The Importance of Whistleblowers to Reducing Fraud Against the Federal Government and Recovering Funds for Taxpayers

A Report Prepared for Taxpayers Against Fraud

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Forward by Taxpayers Against Fraud

In October 2011, the Chamber of Commerce issued a proposal to limit rewards to whistleblowers who report fraud against taxpayers. The "caps" approach advocated by the Chamber would constitute a radical change to a working and effective whistleblower incentive system that has returned billions of dollars to the U.S. Treasury since the False Claims Act (FCA) amendments of 1986. The following report by economist Jack Meyer describes the deep flaws in the analytic assumptions underlying the Chamber's proposal. Any review of the Chamber's caps proposal should involve consideration of the following key facts:

- **The False Claims Act works, and has worked well for 25 years**, drawing praise from both sides of the Congressional aisle and returning over $30 billion to the U.S. Treasury in civil and criminal fines and penalties.[1] Central to the 1986 FCA amendments were provisions incentivizing individuals with inside knowledge of fraud to come forward to report to the government.[2] Since the 1986 amendments, returns to the taxpayer under the law have significantly increased, with government recoveries totaling over $3 billion in FY 2011 alone.[3] The U.S. Department of Justice says the False Claims Act is a critical tool in fighting the war on fraud[4] and notes that nearly 80 percent of all FCA actions are whistleblower-initiated.[5]

- **The Chamber proposal is based on flawed analytic assumptions and presents misleading data.** As detailed by Jack Meyer in the attached report, the Chamber analysis fails to account for criminal fines and state Medicaid recoveries associated with federal False Claims Act cases, assumes all cases are filed by single whistleblowers when that is not always the case, mistakenly assumes all whistleblowers will be successful, completely discounts the value of deterrence, and disregards 9 of the 10 risk factors that whistleblowers and their lawyers must weigh before bringing a case.

- **The Chamber proposal to cap whistleblower rewards would seriously weaken an incentive system with a proven track record and could substantially reduce returns to taxpayers.** The current incentive structure encourages whistleblowers and their counsel to invest their resources in obtaining a *full* recovery for the government regardless of the magnitude of the losses to the United States.[6] In contrast, the Chamber's proposal would discourage whistleblowers and their counsel from seeking full recoveries for the United States when the taxpayers' losses exceed $94 million, the maximum amount on which relators could receive a share under the Chamber's proposal. Many FCA cases have settled for amounts far higher than $94 million,[7] and numerous cases have involved many years, and millions of dollars of whistleblower and private attorney investment, prior to settlement.[8] The Chamber report fails to provide any evidence that its cap proposal would not reduce whistleblower actions and truncate returns from fraudsters. As noted in this report, if a whistleblower reward cap resulted in only a 3 percent overall reduction in FCA judgments and settlements, the impact on recoveries would far exceed all of the purported "savings" the Chamber attributes to a reward cap.

The Chamber of Commerce report focuses on diluting whistleblower incentives instead of advancing initiatives to combat fraud.[9] In short, there is no reason for abandoning the current FCA incentive structure and replacing it with an approach based on a flawed analysis with no track record of success.

I. Statement of Purpose and Summary of Findings

The purpose of this report is to evaluate the proposal set forth in the recent U.S. Chamber of Commerce report titled *Preventing Government Overpayments to Qui Tam Plaintiffs: Proposed Amendments to the False Claims Act (FCA)* to cap whistleblower awards as a federal cost reduction strategy.

The False Claims Act contains *qui tam* provisions that allow individuals with evidence of fraud against the government to sue on behalf of the government. These individuals, known as "relators" or "whistleblowers," are eligible under the FCA to receive rewards of 15 to 30 percent of the amount they help the government recover. The Chamber of Commerce is proposing to upend this reward structure by capping *qui tam* awards at $15 million. The Chamber reaches this number by estimating the anticipated lost compensation of a whistleblower who is mid-career and a mid-level executive, and accounting for taxes and attorneys fees associated with the *qui tam* award.

This report examines the Chamber's analysis and concludes that the Chamber's proposal threatens to substantially reduce returns to taxpayers under the False Claims Act.

II. The Chamber Proposal Is Based on Seriously Flawed Assumptions and Presents Misleading Data

The Chamber Fails to Account for the Range of Whistleblower Risks and Costs

The risks and costs to a would-be whistleblower are multi-faceted, complex, and serious. The Chamber proposal, on the other hand, considers only one risk factor: lost income. In doing so, the Chamber ignores a wealth of academic literature documenting additional risks and costs of whistleblowing.

RISKS AND COSTS IGNORED BY THE CHAMBER REPORT

Some well-studied costs ignored in the Chamber report include:

►**Personal Hardship**: In addition to losing their jobs and usually being blacklisted in their chosen profession, whistleblowers report a myriad of serious social, psychological and physical costs. One review of research in this area[10] finds that fear of social ostracism may explain low rates of whistleblowing. A potential whistleblower's circle of friends is likely to consist largely of fellow employees of the corporate wrongdoer, and their children may attend school, church, or other county social events together. Loss of this community can take a psychological and physical toll. Moreover the larger the fraud — thus the more threatening to the corporation — the greater the social ostracism is likely to be. The same research also cites psychological strain, often involving the loss of family ties and deteriorating health as the case drags. A survey of 22 successful employee whistleblowers in the *New England Journal of Medicine* found that six "relators (all insiders) reported divorces, severe marital strain, or other family conflicts during this time. Thirteen relators reported having stress-related health problems, including shingles, psoriasis, autoimmune disorders, panic attacks, asthma, insomnia, temporomandibular joint disorder, migraine headaches, and generalized anxiety."[11]

►**Financial Hardship:** The Chamber report assumes (correctly)[12] that the risk of lost income for whistleblowers is high, in that most will lose their jobs and be unable to work in their field again. However, the report assumes that the award to the relator will begin to flow immediately upon that person being terminated from his or her job. But this is not how things typically work. A *qui tam* matter is not something that is resolved in a few weeks or months. Frequently, it stretches out *over several years.* During this time, the whistleblowers will most likely be without income, *even if they are later successful and receive an award.* The whistleblower must contemplate three, five, or even as long as ten years of being in limbo with a strong possibility of no financial support during that period.

In the *New England Journal of Medicine* study cited above, eight of 22 successful employee whistleblowers reported extreme financial hardship. One said: "I just wasn't able to get a job. It went longer and longer. Then I lost — I had a rental house that my kids were [using to go] to school. I had to sell the house. Then I had to sell the personal home that I was in. I had my cars repossessed. I just went — financially I went under. Then once you're financially under? Then no help. Then it really gets difficult. I lost my 401[k]. I lost everything. Absolutely everything."[13]

While awaiting case resolution, the whistleblower may exhaust family savings, lose a house, and generally experience dire financial circumstances. This financial hardship is a reality for a substantial percentage of whistleblowers, yet it does not appear to be accounted for in the Chamber report. The report does assume that the whistleblower stops working, but implies that they will have the award to live on immediately after they lose their employment, though in reality the lag between the two is likely to be substantial.

►**Litigation Risks:** The Chamber's analysis contains another fundamental flaw in that it assumes a perfect success rate for relators. The true success rate is much lower, and cases fail for a myriad of reasons that may not have anything to do with the merits of the case. For example, in order to obtain an award, the relator must generally be the "first to file" a case alleging fraud. Because cases are filed under seal, there is no way for a whistleblower to know, before coming forward, whether he or she will be the first. Thus, there is a real threat to would-be whistleblowers that they will move ahead with filing a claim only to find, years later, that they were not the first person to file. This means that they may incur all of the costs of whistleblowing (including job loss) but may get no award at all, or an award that is substantially reduced due only to their having the bad luck to be second to file.

Other factors that are difficult to accurately assess at the outset include, for example, whether evidence has been preserved, whether a court will accept the legal theory, the amount of the damages that will be assessed on the defendant, and whether the defendant will have the assets or income to satisfy any judgment. All told, the litigation risks associated with bringing a False Claims Act case are daunting. A report submitted to Senator Charles Grassley by the U.S. Department of Justice ("DOJ") and the U.S. Department of Health and Human Services found that as of January 4, 2011, DOJ's Civil Division, together with U.S. Attorneys' offices, had obtained 541 *qui tam* settlements and judgments since fiscal year 2006,[14] while DOJ statistics show 2,137 *qui tam* cases were *filed* between 2006 and 2010.[15] Allowing for some spillover of cases at both the front and back ends of the 2006-2010

window, about three-fourths of the *qui tam* cases filed appear not to result in settlements and judgments.[16]

►**Risk that the Government Will Decline:** Still another risk relates to the government's decision to join a case. The number of cases in which DOJ is able to intervene is constrained by the finite government resources provided to DOJ.[17] Large cases require the investment of millions of dollars and experienced counsel. While DOJ declination does not preclude the whistleblower from being successful, it lowers the odds of success.[18]

SUMMARY OF 10 WHISTLEBLOWER RISKS

In summary, the calculus that a whistleblower makes in contemplating whether to move forward includes the following considerations:

- Can I survive the personal and financial hardship? What will the costs be in lost friends and disrupted family relations, damage to my reputation within the community, loss of income from my current job and blacklisting within the job market in my community and my industry nationwide? How long can I go without any income, assuming that the litigation would be successful?
- What are the odds that the case will be successful, and that I will be compensated at all?
- Will I be the first to file, or will my case be barred because someone else has a case pending under seal?
- Will the local U.S. Attorney's Office have the resources to fully investigate the allegations?
- Will DOJ get the needed investigative support from an investigative agency, such as the FBI or HHS-OIG?
- Will the affected program agency support my legal theory?
- Has the defendant destroyed the evidence showing their misconduct, or will the other witnesses lie to the government, meaning that the government won't be able to corroborate my allegations?
- If the government does intervene in my case, or if I have to litigate on my own, what will happen in court?
- Will the judge follow other decisions that have embraced the legal theory of my case, or will the judge disagree and dismiss the case?
- Lastly, if the case ultimately is successful, will the compensation be sufficient to make me whole for lost earnings over the rest of my career, if I must leave my job and cannot find work, at least in the industry in which I have spent my career?

The Chamber report only considers the last of these important questions, and therefore omits very important, real-world components of the risks associated with moving forward.

The Chamber Report Ignores Key Data Regarding the Need for Strong Financial Incentives

The Chamber relies on 26 interviews of whistleblowers summarized in an article in the *New England Journal of Medicine* to justify a relator's share cap. The Chamber claims that these interviews support a cap because financial incentives did not play a significant role in motivating these particular whistleblowers to come forward. In doing so, the Chamber ignores a seminal 2009 study in which professors at the University of Chicago and the University of Toronto analyzed the motivations of whistleblowers in exposing 216 major frauds and concluded that financial rewards *were* a key factor in motivating witnesses to come forward. The Chamber also ignores the limitations of the interviews conducted by the authors of the article in the *New England Journal of Medicine*.

The 2009 University of Chicago and University of Toronto study ("2009 whistleblowing study") concluded that "[m]onetary incentives for fraud revelation seem to play a role regardless of the severity of the fraud . . . a strong monetary incentive to blow the whistle does motivate people with information to come forward."[19] The authors based their conclusions on a review of 216 cases of alleged corporate frauds, including high-profile cases such as Enron, HealthSouth, and World Com.

With regard to the article in the *New England Journal of Medicine*, the Chamber relies on statements by the whistleblowers who were interviewed to the effect that they were motivated by personal ethical standards, by a desire to prevent risks to public health, by a duty to bring criminals to justice, or by a sense that filing suit would protect them from retaliation or other legal consequences.[20] However, the Chamber fails to recognize that the desire to bring cheaters who bilk the taxpayers to justice and to protect the health of the public, on one hand, and to be compensated for risk, on the other hand, are by no means mutually exclusive. A person can view him or herself as motivated by ethics but, at the same time, require a potential financial award to offset the potential financial and other costs of coming forward. A more probing inquiry likely would reveal that whistleblowers interviewed by the *New England Journal of Medicine* made their decisions to come forward after considering that a potential reward would offset the likely damage to their jobs, careers, family and friends, and reputations within their communities.

The Chamber Report Ignores Risks Posed to Whistleblower Attorneys

The Chamber Report in effect proposes a cap on the contingency fees of attorneys working for whistleblowers on *qui tam* cases, without proposing any limitation on fees of attorneys defending entities facing fraud allegations in these cases. This proposal ignores the risks and costs for attorneys who take *qui tam* cases on a contingent basis, as shown by the numerous cases in which no recovery at all is obtained, DOJ declines to intervene or intervenes years after the case was filed, or DOJ intervenes with the understanding that private relator attorneys will take a lead role in building the evidentiary record.

One striking example of such risks and costs concerns the successful effort by the whistleblower pharmacy Ven-A-Care to expose widespread fraud in the pharmaceutical industry. Ven-A-Care began as a Key West, Florida pharmacy that provided intravenous medications and nutrition products known as "infusions." After coming to believe that suppliers were charging Ven-A-Care prices for many pharmaceutical products that were far lower than what the government reimbursed, and that the resulting inflated reimbursements fueled kickback arrangements, the company launched a series of False Claims Act *qui tam* cases, some of which detailed practices in which drug companies grossly inflated the reported "average wholesale price" (AWP) of drugs, and other price points, beyond the actual sale price.[21] These practices directly affected the Medicaid and Medicare reimbursement processes, as both programs routinely based payments for most pharmaceutical products on prices reported by the drug manufacturers.

The total recoveries to date in the Ven-A-Care AWP cases exceed $2.8 billion, with more than $2.2 billion going to the United States. Approximately one third of the recovery to the United States government occurred in cases in which DOJ did not intervene, one-third in cases in which DOJ intervened only after Ven-A-Care successfully pursued a companion case in state court, and one-third in cases settled before the United States made its intervention decision. In their work advancing these recoveries, Ven-A-Care's counsel team expended in excess of $75 million in attorneys' time and advanced more than $15 million in litigation costs.[22]

The Department of Justice's current hiring freeze highlights the importance of the partnership between government attorneys and* qui tam *counsel envisioned by the False Claims Act to marshal resources to pursue fraud.

Few attorneys would invest in this sort of long-term, resource-intensive litigation for only statutory fees that are paid only if the case is successful and only at the end of litigation. Even if an attorney or firm had the resources, it is difficult to imagine many investing millions of dollars and years of time in cases with even a 50 percent chance of winning, if the payout were simply the fees that they could have earned working for a client paying hourly, without risk. Again, the Chamber's analysis fails to adequately price in risk, with the result that attorneys will be disincentivized from practicing in this field.

This point takes on more importance in light of the fiscal pressure under which the federal government is operating. The Department of Justice's current hiring freeze[23] highlights the importance of the partnership between government attorneys and *qui tam* counsel envisioned by the False Claims Act to marshal resources to pursue fraud. Rather than seeking to discourage attorneys from entering this field, a smart investment is to enlarge the field by attracting additional quality attorneys. Many *qui tam* attorneys are former federal prosecutors, and they can be useful partners to the federal government in pursuing fraud. As the last 25 years have demonstrated, more cases bring more money back to the federal budget.

The Chamber Report Presents Misleading Data

Some of the figures reported in the Chamber paper can be quite misleading if not carefully explained. To take one example: in Table 7, on page 15 of the Chamber's report, the authors list what they call the Total Government FCA Recovery for ten cases, and then show the amount of what they call the Relator Share that was actually awarded, and what that share would have been under their proposed cap. The first row of this table highlights a case against Pfizer Inc. that yielded what is called a "total government recovery" of $1 billion in 2009. A casual glance at this table would suggest that "the Relator" in this $1 billion government recovery received $102.4 million, or a little over 10 percent of the award, whereas, under the proposed cap of $15 million, this "Relator" would have received only $15 million, yielding an alleged savings to the federal government of $87.4 million. However, in this particular case, there were actually *six relators*, and the award of $102.4 million was shared among these six individuals.[24] In FCA cases, there are never duplicate awards for exposing a particular fraudulent scheme or transaction. Accordingly, the savings from the proposed cap would be significantly lower than the Chamber suggests, as subjecting each of the six relators to the cap would have resulted in a maximum, combined $90 million relator share ($15 million times 6). This "capped" amount is just 13 percent less than the relator shares actually awarded under the existing system. In addition:

> ***In the largest FCA case to date, the federal government received $54 in recoveries for each dollar that it paid to all of the six whistleblowers combined.***

- The total amount of money recovered was not $1 billion, as reported by the Chamber, but rather $2.3 billion: $1 billion in civil damages and penalties, and $1.3 billion in criminal fines. The Chamber's data is misleading because, by referencing only the civil recovery, it fails to accurately reflect the total recovery generated by these *qui tam* actions against Pfizer. These considerable criminal penalties were part of the payback from the six *qui tam* actions, not to mention an integral part of their deterrent effect.

- Of the $1 billion in civil recoveries, $668.5 million went to the federal government and $331.5 million to the states. Contrary to what the Chamber represents, its proposal would not save the federal government an amount equal to a difference between the *total* relator share awarded out of the $1 billion federal/state recovery and a relator share subject to a $15 million cap. Rather, any savings for the federal government would apply only to the relator shares awarded out of the $668.5 million federal recovery.

- From the $102 million in total whistleblower awards, the six relators and their seven law firms paid taxes equaling an estimated 40 percent, as conceded by the Chamber. Since much of this amount is federal taxes, with the relator share funds consequently circling back to the federal government, it is misleading for the Chamber to compute federal government savings based on the gross amount of relator share awards as opposed to the net amount after federal taxes are paid.

Counting criminal and civil recoveries, the federal government in the Pfizer case recovered almost $2 billion ($1.968 billion). This was made possible by the decisions of six individuals to break the "conspiracy of silence" and the subsequent hard work of these individuals and their counsel to develop evidence and legal arguments supporting the United States' claims. As a group, their net recovery was approximately $36.6 million after reductions for the approximate amount of contingent fees owed counsel (40 percent as estimated by the Chamber) and for the approximate tax burden on the balance (40 percent as estimated by the Chamber). Significantly, this $36.6 million net recovery for the six whistleblowers represents just 1.9 percent of the total recovery for the federal government in the case. Stated somewhat differently, *the federal government received about $54 for each dollar that it paid to all of the six whistleblowers combined*. This is a resounding return on investment for the government.

Similarly, in other cases listed in the group of ten cases highlighted in Table 7 of the Chamber's report, the Chamber fails to note that the recovery total reflects federal and state recoveries combined, that some cases involved multiple relators (two of these cases had twenty-three relators between them), and that criminal fines are not included. This creates a very misleading picture of the share of recoveries going to a relator.

Most of the largest settlements are in fact global settlements of multiple cases brought in different courts (often state courts) and by different whistleblowers.[25] Contrary to the implication of the Chamber's table, single relators typically are not earning relator shares based on the entire recovery in these large settlements. Rather, many individuals are sharing in the rewards.

Summary of Analytic Flaws

The Chamber's report demonstrates a truncated and incomplete view of risk. The Chamber inaccurately assumes that relators don't consider other, non-financial costs when deciding to come forward, and that relators view the maximum relator share award as a dollar-to-dollar compensation for lost income when they balance the costs, risks and benefits of coming forward. In fact, as discussed above, relators are concerned about many other costs besides financial costs when they consider whether to file a *qui tam* action. Further, the Chamber ignores risks posed to whistleblower attorneys, disregards key data regarding the need for strong financial incentives for whistleblowers, and presents misleading data regarding the share of recoveries that goes to a relator.

III. By Significantly Altering the Balance of Risk and Reward, the Chamber's Proposal Would Undercut the Government's Most Effective Tool for Fighting Fraud

The Proposal Would Cause Fewer False Claims Act Cases to be Filed

The False Claims Act has been tremendously successful in returning funds to U.S. taxpayers. The government has recouped over $30 billion since the 1986 revisions to the FCA, and approximately 80% of those actions were initiated by whistleblowers.

In its report proposing a whistleblower cap, the Chamber fails to adequately assess the real-world risks undertaken by whistleblowers. It therefore provides no support for its central proposition: that a cap of $15 million will not impact the number of whistleblowers coming forward, and therefore the amount of money recovered. Even a slight change in the incentive structure, impacting the decision of one or two whistleblowers, could wipe out the Chamber's proposed savings ($674 million over 25 years).

Large awards bring in more whistleblowers, which in turn means more funds recovered by the federal government.

The Chamber's approach also does not account for the huge variance in the size of relator awards. As evidenced by the very data upon which the Chamber relies, many relator awards fall far below the amount the Chamber maintains is necessary to compensate for the lost income for the typical relator. For example, in seventeen cases against pharmaceutical manufacturers reviewed in the *New England Journal of Medicine* article cited by the Chamber, five relators received less than $1 million in recoveries after attorney's fees and taxes; thirteen received between $1 million and $5 million; and seven received more than $5 million.[26] The wide disparity in potential outcomes in *qui tam* cases illustrates the need to allow for a flexible award system that corresponds to the range of possible outcomes. Where there is risk, there must be reward. If we truncate the reward, we will interfere with and distort the decision-making of potential whistleblowers. This, in turn, will cause some to shy away, hunker down, and keep quiet.

Nobody wins if this happens except the perpetrator of the fraud.

In Large Cases, the Chamber's Proposal Would Place the Financial Interests of the Whistleblowers in Direct Conflict with the Interests of the Government

The whistleblower cap proposed by the Chamber report sets forth a new incentive structure that could jeopardize the largest False Claims Act settlements and awards and reduce potential recoveries achieved by the federal government.

Assuming a figure of 16 percent as a long-term average for the whistleblower's share of *qui tam* settlements and judgments,[27] there would be no financial incentive for whistleblowers to support the government's effort to achieve settlements above $94 million. A relator in a case that settles for or yields a recovery of $94 million would get an award of $15 million. But with the cap in force, a relator who is involved in a case that obtains a judgment or settlement for ten times that amount, or $940 million (a number of settlements are in this range), would also receive a relator's share of $15 million. The cap thus creates a disincentive for relators to support the government's efforts to achieve settlements above $94 million. In other words, a cap on a relator's share would also create a potential incentive to cap settlements.

This is not the kind of incentive that is in the interests of U.S. taxpayers.

It is easy to see how such an incentive structure could cause losses to the taxpayer. Many fraud cases involve numerous drugs, different sales programs, different billing practices and/or different sales regions.[28] During litigation and settlement discussions, a whistleblower typically supports the government's efforts to achieve a full recovery by developing evidence, including evidence of liability and damages, and assembling legal arguments, relating to the claims.[29] Under the Chamber's proposal, a whistleblower would only be financially incentivized to develop such evidence and legal arguments on fraud schemes up to damages of $94 million.

Once a defendant makes such an offer, whether on a scheme involving one hundred million dollars or several billion dollars in lost taxpayer funds, the relator's financial interests are now fully aligned with the defendant rather than the taxpayer. This is the ultimate effect of the Chamber's proposal. From a purely financial point of view, a relator would not want the government to turn down the smaller recovery only to enter into litigation which at best would earn the relator the same relator share, and, at worst, would eliminate the prospects for any recovery by the relator at all.

Yet recent cases have settled for as high as $3 billion![30] It would only take one such case adjusted downward, or not filed at all, to wipe out *all* of the putative savings from a whistleblower awards cap.

Another way to think about the issue is the following: If a cap on whistleblower awards resulted in only a 3 percent overall reduction in False Claims Act judgments and settlements, this drag on recoveries would wipe out all of the alleged "savings" claimed by the Chamber for such a cap.[31]

In short, the Chamber's proposal would fully align the economic interests of the whistleblower with those of the defendant, rather than the taxpayer, once the defendant had made a settlement offer resulting in an award to the whistleblower that hits the cap. From a financial point of view, the whistleblower would always be better off if the government accepted the lower settlement offer than if it rejected such an offer and insisted on a higher recovery, which the defendant might be unwilling to pay absent a final court judgment.

The Proposal Threatens to Reduce the Deterrent Effect of Larger Settlements

The Chamber's analysis also does not account for the deterrent effect of the large settlements, yet the combination of billion-dollar plus settlements coupled with the risk of criminal prosecution does have a deterrent effect. If a cap on whistleblower awards pulls down total settlement amounts, as seems likely when a full accounting for risk is considered, this will have both direct and indirect adverse effects on total recoveries. Large awards bring in more whistleblowers, which, in turn, means more funds recovered by the federal government. The reverse will be true as well: a lack of publicity concerning large awards, along with watered-down incentives for individuals considering whether to file a *qui tam* action, will dampen the willingness of people with knowledge of fraud to come forward.

IV. Conclusion

False Claims Act actions against fraudfeasors have returned over $30 billion to the government over the last 25 years. The majority of these cases have involved whistleblowers stepping forward to expose wrongdoing and corruption at no small risk to their own livelihood and wellbeing.

The FCA serves as an important means not only for addressing expensive frauds committed by individual wrongdoers, but also for ensuring that honest businesses have a fair chance to compete in the marketplace. Once a business sector has been infected with fraud, other companies may feel pressure to follow suit or be forced out of the marketplace over time. The result can be a spiral of corruption that consumes billions of taxpayer dollars.

The beauty of the FCA is that it both incentivizes integrity and creates a mechanism by which fraudfeasors foot the bill for their own apprehension. And as public awareness of the FCA has grown, the recovery of taxpayer dollars from fraudfeasors has only continued to increase. The Department of Justice describes the FCA as one of the government's most powerful tools for fighting health care fraud, and the U.S. Attorney General has said the impact of the 1986 amendments strengthening the FCA has been "nothing short of profound."

For all these reasons, policymakers should be cautious about tinkering with whistleblower incentives and protections in the False Claims Act. As the saying goes, "If it ain't broke, don't fix it."

Appendix A

- FACT SHEET -

Taxpayers Against Fraud

Examples of Cases the Department of Justice Declined that Whistleblowers and Their Private Attorneys Pursued to Settlement or Judgment

United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc. This case was filed in March 1994 and was declined by DOJ in mid-1994. The whistleblower alleged DTCA violated the FCA by paying physicians as "medical directors" in exchange for referrals to its hospitals-within-hospitals. The case ultimately settled 15 years later in May 2009 with the defendant agreeing to pay $28 million. Whistleblower attorneys incurred $1 million in up-front expenses during this process, and worked over 18,000 hours, with data coders putting in an additional 33,000 hours.

United States ex rel. Hutcheson v. Blackstone Medical, Inc. This case was filed in May 2007 and was declined by DOJ in 2009. The whistleblower alleged Blackstone was paying doctors as "Medical Advisory Board" members as a form of kickbacks. The case ultimately settled in February 2012 for $30 million, after whistleblower attorneys incurred approximately 3,500 hours and $50,000 in up-front expenses.

United States ex rel. Gonter v. Hunt Valve Co. This case was filed in April 2001 and declined by DOJ in March 2005. The whistleblower alleged that General Dynamics defrauded the federal government by accepting nonconforming submarine valves and valves for containment of low-level nuclear waste from the whistleblower's employer. Ultimately the case settled for $13 million in May 2005 after whistleblower attorneys incurred over 8,000 hours and $75,000 in up-front expenses.

United States ex rel. Ven-A-Care of the Florida Keys, Inc. v. Various Parties. The Florida-based whistleblower pharmacy Ven-A-Care filed multiple claims under the False Claims Act to expose Medicaid and Medicare fraud in the pharmaceutical industry. Ven-A-Care filed its first AWP action in 1995 (*U.S. ex rel. Ven-A-Care of the Florida Keys, Inc. v. Abbott Laboratories, Inc.* (S.D. Fla. No. 95-1354-Civ)) and its second in 2000 (*U.S. ex rel. Ven-A-Care of the Florida Keys, Inc. v. Dey Inc. et al*. (D. Mass No. 00-10698). Both of these federal cases joined claims against numerous drug makers, and Ven-A-Care also brought *qui tam* actions against the same defendants under the *qui tam* provisions of state false claims acts of Florida, California, and Texas to recover those states' shares of improper Medicaid payments.

While Ven-A-Care's Texas and Florida cases proceeded in state courts, its California state case was removed and consolidated with Ven-A-Care's federal FCA actions in a Multi-District Litigation (MDL) proceeding in Boston federal court. All told these actions

ultimately brought hundreds of millions in recoveries to taxpayers. In addition, Ven-A-Care and its counsel assisted several states in pursuing non-*qui tam* actions returning tens of millions more to the state and federal governments.

In many of the *qui tam* actions, the federal government did not intervene and the whistleblower and their attorneys pursued the cases to settlement. For example, while the U.S. Department of Justice declined to intervene and proceed with Ven-A-*Care's qui tam* case against Schering Plough, Ven-A-Care and its counsel team developed the case over a period of twelve years and, working closely with the Attorneys General of Texas, California, and Florida, returned more than $50 million to the United States by the end of 2009.

In their work advancing these and other recoveries, Ven-A-Care's legal team expended in excess of $75 million in attorneys' time, and advanced more than $15 million in litigation costs.

Appendix B

- FACT SHEET -

Taxpayers Against Fraud

Examples of Cases in Which the Department of Justice Intervened after Substantial Time or Commitment of Resources by Whistleblowers and Their Attorneys

United States ex rel. Alderson v. Columbia/HCA Healthcare Corp.; United States ex rel. Schilling v. Columbia/HCA Healthcare Corp.; and United States ex rel. Alderson v. Quorum Health Group, Inc., et al. This case, originally filed in 1993 against HCA, Healthtrust and Quorum, involved allegations of cost report fraud and kickbacks. The case evolved into separate proceedings involving Quorum on the one hand, and HCA and Columbia (a company that had merged with HCA) on the other hand. In 1998, DOJ joined the Quorum case with the understanding that the whistleblower attorneys would play the lead role in prosecuting the case. DOJ also ultimately joined the Columbia/HCA litigation with the understanding that 30 full-time equivalent attorneys were required and that DOJ could provide only five, with the relators providing the majority of the attorney team which totaled six law firms and one individual lawyer. The Quorum matter settled in 2000 for $85.7 million. The Columbia/HCA matter involving the whistleblower cost reporting claims settled in 2003 for $631 million, after whistleblower attorneys had incurred over 66,000 hours and over $29 million in expenses and attorney fees up-front.

United States ex rel. Tyson v. Amerigroup Ill., Inc. In August 2002 the Department of Justice declined to intervene in an FCA whistleblower action against Amerigroup that involved an allegation that the company defrauded the Medicaid program in the State of Illinois by not enrolling pregnant women in the program to avoid paying for costly care. Ultimately the State of Illinois intervened in March 2005 and DOJ intervened in October 2005 and the case went to trial. The whistleblower and his attorneys took the lead in pursuing the case and preparing for the trial, with the whistleblower attorneys incurring over 25,000 hours of legal work and $2 million in out of pocket expenses for costs including experts, transcripts, and trial preparation. After a verdict, post-trial motions, and appeal, the case was settled for $225 million in August 2008.

United States ex rel. Taylor v. Gabelli. In February 2001 a whistleblower filed a case under the FCA alleging fraud in the purchase of radio spectrum licenses. DOJ initially declined to intervene in December 2001 but ultimately requested to intervene in late March 2006. The case settled in June 2006 and the court approved a $135 million settlement in July 2006. The whistleblower attorneys incurred over 19,000 hours and approximately $8.7 million in fees and expenses.

United States ex rel. Shea v. Verizon Communications, Inc. Filed in January 2007, this *qui tam* case involved allegations that MCI/Verizon was submitting false claims for illegal surcharges on invoices submitted under two telecommunications contracts with the United States. DOJ intervened in 2011 and the case settled in February 2011 for $93.5 million. In a memorandum opinion relating to this case, a district court judge noted that the whistleblower's role in this case included:

- "enabling the government to save enormous amounts of lawyer time, auditor time, and other staff time" by directing the government to prioritize and focus on two specific categories of surcharges that ultimately were the basis of over 80% of the recovery;
- spending an estimated hundreds of hours each year on the case and hiring FCA specialists who spent over 1,200 hours in attorney and paralegal time; and
- in conjunction with his counsel, providing extensive pre-filing research and analysis on what was legally allowed as surcharges on government contracts; helping the government draft proposed subpoena categories when informal discovery began; responding to all substantive arguments Verizon made denying its liability, including through a multi-hour 40-page power-point presentation to DOJ; and identifying an additional category of damages beyond those the government identified.

The judge further stated that "it is certainly more than likely that without this lawsuit, Verizon would have continued to overcharge the United States indefinitely, i.e., as long as it could get away with it."

United States ex rel. Kammerer v. Omnicare, Inc. In March 2004 a whistleblower filed an FCA case against Omnicare, Inc., the nation's leading long-term care pharmacy provider. The case involved allegations that Omnicare dispensed and billed for different drug forms than the forms ordered by physicians to maximize Medicaid reimbursement, and that Omnicare violated a Medicaid billing rule requiring pharmacies to charge Medicaid no more than their "usual and customary charge to the general public." The whistleblower filed the action on behalf of the federal government, the District of Columbia, and the 16 states in which Omnicare does significant business. While the federal government investigated and resolved the first claim, it declined in February 2007 to intervene in the claim involving the "usual and customary charge" billing rule.

The whistleblower spent close to a thousand hours and his counsel spent over 850 hours on the case, including work to convince states to participate. In late 2007 and early 2008, Massachusetts agreed to seek claims data from its Medicaid program and documents from Omnicare, with the understanding that the whistleblower would do the initial audit and document review. The whistleblower hired a software programmer to write a program to audit the claims and employed a data analyst full time for several months to do this work. The whistleblower presented his preliminary damage computations to the Massachusetts Attorney General's office in July 2008, and once this work established substantial evidence of damage to the state's Medicaid program, Massachusetts invested resources in its own audit and investigation, sharing the results with Michigan. Eventually Massachusetts and Michigan successfully negotiated settlements in September 2010 totaling $21 million. This case was the first FCA case based on violations of the "usual and customary" rule, and

beginning in 2009 the annual work plans of the Inspector General of the U.S. Department of Health and Human Services have proposed audits of large pharmacy chains for compliance with this rule.

United States ex rel. Eckard v. GlaxoSmithKline. The relator in this case was a Global Quality Assurance Manager for GlaxoSmithKline who reported that the company was manufacturing and distributing drug products from its huge facility in Cidra, Puerto Rico – drug products that were contaminated with micro-organisms, super- or sub-potent, lacking the active ingredient, and/or otherwise adulterated. Based on the relator's allegations, the Food and Drug Administration executed search warrants and seized billions of dollars of adulterated drugs, leading to the ultimate shut down of the plant. In October 2010, GSK resolved the relator's *qui tam* action for $600 million and paid an additional $150 million criminal fine. The GSK subsidiary that operated the factory pled guilty to distributing adulterated product with intent to defraud and mislead.

The *qui tam* case was filed in February 2004 and was unsealed in July 2007, at which time the government filed a notice of non-intervention, while continuing to investigate the allegations. The government intervened when settlement was reached in October 2010. In this FCA case of first impression concerning manufacturing standards essential to ensuring drug quality, safety and efficacy, the relator and/or her counsel, in support of the government's investigation and prosecution of the case: reviewed, organized and analyzed approximately 1.6 million pages of complex and technical documents produced by GSK; prepared legal, factual and technical memoranda, amounting to more than 1,200 pages of work product citing to more than 4,000 documents; managed the civil litigation in a non-intervened posture for almost three years after the case was unsealed, moving it forward while avoiding any conduct prejudicial to the government's ongoing criminal investigation; and participated in the settlement negotiations and settlement strategies that led to the successful outcome. In total, relator's counsel spent approximately 12,000 hours on the case, approximately 86% of which was spent directly and actively assisting the government. The relator, an expert in pharmaceutical Good Manufacturing Practices, who also has a degree in Chemistry and is formally trained to operate manufacturing equipment, translated complex scientific concepts into lay terms and contributed countless hours reviewing documents, interpreting and explaining their scientific and technical content and ramifications and suggesting follow up strategies. The expertise of the relator and her attorneys and their dedication to the pursuit of the case throughout its six year-plus history were essential to the ultimate $750 million recovery.

United States ex rel. Ven-A-Care of the Florida Keys, Inc. v. Various Parties. Florida-based pharmacy Ven-A-Care filed cases against Abbott Laboratories, Dey Laboratories and Roxane Pharmaceuticals, in 1995, 1997, and 2000, respectively. In these cases, Ven-A-Care alleged that the pharmaceutical companies had inflated the average wholesale price of drugs and other price points beyond the actual sale price. The United States did not elect to intervene in these cases until 2006, after which Ven-A-Care's counsel team continued to litigate alongside the DOJ lawyers, taking the lead where appropriate, and shouldering a substantial portion of the litigation costs.

However, during the many years these cases remained under seal pending the DOJ investigations, Ven-A- Care litigated companion state court *qui tam* cases with the assistance

of the Attorneys General of Texas, California, and Florida, each of whom had intervened and assigned several state lawyers to the trial teams. As with the cases in which the United States declined to intervene, Ven-A-Care pursued its Texas cases up to immediately before trial, and successfully negotiated state settlements. The litigation work product, including expert reports and depositions, was made available to assist in the United States decisions to intervene and in the subsequent litigation of the United States cases.

Ven-A-Care's Texas settlements included $18 million from Dey, $10 million from Roxane and $28 million from Abbott, each of which included recoveries of the U.S. portion which was returned to the U.S. Treasury. The later U.S. settlements included $280 million from Dey, $280 million from Roxane, and $126.5 million from Abbott. The United States made its intervention decisions after receiving the evidence and information provided by Ven-A-Care's successful litigation of its state cases.

Endnotes

[1] Total federal civil FCA recoveries as of September 30, 2011 were $30,315,593,792 (*see* http://www.taf.org/DoJ-fraud-stats-FY2011.pdf) and federal criminal fines associated with FCA cases totaled $4,870,000,000 (*see* http://www.taf.org/FCA-criminal-fines.xls). The total relator share paid out as of September 30, 2011 was $3,418,672,503 (*see* http://www.taf.org/DoJ-fraud-stats-FY2011.pdf). Total civil and criminal recoveries net whistleblower awards were $31,919,866,405 as of end of FY 2011. This is a conservative number as it does not account for the billions of dollars recovered for states in federal FCA actions involving Medicaid fraud.

[2] 31 U.S.C. §§ 3730(b), (c), (d). Before the 1986 FCA revisions that revitalized whistleblower incentives, the law produced relatively small returns. For example, in 1979, the U.S. Department of Justice reported that the Civil Division had recovered just $11,913,000 under the FCA (*see* Letter from J. Roger Edgard, Director, Commercial Litigation Branch, Civil Division, Department of Justice, to Senator Dennis DeConcini (Nov. 3, 1979) at http://www.justice.gov/jmd/ls/legislative_histories/pl99-562/hear-96-33-1979.pdf) – an amount equal to $36,910,000 in 2011 inflation-adjusted dollars (*see* http://www.bls.gov/data/inflation_calculator.htm). Another recent case in point regarding the impact of whistleblower provisions is the whistleblower program in the Internal Revenue Service. Prior to 2006, that agency had a whistleblower program in place in which the awards were discretionary and capped at $10 million. In 2006, Congress enacted legislation providing for an IRS whistleblower system modeled on the FCA. The numbers show the difference the change in the program made. In FY 2009, the IRS paid out on only 110 whistleblower claims submitted under the pre-2006 program (*see* http://www.irs.gov/pub/irs-utl/whistleblowerfy09rtc.pdf), of which only five involved collections of more than $2 million. In contrast, the IRS now reports that it now has 10,000 fraud claims submitted of over $2 million each (*see* http://www.gao.gov/new.items/d11683.pdf).

[3] *See* http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html.

[4] Department of Justice, Press Release, *Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986* (Jan. 31, 2012), online at http://www.justice.gov/opa/pr/2012/January/12-ag-142.html.

[5] *See* http://www.mainjustice.com/2012/02/01/justice-department-celebrates-25-years-of-false-claims-act/.

[6] The FCA was envisioned as a public/private partnership that would result in the dedication of private resources to support public actions against fraudsters (*see* http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html).

[7] For examples, see http://www.taf.org/top20.htm.

[8] While the majority of FCA cases that have resulted in settlement with or judgment against defendants have been cases in which the Department of Justice has intervened (http://www.taf.org/DoJ-fraud-stats-FY2011.pdf) a substantial amount of taxpayer dollars has been recouped in cases where the whistleblower persisted despite DOJ declination. *See* Appendix A for examples of such cases. Further, in many cases, the Department of Justice intervened after many years were invested by the whistleblowers and their private counsel, or DOJ intervened with the understanding that the relator and his or her counsel would invest substantial time and resources in developing the case. *See* http://www.mainjustice.com/2012/02/01/justice-department-celebrates-25-years-of-false-claims-act/ and Appendix B.

[9] Other Chamber of Commerce initiatives relating to the False Claims Act amendments have included efforts to press the Supreme Court to declare the FCA whistleblower provisions unconstitutional (*See* Brief of Amici Curiae Chamber of Commerce of the United States of America and the American Hospital Association in Support of Petitioner, *Vermont Agency of Natural Res. V. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (No. 98-1828), 1999 WL 33640659); and to urge lawmakers to ensure that the FCA does not reach subcontractor fraud

that results in false claims being submitted to the government (*See* Senate Committee on the Judiciary, *Hearing on the False Claims Act Corrections Act of 2007*, 110th Cong. 12 (2008) (statement of John T. Boese, U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform); House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property and the Subcommittee on Commercial and Administrative Law, *Hearing on the False Claims Act Corrections Act of 2007* 110th Cong., 7 (2008) (statement of Peter B. Hutt II, U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform); and House Committee on the Judiciary, *Hearing on the H.R. 1788, the False Claims Act Correction Act of 2009,* 111th Cong., 3 (2009) (statement of Marcia G. Madsen, U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform)). The Chamber also has advocated prohibiting whistleblowers from taking FCA action unless they have first reported their allegations to their employer (*see, e.g.,* U.S. Chamber of Commerce, *Preventing Government Overpayments to Qui Tam Plaintiffs: Proposed Amendments to the False Claims Act (FCA)* (Oct. 29, 2011)), despite data showing in the vast majority of cases whistleblowers attempt to report internally without a statutory reporting mandate, and that when they do report internally they risk retaliation (s*ee, e.g.,* examples cited in Taxpayers Against Fraud, *the 1986 False Claims Act Amendment: A Look at 25 years of Effective Fraud Fighting in America*, p. 7 (available online at http://www.taf.org/TAF-fca-25anniversary_12.pdf); Ethics Resource Center, *2009 National Business Ethics Survey: Ethics in the Recession* (reporting that retaliation against employees who reported misconduct on the job increased between 2007 and 2009); Alexander Dyck, Adair Morse, and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" 65 Journal of Finance 6, pp. 2213 – 2253 (Sept. 2009) at 4, accessed at http://faculty.chicagobooth.edu/luigi.zingales/research/papers/whistle.pdf).

[10] Geoffrey Christopher Rapp, *Beyond Protection*: *Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 108-09 (2007) at http://128.197.26.34/law/central/jd/organizations/journals/bulr/volume87n1/documents/RAPPv.2.pdf.

[11] Aaron Kesselheim, David M. Studdert, and Michelle M. Mello, *Whistle-Blowers' Experience in Fraud Litigation Against Pharmaceutical Companies*, 362:19 *New Engl. J. Med.* 1832 (May 13, 2010) at http://www.nejm.org/doi/full/10.1056/NEJMsr0912039. Note: This is a very small sample, and may not be representative, but it remains one of the few direct interviews of a sample of whistleblowers by an unbiased source. Depending on how the authors operationalize their terms, the total number of whistleblowers in the sample may vary.

[12] An in-depth study of whistle-blowing conducted by researchers at the University of Chicago and the University of Toronto showed that in 82% of the cases, the whistle-blowers say they were fired, quit under duress, or had significantly altered responsibilities. Dyck *et al.* at 4, accessed at http://faculty.chicagobooth.edu/luigi.zingales/research/papers/whistle.pdf.

[13] Kesselheim, *et al.*, 362:19 *New Engl. J. Med.* 1832 (May 13, 2010), *supra* note 11.

[14] Letter from Jim Esquea, Assistant Secretary, Department of Health and Human Services, and Ronald Weich, Assistant Attorney General, United States Department of Justice, to Senator Charles Grassley (Jan. 24, 2011) (posted online at http://taf.org/DOJ-HHS-joint-letter-to-Grassley.pdf).

[15] *See* table at http://www.taf.org/DoJ-fraud-stats-FY2011.pdf.

[16] Dividing the 541 cases settled by the 2,137 filed yields a proportion of 25 percent of cases filed resulting in a settlement or judgment, and 75 percent not doing so. This is a rough estimate since cases filed and settled may not actually cover the exact same time period, both because some underlying cases remain open pending appeal or outstanding claims against other defendants, and because some cases settled in 2006 or 2007 arose from actions initiated earlier. However, juxtaposing the two gives a rough approximation of the success rate, and 75 percent figure is roughly in line with the 75-80 percent figure cited in the Chamber report.

[17] In numerous cases in which DOJ has declined to intervene, DOJ has stated that its declination decision should not be equated with a decision on the merits of the case. For example, *see* http://www.taf.org/SOI-Non-Intervention.pdf.

[18] *See* U.S. Government Accountability Office (GAO), "Information on False Claims Act Litigation Briefing for Congressional Requesters, December 15, 2005" at http://www.gao.gov/new.items/d06320r.pdf and Department of Justice, *Fraud Statistics – Overview: October 1, 1987 – September 30, 2011* (indicating that settlement and judgment totals for qui tam cases where DOJ intervened are higher than settlement and judgment totals for qui tam cases where DOJ declined) at http://www.taf.org/DoJ-fraud-stats-FY2011.pdf. It is important to note that the DOJ numbers regarding total cases in which DOJ intervened include numerous cases in which DOJ either initially declined and then intervened after the whistleblowers and their attorneys invested substantial resources building the evidence, as well as cases in which DOJ intervened with the understanding that the whistleblower and their counsel would devote substantial resources to working in tandem with DOJ as the case progressed. *See* Appendix B for such examples.

[19] Alexander Dyck, Adair Morse, and Luigi Zingales. *Who Blows the Whistle on Corporate Fraud?,* 65 Journal of Finance 6, pp. 2213 – 2253 (Sept. 2009), accessed at http://faculty.chicagobooth.edu/luigi.zingales/papers/research/whistle.pdf , p. 4.

[20] Peter B. Hutt II and Anna R. Dolinsky, the law firm of Akin Gump Strauss Hauer & Feld LLP, *Preventing Government Overpayments to Qui Tam Plaintiffs: Proposed Amendments to the False Claims Act,* published by U.S. Chamber Institute for Legal Reform (Oct. 2011), at http://www.instituteforlegalreform.com/doc/preventing-government-overpayments-to-qui-tam-plaintiffs-proposed-amendments-to-the-false-claims.

[21] *See* Wall Street Journal, *High Reimbursement Caught Eye Of Home-Care Business Newcomer* (May 12, 2000).

[22] For additional examples *see* Appendices A and B.

[23] U.S. Department of Justice, *Justice Department Announces More than $130 Million in Cost Saving and Efficiency Measures to Utilize Resources More Effectively* (Oct. 5, 2011) (online at http://www.justice.gov/opa/pr/2011/October/11-ag-1320.html).

[24] *See* Taxpayers Against Fraud, *Pfizer Settles Largest False Claims Act Ever* (Sept. 2, 2009) (describing the six relator claims) (online at http://www.taf.org/whistle253.htm).

[25] For example, the Pfizer case discussed in the text involved six whistleblower actions involving a dozen drugs and three companies (Pfizer, Pharmacia and UpJohn). The drugs involved were Bextra (an anti-inflammatory drug), Geodon (an anti-psychotic drug), Lipitor (a cholesterol drug), Norvasc (anti-hypertensive drug), Viagra (erectile dysfunction), Zithromax (antibiotic), Zyrtec (antihistamine), Zyvox (an antibiotic), Lyrica (an anti-epileptic drug), Relpax (anti-migraine drug), Celebrex (anti-inflammatory drug), and Depo-provera (birth control). Cases brought in multiple states, and a federal case, were settled together. *See* http://www.taf.org/whistle253.htm. An FCA case involving allegations against Merck that settled in January 2008 was actually two whistleblower cases involving Vioxx (an arthritis drug), Zocor (a cholesterol drug), Pepcid (an acid-reflux drug), Cozaar (a hypertensive medication), Fosamax (a bone loss drug) Maxalt (a migraine medication) and Singulair (an asthma medication). Cases brought in multiple states and a federal case were settled together. *See* http://www.drugfraudsettlement.com/. Another example is an FCA action involving allegations against Bristol-Myers Squibb that settled in October 2007 for $515 million. This settlement involved seven *qui tam* cases (six in Boston and one in Florida) concerning pricing and promotional activities (including kickbacks to doctors) for more than 50 drugs, including 13 drugs with a combined 2007 sales of $10.7 billion -- a total of 69 percent of Bristol-Myers' 2007 pharmaceutical revenue. Drugs addressed in this settlement include the blood thinner Plavix, antipsychotic Abilify, the cholesterol treatment Pravachol, the cancer therapy Taxol, and the antidepressant, Serzone. Cases were brought in multiple states as well as at the federal level and all were settled at once. Of the $515 million settlement, approximately $328 million was paid under the Federal False Claims Act, with the states getting a total of $187 million. *See* http://www.usdoj.gov/usao/ma/Press%20Office%20-%20Press%20Release%20Files/Sept2007/BMS-PR-Final.html.

[26] Aaron Kesselheim, David M. Studdert, and Michelle M. Mello, *Whistle-Blowers' Experience in Fraud Litigation Against Pharmaceutical Companies*, 362:19 *New Engl. J. Med.* 1832 (May 13, 2010).

[27] *See* http://www.taf.org/DoJ-fraud-stats-FY2011.pdf.

[28] For example, Pfizer, which settled for $2.3 billion, involved twelve drugs, while Glaxo, which settled for $750 million, involved four drugs. See http://www.justice.gov/opa/pr/2009/September/09-civ-900.html and http://www.taf.org/whistle253.htm as well as http://www.taf.org/eckardcomplaint3.pdf. Further, the Merck case involved 15 different sales programs. *See* http://www.justice.gov/opa/pr/2008/February/08_civ_094.html.

[29] *See, e.g.,* cases discussed in Appendix B.

[30] New York Times, *Glaxo Settles Cases With U.S. for $3 Billion* (Nov. 3, 2011).

[31] Over $30 billion has been recovered under the False Claims Act in the last 25 years, not including criminal penalties and state recoveries associated with federal False Claims Act cases. Three percent of $30 billion is $900 million, which far exceeds the Chamber's purported savings from a cap.

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