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United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

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April 26, 2006

Via Electronic Transmission

The Honorable Daniel R. Levinson
Inspector General
Department of Health and Human Services
330 Independence Avenue, S.W.
Washington, DC 20201

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20535

Dear Inspector General Levinson and Attorney General Gonzales:

On March 17, 2006, I wrote to you emphasizing the importance of section 6032 of the Deficit Reduction Act of 2005 (DRA). As you are aware, section 6032 provides an incentive—a 10% increase in the states' share of Medicaid recoveries—for states to enact state False Claims Acts (state FCAs) modeled after the federal False Claims Act (FCA). The DRA requires that the Office of the Inspector General (OIG) work in consultation with the Department of Justice (DOJ) to determine if a state FCA meets the qualifications outlined in section 6032. As Chairman of the Senate Finance Committee and as the principle author of section 6032, I write today to further elaborate on the requirements in the law enacted by Congress.

Currently, a number of state legislatures are crafting legislation that would enact state FCAs that do not meet the requirements of section 6032. While these states are working in anticipation of qualifying for the increased share of Medicaid recoveries as envisioned in the DRA, some states are crafting variations that do not permit *qui tam* actions to proceed once state Attorney's General decline to intervene in the matter. This variation is contrary to the requirements of section 6032 and does not qualify for enhanced matching funds.

To elaborate further, section 3730(c)(3) of the FCA states, "If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." This provision, taken in conjunction with various cases interpreting its constitutionality,¹ expressly allows a FCA relator to continue to prosecute a *qui tam* action on behalf of the federal Government even if DOJ declines to intervene. As the primary author of the 1986 amendments to the federal FCA expanding the *qui tam* provisions of the FCA, I am aware of the importance of allowing relators to continue *qui tam* actions after DOJ has declined to intervene.

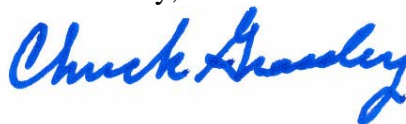
¹See e.g. *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001); *U.S. ex rel. Taxpayers Against Fraud v. General Electric Co.* 41 F. 3d 1032 (6th Cir. 1994); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) *cert den.* 510 U.S. 1140 (1994).

DOJ often declines to intervene in *qui tam* actions for a number of reasons. A few examples include, but are not limited to: lack of resources at DOJ, a case that is not fully developed or matured into a winnable case, or DOJ determines that the case may lack merit. Given these various outcomes, it would be presumptuous to say that when DOJ declines to intervene it is in fact because the case lacks merit. It is for precisely this reason that the FCA allows relators to continue prosecuting a *qui tam* action absent government intervention. Through continued diligence on the part of the *qui tam* relator, many cases that were initially declined intervention continue to develop and progress and are *subsequently* joined by DOJ at a later date. Further, *qui tam* relators often proceed without the intervention of DOJ and succeed in court recovering monies for the federal government that would have been lost to fraud, waste, or abuse of programs absent the actions of a *qui tam* relator.

Congress expressly stated in the DRA that in order for a state FCA to qualify under section 6032, the state FCA must contain “provisions that are *at least as effective* in rewarding and facilitating *qui tam* actions for false and fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code.” (emphasis added). By referencing sections 3730 through 3732 in the section 6032, Congress expressly included section 3730(c)(3), which *permits qui tam* actions to proceed absent participation by the Government. Accordingly, any state FCA law that does not permit *qui tam* actions to proceed if the state Attorney General declines to intervene is exactly the opposite of what is required under section 3730(c)(3) of the federal FCA.

As you complete your statutorily mandated review of both existing state FCAs and newly enacted state FCAs, I ask that you pay particular attention to the *qui tam* provisions to ensure compliance with these FCA provisions. The success of the FCA lies with the *qui tam* provisions, and the adjudication of any FCA case—state or federal—should *not* hinge solely upon intervention by a government agency, but instead should be decided by the courts. Congress enacted the DRA to ensure that state FCA laws would meet these requirements. I thank you for your continued support in fighting fraud, waste, and abuse in federal healthcare programs. As many states are in the process of drafting state false claims act legislation in order to qualify for an increased share of Medicaid recoveries, I encourage you to work together to create guidance outlining the requirements necessary for a state FCA to qualify as soon as possible. Should you have any questions regarding this matter please contact Emilia DiSanto or Nick Podsiadly of my staff at (202) 224-4515.

Sincerely,



Charles E. Grassley
Chairman

Cc: The Honorable Michael O. Leavitt
The Honorable Mark McClellan
National Governors Association
National Conference of State Legislatures