

**TESTIMONY OF THE NEW YORK CITY
DEPARTMENT OF INVESTIGATION
REGARDING THE NEW YORK CITY FALSE CLAIMS ACT
COMMITTEE ON GOVERNMENTAL OPERATIONS**

JANUARY 20, 2012

Good morning, Chairperson Brewer, members of the Committee on Governmental Operations and staff. I want to thank you for giving the Department of Investigation the opportunity to testify about the importance of extending the City's False Claims Act. DOI supports the continuation of this law because it plays a vital role in helping to prevent the City from being defrauded by unscrupulous individuals. Under the City's False Claims Act, people may bring evidence of false claims for City funds to the attention of City authorities and may receive a percentage of any financial recovery to the City based on the information they supply. DOI's experiences with the law in the six years since its enactment has demonstrated that the law has functioned in the way it was intended by both contributing to financial recoveries to the City and by assisting in thwarting misconduct and criminal conduct.

Under the City's False Claims Act, people who believe they have evidence of false claims for City funds are able to submit to the City a proposed civil complaint along with all material evidence in support of that complaint. The proposed civil complaint must be submitted first to DOI so that DOI has the opportunity to evaluate whether the allegations suggest potentially criminal conduct that requires further investigation and/or that is already the subject of a pending DOI investigation. Where DOI determines that the allegations in the proposed civil complaint do not warrant further investigation and/or are not the subject of a pending investigation, DOI forwards the complaint to the Law Department and informs it of DOI's determination. The majority of the proposed civil complaints DOI has received that fall in this

category are referred to the Law Department within a week or less after they come into DOI. Where DOI determines that alleged criminal conduct does warrant further investigation or is already the subject of a pending investigation, and where DOI, therefore, determines that the commencement of a civil enforcement action by the City Law Department would interfere with or jeopardize such investigation, DOI promptly notifies the Law Department of this determination.

Since the City's False Claims Act went into effect in 2006 through the end of 2011, DOI received a total of 52 submissions under the City's law. Twenty-two of the 52 submissions were received in the first four years after the law was enacted. Thirty submissions were made in the past two years. Thus, there has been an increase in the number of complaints filed with the City.

In evaluating a submission, DOI interviews the complainant and relevant City employees, and reviews the documents submitted by the complainant and other relevant records. As will be discussed in more detail, DOI has opened 6 False Claims Act submissions for investigation so far, 4 based on claims it received in 2011, 1 based on a 2010 claim and 1 based on a claim received in 2009.

1. Summary of Claims Received by DOI

Year	Claims Received	Medicare/Medicaid Claims	Other Claims	DOI Investigation
2006	5	2	3	0
2007	9	5	4	0
2008	3	0	3	0
2009	5	4	1	1
2010	10	8	2	1
2011	20	12	8	4
TOTAL	52	31	21	6

As reflected in this chart, of the 52 submissions received between 2006 and 2011, 31 concerned Medicare/Medicaid claims. In addition to being commenced under the City's False Claims Act, these Medicare/Medicaid proposed civil complaints were generally also brought under the Federal False Claims Act and other state and local false claims statutes in jurisdictions across the United States. In the main, they were made against pharmaceutical companies, health care providers, and medical goods suppliers and contained a range of fraud allegations such as off-label marketing, overcharges and kickbacks. Thus far, DOI has determined that none of these Medicare/Medicaid proposed civil complaints contained allegations of misconduct that either warranted further investigation by DOI or that were already the subject of a pending DOI investigation. Based on the statutory scheme underlying the Medicare and Medicaid programs, criminal and civil investigations and prosecutions of Medicare/Medicaid fraud allegations are

generally handled by State and Federal authorities. Indeed the Department of Justice had already been alerted to most of the 31 Medicare/Medicaid cases prior to DOI's receipt of the proposed civil complaints because they had been filed under the Federal False Claims Act, along with the City's False Claims Act.

The remaining 21 submissions made under the City's False Claims Act dealt with a broad array of City activity, including construction, the purchase of goods, City taxes and fees, environmental compliance, housing, and the provision of social services. After careful review, 15 proposed civil complaints were determined not to have been appropriate for investigation by DOI for a variety of reasons including because the allegations did not describe criminal conduct but rather described disputes over contract interpretation or statutory requirements and because essential facts alleged were not accurate. DOI determined that the facts alleged in 6 of the proposed civil complaints constituted conduct that warranted further investigation or that was already the subject of an ongoing DOI investigation.

In several of these 6 cases, the receipt of a proposed civil complaint was the first notice that the City had of the alleged misconduct and potential loss of City funds. In these situations where the submission of a proposed civil complaint was the first notice to the City of the allegations, the City would not necessarily have ever been made aware of the misconduct that is the subject matter of each of these complaints without the existence of the City's False Claims Act. Significantly, DOI's ability to promptly conduct an investigation in these cases has already resulted in positive outcomes to the City in the form of a recovery of funds and a significant alteration of practices, thus demonstrating how vital the first notice to DOI under the City's False Claims Act is to the City.

In some of the 6 False Claims Act cases that DOI opened for investigation, DOI was already involved in investigations related to the claims that were the subject matters of the proposed civil complaints at the time the proposed civil complaints were received. In those cases, the City False Claims Act requirement of first service on DOI was critical to preserving the confidentiality of ongoing criminal investigations. While these matters involve False Claims Act cases that are under seal and investigations that are currently open and ongoing and so they can not be specifically identified, it can be reported that there have been multiple arrests and convictions in one of these cases that might have been jeopardized absent the requirement that proposed civil complaints be served on DOI.

As of today, 3 of the 6 False Claims Act cases that DOI opened for investigation or already had open for investigation at the time the proposed civil complaints were filed, have been closed and DOI's findings have been referred to the Law Department for whatever action it deems appropriate. The other three cases remain open for investigation and possible prosecutions. In connection with the 6 cases that DOI opened for investigation or already had opened for investigation at the time the proposed civil complaint was received, there have so far been multiple arrests and convictions, the recovery of money for the City, and the cessation of unlawful and improper practices. All of these positive results were enhanced by and in some instances entirely made possible by the City's False Claims Act.

Accordingly, DOI opposes allowing the City's False Claims Act to sunset. Although since the time that the City's False Claims Act was enacted, the State also enacted a False Claims Act that covers false claims against the City, the State law does not provide that first notice of proposed civil complaints go to DOI. As mentioned earlier, this notice requirement has been instrumental in ensuring the positive outcomes the City has achieved in certain cases because it

allowed early action by DOI. The experience DOI has had with the City's False Claims Act has demonstrated that the law has succeeded in achieving the Council's goals. We have particularly seen these results in the last few years as the existence of the City's law became more widely known and the number of complaints filed has correspondingly increased. We urge the Council to take all necessary steps to see that the law continues in its present form so that the City can continue to identify and prevent wrongful conduct and successfully recover funds lost to fraud.



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January 19, 2012

Members of the Committee
New York City Council Committee on Governmental Operations
City Hall
New York, NY 10007

Re: New York City False Claims Act

Dear Members of the Committee:

We write in support of the New York City Department of Investigation ("DOI") testimony regarding the importance of extending the City's False Claims Act. The False Claims Act provides a cause of action for whistleblowers (relators) and requires that these individuals bring evidence of false claims to DOI, as described in the written DOI testimony. In addition, the City's False Claims Act also provides that the City, through the Corporation Counsel, may institute a civil action to recover funds. These provisions have given the City a useful additional tool to combat fraud, adding to the arsenal of claims that the City pleads in civil cases along with claims of breach of contract, common-law fraud, restitution and other causes of action seeking recovery of funds. As indicated in the written testimony of DOI, information submitted pursuant to the City's False Claims Act has led to financial recovery to the City, criminal investigations and changes in agency practices.

As to the whistleblower (relator) provisions in the law, the Law Department is aware of 81 Federal, State or City False Claims Act relator filings since the enactment of the City's False Claims Act. Not all of them plead the City's False Claims Act and therefore may not have been submitted to DOI before they were sent to the Law Department. Of the 81, 52 plead Medicaid or Medicare claims. As noted in the written testimony submitted by DOI, criminal and civil investigations and prosecutions of Medicaid or Medicare fraud allegations are generally handled by the Federal and State authorities.

Of the 29 non-Medicaid or Medicare cases of which the Law Department is aware, 12 are closed and 17 remain open and the subject of on-going consideration. Many of these cases in the pipeline would be adversely affected by the sunset provision of the City's False Claims Act.

Even though it has a savings provisions, which provides that the expiration date of the law shall not apply to any civil enforcement action commenced pursuant to Section 7-804 of the Administrative Code prior to the expiration date, that savings provision may not apply to those matters where a proposed civil complaint has been submitted to DOI, but a "civil enforcement action" has not yet been commenced in court. Hence, the remaining open matters under consideration by DOI and/or the Law Department may be adversely affected if the law were allowed to sunset.

The Law Department has not commenced any cases pursuant to the relator provisions of the City's False Claims Act, although several matters remain open for consideration, and a claim may be resolved without commencing a suit under the City's False Claims Act -- for example, through settlement. Because many relator cases plead Federal and State False Claims Act claims as well and are filed in court under seal, we cannot be more specific on these issues.

Aside from the relator provisions, the City has pled a civil enforcement claim under the City's False Claims Act in at least 8 cases, along with other causes of action such as breach of contract, common law fraud, the State False Claims Act, and restitution in several matters involving overcharges to the City, false and inflated invoicing and bid-rigging. Several of the various cases in which the City's False Claims Act has been included as a claim have been resolved through negotiation and settlement. A recent example of a case in which the Law Department has pled a civil enforcement claim under the City's False Claims Act is the case first brought by a relator under the State False Claims Act against the Bank of New York Mellon, concerning the manner in which the Bank trades foreign exchange on behalf of its custodial clients. The Law Department, on behalf of the pension funds, joined the Attorney General, and filed a superseding complaint that pled various claims, including a claim under the City's False Claims Act.

Sincerely yours,



Gail Rubin
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January 20, 2012

Statement of David A. Koenigsberg Re: New York City False Claims Act

Thank you for the opportunity to address the New York City Council's Committee on Governmental Operations with regard to the Usage and Efficacy of New York City's False Claims Act.

I am a partner of the law firm Menz Bonner Komar & Koenigsberg LLP in New York City. I have been litigating False Claims Act cases since 1990, first as an Assistant United States Attorney for the Southern District of New York on behalf of the federal government. Since 1999, I have been in private practice representing whistleblower/ relators in Qui Tam False Claims Act cases brought under both the federal statute and the parallel state laws.

At the outset, please understand that I have not had personal experience with a case under the NYC False Claims Act and so please be aware of that when you consider my remarks.

When the NYC False Claims Act was passed in 2005, I was encouraged that the City did so. Enactment of the NYC FCA sent an important signal to persons and entities doing business with the City that individuals who may have information about schemes to cheat the City of money now had a powerful incentive to come forward and report that information. It is important to remember that deterrence is an important aspect of the qui tam False Claims Act laws.

When I reviewed the law after it was passed, however, I was not certain how effective it would be. Unlike the Federal False Claims Act, the City's law did not permit the relator to file a case directly in court. Instead, a relator had to give the Corporation Counsel the opportunity to review the complaint and the relator's information. If the Corporation Counsel did not want to take the case, the relator could not proceed without the Corporation Counsel unless the Corporation Counsel designated the relator to go forward. This mechanism, while appropriately providing the Corporation Counsel the opportunity to screen a case, also gave the Corporation Counsel a powerful role as a gate keeper that does not exist in the federal statute. In addition, the inability of a relator to begin an action by filing the case in court under seal, as is the procedure under the federal law, created the potential for a relator's case to be subsequently dismissed where the statute of limitations was an issue.

In 2007, New York State passed its own False Claims Act. Clearly, the enactment of the City's law two years earlier gave substantial impetus to the passage of the State's law. The State False Claims Act, as you know, permits a whistleblower to file a case on behalf of the state government and and/or local governments as well, including the City of New York. In my view, the New York State statute overlaps the intended scope of the City's law. The statute of limitations problem that may arise under the City law is not an issue since under the state law a relator has the ability to file a case in state court then serve it on the Attorney General, who in turn notifies the NYC Law Department if the City is a victim of the alleged conduct. But, the state statute does not give the Attorney General or Corporation Counsel a veto over a case if the State or City did not wish to pursue a relator's claims. If the State or City

declines a case, relators have the right to pursue their cases on their own, unlike the City law that permits a relator to proceed alone only with the blessing of the Corporation Counsel.

As I have stated, the passage of the NYC False Claims Act in 2005 provided a powerful impetus for the passage of the NY State False Claims law two years later and was extremely important in the evolution of False Claims laws at the time. In light of the overlapping coverage of the state statute there is a case to be made that the City's law in its present form is unnecessary. The provisions of the State law adequately permit a relator to file a case on behalf of the City to recovery monies obtained from the City by means of false statements or records. If the law is to be renewed, however, I believe it should be amended to permit the relator to have direct access to the courthouse and to decide whether to proceed with a case when the Corporation Counsel has declined to intervene. If those changes are not made, as a practitioner I would see little reason to file a case under the NYC law when the NY State law was available as an option.

Thank you for providing this opportunity to share my views with the Committee.

**THE COUNCIL
THE CITY OF NEW YORK**

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in favor in opposition

Date: _____

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Name: NEIL V. GETNICK

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I represent: Teaching Individually (For ID: Managing Partner, Getnick & Getnick LLP; Chair Taxpayers Against Fraud)

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Name: MARJORIE LANTA, GENERAL COUNSEL

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Name: Marjorie Landa

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Date: 1/20/12

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Name: David Koenigsberg

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