	0	0	0	27,897,128	0	0	0
1988	122	28	149,136,213	0	33,750	33,750	149,169,963	0	8,438	8,438
1989	122	31	154,588,297	10,002,058	0	10,002,058	164,590,355	1,394,770	0	1,394,770
1990	74	41	117,115,978	21,630,713	69,000	21,699,713	138,815,691	3,776,850	18,870	3,795,720
1991	78	44	227,898,245	57,200,000	42,000	57,242,000	285,140,245	8,625,800	10,500	8,636,300
1992	73	61	62,603,695	127,700,000	994,456	128,694,456	191,298,151	23,540,000	259,784	23,799,784
1993	93	53	83,742,840	24,000,000	5,707,641	29,707,641	113,450,481	3,280,425	1,671,498	4,951,923
1994	62	81	222,799,421	369,136,206	1,530,000	370,666,206	593,465,627	67,712,679	451,200	68,163,879
1995	54	88	110,459,386	140,548,237	15,000	140,563,237	251,022,623	28,348,711	0	28,348,711
1996	44	75	78,085,099	55,908,927	5,924,726	61,833,653	139,918,752	10,825,550	1,696,923	12,522,473
1997	48	79	30,734,273	35,090,213	1,513,700	36,603,913	67,338,186	6,018,810	379,435	6,398,245
1998	30	61	71,063,139	122,463,185	27,717,000	150,180,185	221,243,324	12,213,171	8,298,630	20,511,801
1999	33	66	30,522,711	15,114,509	745,137	15,859,646	46,382,357	2,684,186	179,750	2,863,936
2000	9	40	53,007,693	95,607,325	505,500	96,112,825	149,120,518	15,668,259	122,800	15,791,059
2001	10	41	17,472,751	30,030,696	88,083,098	118,113,794	135,586,545	5,955,566	19,451,866	25,407,432
2002	16	41	15,017,365	18,057,658	1,350,000	19,407,658	34,425,022	2,576,196	381,000	2,957,196
2003	10	36	107,337,000	204,884,468	0	204,884,468	312,221,468	48,592,795	0	48,592,795
2004	16	49	10,098,491	21,581,366	0	21,581,366	31,679,857	3,031,610	0	3,031,610
2005	16	49	19,049,935	101,125,200	0	101,125,200	120,175,135	21,428,085	0	21,428,085
2006	12	68	586,550,385	51,937,163	1,520,203	53,457,366	640,007,751	11,028,675	299,986	11,328,661
2007	25	50	16,400,000	32,044,844	496,909	32,541,753	48,941,753	4,983,718	126,419	5,110,137

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FRAUD STATISTICS - DEPARTMENT OF DEFENSE[1]

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2008	27	43	77,846,834	60,468,116	5,701,365	66,169,481	144,016,315	11,891,101	1,439,451	13,330,552
2009	17	51	22,388,261	416,852,869	140,000	416,992,869	439,381,130	64,469,853	26,600	64,496,453
2010	23	56	26,251,482	231,354,446	9,473,700	240,828,146	267,079,628	12,335,365	2,833,839	15,169,204
2011	19	45	29,484,345	111,630,570	0	111,630,570	141,114,915	9,195,127	0	9,195,127
2012	16	59	2,000,000	166,386,739	307,000	166,693,739	168,693,739	20,777,673	70,000	20,847,673
2013	12	78	669,234,165	47,118,462	154,000	47,272,462	716,506,627	7,246,939	41,580	7,288,519
2014	9	44	14,102,250	46,234,251	8,314,000	54,548,251	68,650,501	8,449,658	2,494,000	10,943,658
2015	7	34	109,991,660	142,369,076	6,607,150	148,976,226	258,967,886	23,876,368	1,915,650	25,792,018
TOTAL	1,314	1,512	3,142,879,042	2,756,477,296	166,945,335	2,923,422,630	6,066,301,673	439,927,939	42,178,219	482,106,158

NOTES:

1. The information reported in this table covers matters in which the Department of Defense is the primary client agency.
2. 'New Matters' refers to newly received referrals, investigations, and qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. § 3730(h).

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FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD)[1]

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM			
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL		WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
1987	94	7	47,220,995	0	0	0	47,220,995	0	0	0
1988	81	10	21,968,775	1,954,354	0	1,954,354	23,923,129	0	0	0
1989	83	40	42,263,423	10,000	1,681	11,681	42,275,104	2,000	200	2,200
1990	142	20	62,120,889	17,949,496	6,000	17,955,496	80,076,385	2,694,612	1,800	2,696,412
1991	137	28	33,961,487	7,764,431	27,500	7,791,931	41,753,418	1,180,336	8,250	1,188,586
1992	186	38	65,532,871	4,056,969	0	4,056,969	69,589,840	135,000	0	135,000
1993	189	47	85,679,571	7,883,383	895,359	8,778,742	94,458,313	1,349,709	95,404	1,445,113
1994	175	61	101,753,461	3,601,184	1,052,323	4,653,507	106,406,968	627,074	315,697	942,771
1995	152	94	63,239,477	14,414,266	0	14,414,266	77,653,743	2,475,603	0	2,475,603
1996	121	89	106,212,299	19,215,578	5,257,707	24,473,285	130,685,584	2,586,902	1,367,655	3,954,557
1997	90	199	83,393,761	7,841,980	4,415,000	12,256,980	95,650,741	986,005	1,258,800	2,244,805
1998	55	131	40,264,735	64,547,494	5,000	64,552,494	104,817,229	11,187,844	1,000	11,188,844
1999	80	112	126,866,982	71,048,596	2,955,667	74,004,263	200,871,245	15,159,323	876,908	16,036,231
2000	51	111	105,980,489	389,610,617	850,000	390,460,617	496,441,106	52,613,715	165,000	52,778,715
2001	41	92	41,175,045	254,232,298	25,512,500	279,744,798	320,919,843	37,730,204	7,514,514	45,244,718
2002	23	84	30,126,500	122,275,179	1,028,569	123,303,748	153,430,248	8,520,908	192,633	8,713,542
2003	56	83	58,831,489	25,057,571	2,305,126	27,362,697	86,194,186	4,640,694	660,508	5,301,202
2004	61	110	70,741,084	69,801,056	3,486,818	73,287,873	144,028,957	11,272,462	750,999	12,023,461
2005	55	87	53,043,500	141,265,488	810,000	142,075,488	195,118,988	26,163,159	131,600	26,294,759
2006	41	101	75,388,158	211,511,060	4,911,620	216,422,680	291,810,838	45,679,413	1,425,854	47,105,266
2007	79	116	83,373,851	285,880,313	7,293,345	293,173,657	376,547,508	31,618,872	1,993,303	33,612,175

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FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD)[1]

October 1, 1987 - September 30, 2015

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]					RELATOR SHARE AWARDS[4]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM			
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL		WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
2008	74	105	78,464,624	19,341,166	125,000	19,466,166	97,930,790	3,462,415	36,000	3,498,415
2009	81	103	208,884,996	178,091,864	3,353,028	181,444,892	390,329,888	29,656,732	987,725	30,644,457
2010	75	135	74,168,279	93,218,341	83,938,681	177,157,022	251,325,301	15,929,854	23,442,348	39,372,202
2011	68	173	33,594,105	352,279,170	85,597,310	437,876,480	471,470,585	54,564,832	24,986,043	79,550,875
2012	103	178	1,048,838,895	626,732,467	7,102,675	633,835,142	1,682,674,036	121,935,210	2,042,949	123,978,159
2013	61	173	102,903,274	312,631,949	6,833,687	319,465,636	422,368,910	62,237,725	1,593,156	63,830,881
2014	56	200	2,623,432,486	682,030,614	6,009,185	688,039,799	3,311,472,285	76,300,384	1,287,632	77,588,016
2015	73	175	426,451,871	258,330,872	674,516,850	932,847,722	1,359,299,593	39,746,064	201,678,887	241,424,951
TOTAL	2,583	2,902	5,995,877,371	4,242,577,754	928,290,630	5,170,868,384	11,166,745,755	660,457,051	272,814,866	933,271,917

NOTES:

1. The information reported in this table covers matters in which the primary client agency is neither the Department of Health and Human Services nor the Department of Defense.
2. 'New Matters' refers to newly received referrals, investigations, and qui tam actions.
3. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. § 3730(h).

Office of Inspector General (OIG) Updated Criteria for Section 1128(b)(7) Exclusion Authority

Criteria for implementing section 1128(b)(7) exclusion authority
April 18, 2016

Preamble

Under section 1128(b)(7) of the Social Security Act (the Act), the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services may exclude any individual or entity (collectively, "person") from participation in the Federal health care programs for engaging in conduct prohibited by sections 1128A or 1128B of the Act. In 1997, OIG published a policy statement with non-binding criteria to be used by OIG in assessing whether to impose exclusion under section 1128(b)(7). See 62 Fed. Reg. 67,392 (December 24, 1997). Since the original publication of the policy statement, OIG has used these criteria to evaluate whether to impose exclusion under section 1128(b)(7); release this authority in exchange for integrity obligations with OIG, within this document we refer to both "integrity obligations" or corporate integrity agreements (CIA) interchangeably; or take some other approach. OIG solicited information and recommendations for revising these criteria on June 27, 2014. OIG received five comments from the public. Based on its experience in evaluating persons for exclusion and on the comments received in response to the solicitation, OIG has revised the non-binding criteria for use in evaluating exclusion under section 1128(b)(7).

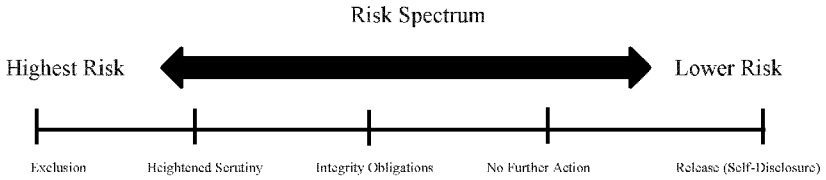
This revised policy statement supersedes and replaces the 1997 Federal Register notice.

Background

Exclusion is a remedial measure designed to protect the Federal health care programs from any person whose continued participation in the programs constitutes a risk to the programs and their beneficiaries. Federal health care programs may not pay for any items or services furnished, ordered, or prescribed by an excluded person. OIG has discretion as to whether to impose exclusion under section 1128(b)(7).

The question of whether to exercise exclusion authority under section 1128(b)(7) often arises in the context of False Claims Act matters. Health care fraud that subjects a person to liability under the False Claims Act, 31 U.S.C. §§ 3729 – 3733, will generally also subject that person to liability under section 1128(b)(7). In determining whether to exercise its discretion under section 1128(b)(7), OIG presumes that some period of exclusion should be imposed against a person who has defrauded Medicare or any other Federal health care program. This presumption in favor of exclusion is rebuttable in certain situations. This document sets forth circumstances in which the presumption may be rebutted and the non-binding factors that OIG will use to make such a determination. This document also describes how OIG evaluates risk to the Federal health care programs in using its other available remedies.

OIG evaluates health care fraud cases on a continuum: resolution of OIG's exclusion authorities is based on OIG's assessment of future risk to the Federal health care programs.



OIG often concludes that exclusion is not necessary to protect the Federal health care programs if the person agrees to appropriate integrity obligations. In these cases, OIG will require integrity obligations in exchange for a release of OIG's 1128(b)(7) exclusion authority. The goals of CIAs are to strengthen a person's compliance program and promote compliance so that future issues can be prevented or identified, reported, and corrected. Integrity obligations also enhance OIG's oversight of the person.

In relatively rare circumstances, OIG has determined that a CIA is necessary but the person has refused to agree to appropriate integrity obligations with OIG. In these situations, OIG evaluates whether to pursue exclusion or whether other administrative actions, such as use of its authorities under the Inspector General Act, are appropriate to monitor the person's compliance with Federal health care programs (known as "unilateral monitoring"). For example, in addition to making referrals to the Centers for Medicare and Medicaid Services (CMS) contractors for claims reviews, OIG has audited, evaluated, and investigated persons after fraud settlements where integrity provisions are not in place to protect the Federal health care programs.

Integrity obligations do not guarantee that fraud will not occur in the future. However, OIG believes that integrity obligations with OIG oversight mitigate that risk. Persons under CIAs demonstrate responsibility for their past conduct by accepting OIG oversight. OIG considers persons that have refused to enter into CIAs a greater continuing compliance risk to the programs than persons that have entered into CIAs. OIG will continue to use various tools, including unilateral monitoring and providing information to the public, to mitigate these compliance risks.

OIG also sometimes concludes that a person presents a relatively low risk to Federal health care programs so that neither exclusion nor integrity obligations are necessary. OIG typically determines that relatively low risk exists in two situations. First, in the absence of egregious conduct such as patient harm or intentional fraud, relatively low financial harm weighs in favor of not requiring integrity obligations. In making this

determination, OIG considers the financial loss to the Federal health care programs in proportion to the size of the entity, e.g., whether the person is an individual or small entity (one with 50 or fewer employees or independent contractors) or a larger entity. Second, there may be less risk when the person with whom the Government is resolving a fraud case is a successor owner. In determining whether to require integrity obligations with a successor, OIG will consider whether the new owner: (1) purchased the entity after the fraudulent conduct occurred; (2) has an existing compliance program; (3) does not have a prior history of wrongdoing or fraud settlements with the United States; (4) took appropriate steps to address the predecessor's misconduct and reduce the risk of future misconduct; and (5) can demonstrate other facts and circumstances as relevant to each unique situation.

OIG reserves its exclusion authorities in a False Claims Act settlement agreement for one of several reasons: OIG is closing its case against the person, OIG is considering unilateral monitoring, or OIG is considering exclusion. Reservation does not necessarily mean that OIG has concluded the person poses a low risk to the Federal health care programs. Prior to settlement, a person can ask, and OIG will explain, whether a reservation of its exclusion authorities indicates that OIG has determined that the person is higher risk or lower risk.

There are two limited circumstances in which OIG will usually give a person a release of 1128(b)(7) exclusion without requiring integrity obligations: (1) when the person self-discloses the fraudulent conduct, cooperatively and in good faith, to OIG; or (2) when the person agrees to robust integrity obligations with a State or the Department of Justice and OIG determines these obligations are sufficient to protect the Federal health care programs.

In summary, OIG has a range of administrative options it can exercise. Depending on the facts and circumstances presented, OIG will usually pursue one of the following approaches with respect to a person when settling a civil or administrative health care fraud case: (1) exclusion; (2) heightened scrutiny (e.g., implement unilateral monitoring); (3) integrity obligations; (4) take no further action; or (5) in the case of a good faith and cooperative self-disclosure, release 1128(b)(7) exclusion with no integrity obligations.

Applying Factors to Decide Whether to Exclude

OIG will weigh various factors described below in its determination of where a person falls on the compliance risk spectrum. At the Highest Risk end of the spectrum, OIG will pursue exclusion. At the Lower Risk end of the spectrum (cooperative and good faith self-disclosures), OIG will provide an exclusion release without integrity obligations. In

evaluating a person's place on the risk spectrum, OIG considers the facts relevant to each factor to determine how to weigh that factor.[1]

The following factors are listed under four broad categories: nature and circumstances of conduct, conduct during the Government's investigation, significant ameliorative efforts, and history of compliance. Each factor: (1) indicates a higher risk; (2) indicates a lower risk; or (3) is neutral to the risk assessment.

Nature and Circumstances of Conduct

- *Adverse Impact on Individuals*
    - Conduct that causes or had the potential to cause any adverse physical, mental, financial, or other impact to program beneficiaries, recipients, or other patients indicates higher risk.
    - A lack of patient harm does not affect the risk assessment.
- *Financial Loss*
    - The greater the amount of actual or intended loss to Federal health care programs, the higher the risk.
- Conduct that occurs as part of a pattern of wrongdoing indicates higher risk.
- Conduct that occurs over a substantial period of time indicates higher risk.
- Conduct that is continual or repeated indicates higher risk.
- Conduct that is currently ongoing or conduct that the person continued to engage in until or after the person learned of the Government's investigation indicates higher risk.
- The absence of criminal sanctions does not affect the risk assessment.

[1] In deciding whether to exclude a person or pursue alternative remedies, OIG also considers whether the person is a sole source of essential specialized items or services in a community or provides items or services for which there are no alternative or comparable sources. While these facts do not necessarily indicate that a person presents a higher or lower risk to Federal health care programs, their presence will weigh in favor of OIG pursuing remedies other than exclusion.

- *Leadership Role*
    - In the case of an individual, if the individual organized, led, or planned the unlawful conduct, this indicates higher risk.
    - In the case of an entity, if individuals with managerial or operational control at or on behalf of the entity organized, led, or planned the unlawful activity, this indicates higher risk.
- *History of Prior Fraudulent Conduct*
    - A person's history of judgments, convictions (as defined at section 1128(i) of the Act), decisions, or settlements in prior federal or state criminal, civil, or administrative enforcement actions indicates higher risk.
    - If the person previously refused to enter into a CIA, this indicates higher risk.
    - If the person is or was previously under a CIA, this indicates higher risk.
    - If the person was previously under a CIA and breached the CIA, or lied or failed to cooperate with OIG while under a CIA, this indicates higher risk.

Conduct During Investigation

- If the person obstructed or impeded, or attempted to obstruct or impede, the investigation, audit, or internal or external reporting of the unlawful conduct, this indicates higher risk.
- If the person took any steps to conceal the conduct from the Government or others, this indicates higher risk.
- The inability of a person to engage in the conduct again because a contract or arrangement was terminated, or due to a change in the Federal health care program rules, does not affect the risk assessment.
- Prompt response to a subpoena is expected and does not affect the risk assessment.
- Failure to comply with a subpoena within a reasonable period of time indicates higher risk.

- *Internal Investigation*

    - If the person initiated an internal investigation before becoming aware of the Government's investigation to determine who was responsible for the conduct, and shared the results of the internal investigation with the government, this indicates lower risk.

    - If the person self-disclosed the conduct cooperatively and in good faith as a result of the internal investigation, prior to becoming aware of the Government's investigation, this indicates lower risk.

- If the person clearly demonstrates acceptance of responsibility for the conduct, this indicates lower risk.

- *Cooperation*

    - If the person cooperated with or agrees to cooperate with the Government, this indicates lower risk.

    - If the person's cooperation resulted in a criminal, civil, or administrative action or resolution with or against other individuals or entities, this further indicates lower risk.

- *Resolution*

    - An adverse licensure action as a result of the conduct indicates higher risk.

    - A criminal resolution indicates higher risk. For purposes of this factor, a criminal resolution includes (1) a "conviction" as defined at section 1128(i); (2) a Deferred Prosecution Agreement; or (3) a Non-Prosecution Agreement. The nature of the criminal resolution bears on the degree of higher risk.

    - The inability to pay an appropriate monetary amount (including damages, assessments, and penalties) to resolve a fraud case indicates higher risk.

Significant Ameliorative Efforts

- *Significant changes in the entity.*

    - If the entity has taken appropriate disciplinary action against individuals responsible for the conduct, this indicates lower risk.

- If the entity has devoted significantly more resources to the compliance function, this indicates lower risk.

- If, since the end of the conduct at issue, the entity has been sold in an arm's-length transaction to a non-affiliated, independent third party with a history of compliant participation in the Federal health care programs, this indicates lower risk.

- If a licensed individual has obtained relevant additional training, retained a proctor or a mentor, or took similar steps to improve his or her ability to practice as a provider of health care items or services to the Federal health care programs, this indicates lower risk.

History of Compliance

- If the person has a history, prior to becoming aware of the investigation, of significant self-disclosures made appropriately and in good faith to OIG, CMS (for Stark law disclosures), or CMS contractors (for non-fraud overpayments), this indicates lower risk.

- The existence of a compliance program that incorporates the U.S. Sentencing Commission Guidelines Manual's seven elements of an effective compliance program does not affect the risk assessment.

- The absence of a compliance program that incorporates the U.S. Sentencing Commission Guidelines Manual's seven elements of an effective compliance program indicates higher risk.

Prepared statement of Matthew Solomson, Chief Legal Officer, Federal Government Services of Anthem, Inc.

Statement from

Matthew Solomson, Chief Legal Officer,
Federal Government Services of Anthem, Inc.

Submitted to

United States House Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

May 13, 2016

For the record on

Oversight of the False Claims Act hearing on April 28, 2015

Chairman Franks, Ranking Member Cohen, and distinguished members of the subcommittee, thank you for the opportunity to submit a statement for the record regarding the Committee's hearing on the False Claims Act on April 28, 2016, on behalf of Anthem, Inc. and, specifically, its Federal Government Solutions (FGS) business unit, where I serve as the Chief Legal Officer. FGS comprises subsidiaries and business units that perform almost all of Anthem's contracts and subcontracts issued under the Federal Acquisition Regulation (FAR).[1]

By way of background, my experience with the False Claims Act (FCA) spans both private practice, where I represented corporate defendants in FCA cases, and the U.S. Department of Justice, where, as a Trial Attorney, I represented the United States – including as counsel of record – in a number of matters involving the FCA. I also have published extensively on the FCA,[2] and currently serve both as an adjunct professor of

[1] *See* FAR 1.104 (Applicability) ("The FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded."); FAR 2.101 (defining "Acquisition" as "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease . . . .").

[2] *See, e.g., When The Government's Best Defense Is A Good Offense: Litigating Fraud And Other Counterclaim Cases Before the U.S. Court Of Federal Claims*, Briefing Papers No. 11-12 (November 2011); *Congress Declares Checkmate: How the Fraud Enforcement and Recovery Act of 2009 Strengthens the Civil False Claims Act and Counters the Courts*, 5 J. Bus. & Tech. L. 295 (2010); *What Would Scalia Do? – A Textualist Approach to the Qui Tam Settlement Provision of the False Claims*

law at the University of Maryland Francis King Carey School of Law, where I teach government contracts (including the FCA), and as a commissioner on Maryland Governor Larry Hogan's Commission to Modernize State Procurement.

Anthem agrees that the FCA provides the Federal government – and would-be *qui tam* whistleblowers – with a powerful weapon that has been used to great positive effect to fight fraud. I am proud of my anti-fraud work at the Justice Department, where I experienced firsthand the important role that FCA cases play in protecting the financial integrity of federal programs, and ultimately, the prudent expenditure of taxpayer dollars.[3]

That being said, while the FCA frequently has been described as an "anti-fraud statute,"[4] the fact remains that there are instances where the FCA makes defendants liable, not just for fraudulent conduct, but also for conduct even where there is "no proof of specific intent to defraud."[5] It is precisely this notion of "fraud without proof of fraud" that has led to differing interpretations of the FCA by the federal court system. While some courts have purported to "guard[] against turning what is essentially a breach of contract into an FCA violation,"[6] other courts have recognized that "a claim for payment is false when it rests on a false representation of compliance with an applicable . . . [regulatory or] contractual term."[7]

Moreover, courts have expanded the FCA well beyond its origins to combat "rampant fraud" upon the government during the Civil War[8] and allowed FCA suits to proceed on virtually any breach of contract matter, even when a contractor has made *no statement at all* – so called "implied certification" cases.[9] Indeed, the *qui tam* bar has

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Act, 36 Public Contract Law Journal 39 (2006); *Current Issues in False Claims Litigation*, Briefing Papers No. 06-10 (Sept. 2006).

[3] *See also* April 28, 2016 Testimony of Jonathan L. Diesenhaus (Hogan Lovells US LLP), Unintended Consequences of Qui Tam Litigation for Small Business ("Diesenhaus Testimony"), at 1.

[4] *United States ex rel. Gross v. AIDS Research Alliance–Chicago*, 415 F.3d 601, 604 (7th Cir. 2005); *Wood ex rel. U.S. v. Applied Research Associates, Inc.*, 328 F. App'x 744, 747 (2d Cir. 2009); *U.S. ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 916 (8th Cir. 2014).

[5] 31 U.S.C. § 3729(b)(1)(B).

[6] *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 635 (4th Cir. 2015).

[7] *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010).

[8] *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015) (quoting S. Rep. No. 99-345, at 8 (1986)).

[9] "Courts infer implied certifications from silence 'where certification was a prerequisite to the government action sought.' " *SAIC*, 626 F.3d at 1266 (quoting *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000)).

created a cottage industry of litigants pursuing government contractors for FCA violations based on mere technical regulatory or simple contractual breaches where there has been no direct financial harm to the government or for which the government already has adequate remedies at law (aside from the FCA). We respectfully suggest that the FCA is being used in ways Congress never intended.

More importantly, we believe litigation under the FCA has resulted in serious financial consequences for the government, itself. This can only be described as an ironic outcome for a statute that sought to reduce unwarranted federal expenditures.

Although the theory of "implied certification" is currently front-and-center in a case pending before the Supreme Court,[10] Congress long ago precluded the government from forcing contractors to execute certifications not required by law. In section 4301(b)(2) of the Clinger-Cohen Act of 1996,[11] Congress prohibited the inclusion of new certification requirements in the FAR for contractors or offerors unless the certification requirement is specifically imposed by statute, or unless written justification for such certification requirement is provided to the Administrator for Federal Procurement Policy by the FAR Council and the Administrator approves in writing the inclusion of the certification.[12]

Moreover, notwithstanding the Government Accountability Office's recognition that "the [Clinger-Cohen Act of 1996] makes it clear that the impetus behind the prohibition was the desire to reduce the administrative and enforcement burdens posed by an array of such certifications[,]"[13] the "implied-certification" theory of FCA liability thwarts congressional intent by effectively allowing certification requirements where Congress has otherwise precluded them. Of course, an agency is always free to create contract requirements, such as warranties,[14] but breach of such contract provisions should not translate into FCA liability "premised on [the] lower standard of scienter rather than fraud" permitted by the FCA.[15]

Mr. Chairman, even if the Committee does not, fully, accept the argument that use of the FCA to pursue ordinary contract breach is neither fair nor reasonable to

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[10] Petition for a Writ of Certiorari, *Universal Health Services, Inc. v. United States ex rel. Escobar*, 15-7 (U.S., filed Jun. 30, 2015) (discussed in Diesenhaus Testimony at 4).

[11] PL 104–106, February 10, 1996, 110 Stat 186.

[12] New FAR Certifications, 62 Fed. Reg. 44813-0162, 1997 WL 475236 (Aug. 22, 1997).

[13] *Sea-Land Serv., Inc.*, B-278404, 98-1 CPD ¶ 47, 1998 WL 53923 (Feb. 9, 1998).

[14] *Id.*

[15] *U.S. ex rel. King v. Solvay S.A.*, 304 F.R.D. 507, 514 (S.D. Tex. 2015) ("Indeed, knowing conduct under the federal [FCA] requires 'no proof of specific intent to defraud.'")

would-be contractor defendants, we respectfully suggest that you consider the fact that the costs to the government of such overreach are likely much higher than the general public understands. We acknowledge, generally, the point made by one of the other witnesses who appeared before the panel on April 28, 2016, and noted that "[a] significant number of successful intervened cases only come about because . . . of the relator pursuing the case after an initial decision by the [DOJ] not to intervene[.]"[16] What the DOJ statistics[17] cited by the witness do not reflect, however, is the cost *to the government* for contractors successfully defending against these types of *qui tam* cases, as the bulk of the costs related to those defenses are reimbursed to contractors by the government. With the government intervening in only approximately 20% of such cases,[18] we suggest that the Committee investigate the associated costs of cases in which a defendant contractor prevails. As one group of commentators explained:

> In the end, if the defendant prevails, much of the cost of litigating the suit are likely to be considered allowable costs under the FAR's cost allowability provisions. As such, these costs are borne not by the relator or by the defendant, but by the taxpayer. The costs to courts of overseeing all of this are also ultimately borne by taxpayers (and parties with legitimate cases).[19]

Accordingly, we suggest that the Committee consider legislation to amend the FCA to bring back into balance the contractual nature of a company's relationship with the federal government as intended by the Clinger-Cohen Act certification requirements noted earlier. Such a change would be in line with the view of courts that have declined to allow litigators to turn every possible contract dispute between the government and a

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[16] April 28, 2106 Testimony of Neil V. Getnick, Oversight of the False Claims Act.

[17] https://www.justice.gov/opa/file/796866/download.

[18] Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement, June 7, 2012, *available at* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-stuart-f-delery-speaks-american-bar-association-s-ninth ("Our intervention rate in these matters, however, has remained fairly constant over the decades. For every ten cases filed by relators, the government ultimately intervenes in only two.").

[19] Brian C. Elmer, Andy Liu, Ann M. Mason, *The Government's Overlooked Weapon in Protecting the Public Fisc: Dismissals Under 31 U.S.C. § 3730(c)(2)(A)*, ABA 7th Annual National Institute on the Civil False Claims Act and Qui Tam Enforcement, Washington, D.C. (June 11-13, 2008), at 5 & n.28 (citing FAR 31.205-33 (Professional and Consultant Service Costs) and FAR 31.205-47 (Costs Related to Legal and Other Proceedings)), *available at* https://www.crowell.com/documents/FCA-Govt-Dismissal-Article.pdf.

contractor into an FCA case. As noted by the United States Court of Appeals for the Seventh Circuit, in *United States v. Sanford-Brown, Ltd.*, "it would be . . . unreasonable . . . to hold that an institution's continued compliance with thousands of pages of federal statutes and regulations incorporated by reference into the [agreement with the government] are conditions of payment for purposes of liability under the FCA."[20]

To accomplish this outcome, without unduly burdening would-be plaintiffs bringing meritorious cases using the *qui tam* provision of the statute, we suggest the following amendments:

- ***Enhance the Required Scienter.*** For FCA actions based on an alleged "implied certification" – and where the government would otherwise have an adequate remedy at law (*e.g.*, via a breach of contract claim or an independent regulatory enforcement scheme) – the FCA scienter requirement could be amended to require proof of a specific intent to defraud. This would help restore the original purpose of the FCA: protecting the public fisc from fraud.

- ***Revise the Definition of "Material."*** The FCA currently defines the term "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[21] For an "implied certification" case, the term "material" could be amended to reflect the higher standard required to prove a material breach of contract. *See Thomas v. Dep't of Housing & Urban Dev.*, 124 F.3d 1439, 1442 (Fed.Cir.1997) ("A breach is material when it relates to a matter of vital importance, or *goes to the essence of the contract.*" (emphasis added)).[22]

- ***Impose Attorney Fee & Cost Shifting.*** Where the DOJ declines to intervene in an FCA case, and the costs of a successful defense of the action would otherwise be absorbed by the public pursuant to the FAR, a *qui tam* plaintiff could be required to foot the bill for the litigation (and not the defendant or the government). In the alternative, the plaintiff could be

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[20] 788 F.3d 696, 711 (7th Cir. 2015).

[21] 31 U.S.C. § 3729(b)(4).

[22] *See also Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1550-51 (Fed. Cir. 1992) (holding that "[t]he determination [of whether a breach is material] depends on the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties").

required to pay the 20% of the defense costs considered unallowable under FAR 31.205-47.

- ***Disputed Statutory, Regulatory, or Contractual Provisions.*** Frequently, FCA cases turn on statutory, regulatory, or contractual provisions, the meaning or interpretation of which is disputed by the parties. A contractor's plausible interpretation of such provisions, however, should render a claim "not false" as a matter of law, thus permitting the issue to be resolved on a motion to dismiss (as opposed to requiring costly discovery and, subsequently, motions for summary judgment or trial).

In sum, the "implied certification" theory" has led the FCA, and its *qui tam* enforcement provision, to an unintended place. To wit, a statute intended to police fraud and severely limit unjustified federal spending (through a combination of government and private action) has become a statute that causes unjustified federal spending due to abuse by some litigants who see an FCA action in violations of non-material contractual and regulatory provisions. Congress should amend the FCA to bring the intended outcome of the statute back into focus and place some responsibility for public costs in the hands of would-be *qui tam* plaintiffs.

Once again, we thank you for the opportunity to submit our views for your consideration.

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