Getnick & Getnick LLP
Counsellors at Law
Rockefeller Center
620 Fifth Avenue
New York, NY 10020-2457
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(212)376-5666 (Telephone)
(212) 292-3942 (Telefax)
e-mail: info@getnicklaw.com
www.getnicklaw.com

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Statement of Neil V. Getnick
Re: New York City False Claims Act

Good morning Chairperson Brewer, Members of the Committee on Governmental Operations, Counsel Grossman, and staff. Thank you for your invitation to appear here today. I am Neil Getnick, the managing partner of Getnick and Getnick LLP. I am also the chairperson of Taxpayers Against Fraud, which is the leading national advocacy organization for the False Claims Act and other whistleblower laws with citizen provisions, but I am testifying today in my individual capacity.

This statute enlists private citizens as sources of information about fraud and empowers their attorneys as Special Assistant Corporation Counsel helping the City to recover defrauded funds. For their efforts, private parties are entitled to receive up to 30% of the recovery as an award. I have been asked to testify about the efficacy of the act, whether it should be extended, and recommended changes.

Let me start out by saying that this is a time to celebrate the passage of this law, which was passed in 2005. The purpose right from the beginning was to enact legislation that was modeled on the Federal False Claims Act to enhance the City's ability to recover the substantial sums lost to taxpayers through fraud on city government. I am very proud that I was able to play a part, alongside the principal sponsor Council Member Yassky, in the drafting of the bill, testifying at the original hearings, and being present for the 2005 signing ceremony. I think that it is important to recognize that this was groundbreaking legislation.

Sometimes it is hard to take the long view of what are we accomplishing day in, day out, but it is worth remembering that this Committee and this Council passed pioneering legislation that set the stage for the enactment of the New York State False Claims Act. The New York State legislature followed that lead three years later, providing New York State with the most robust such law in the nation. The history goes back to President Lincoln which is how the Federal False Claims Act came to be known as the Lincoln Law. He saw what was going on—the same thing that is going on today was going on in the 1860s, with Federal contractors not giving the government a fair shake. So Lincoln called for the passage of the law which has worked extraordinarily well over time.

The timing of this hearing is also fitting because next week the United States Department of Justice will be holding a 25th Anniversary celebratory event marking the passage of the 1986 amendments that defined the modern Federal False Claims Act. All of this is built on the principle of empowering citizens who have unique knowledge of fraud on the government to bring suit through their counsel, forming a public/private partnership with government to recover stolen taxpayer funds. That is quite exceptional—having the opportunity as private citizens to join with our government hand-in-hand to protect taxpayers. In the Federal case, there are treble damages, plus attorneys' fees and expenses, and $11,000 per claim. The law has worked very effectively. For one thing, the Federal False Claims Act has returned $15 in recovered funds for every dollar the government has invested in enforcement and the recoveries have been more than $30 billion since 1986. The experience with the Federal law is worth mentioning because it is analogous to what has happened already with the City law as well as its future potential.

In the last year alone, more than $3 billion was recovered under the Federal law and Taxpayers Against Fraud predicts that in the year ahead based on the cases that are lined up, more than double, and perhaps triple, that amount will be recovered this year alone. So how do you look at the New York City False Claims Act with all these other false claims acts out there, including the state law which may have surpassed it to some extent? I think we should view it as part of a rich, legislative tapestry that has interlocking whistleblower laws with citizen initiative provisions that together make for a very powerful and synergistic combination. We have the Federal False Claims Act, state False Claims Acts (including the New York State law, which is the most robust such law in the nation), and the Securities Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") whistleblower laws. And then there is the IRS whistleblower law as well.

A case cited in the New York City Department of Investigation's ("DOI") testimony is one of ours. It was a Medicaid fraud whistleblower case against GlaxoSmithKline. We filed it under the Federal False Claims Act in the United States District Court in Boston. Using supplemental jurisdiction, we also filed pursuant to state False Claims Acts and the New York City False Claims Act, as well as the Chicago False Claims Act. The case, which settled at the end of last year, proved to be enormously successful. It resulted in a $750 million global recovery—a $600 million civil settlement and a $150 million criminal fine—and there was a specific share back to New York State of $21 million—I'll be very specific, $21,123,039.35—and a significant portion of that was on behalf of New York City. So while it is true that the City may not have literally participated in that case because of the pass-through phenomenon—that is, the recovery passes through to the state and so the City defers to the state to pursue such matters—it is very helpful to have these multiple approaches to go after these frauds.

Let's turn for the moment to the question whether something can be done to incentivize the City to be able to do work in the Medicaid area because there are resources that it has to add, but it doesn't make sense to do that if it is all cost and no benefit. One thing that is important is to utilize the provision in the New York State and City statutes allowing the City to recover its expenditures on enforcement. The law says that when private citizens initiate a case, they are entitled to their share plus attorneys' fees and expenses. Similarly, New York City should exercise the provisions allowing it to recover its expenses as well. It seems only appropriate in a fraud matter if the government has to expend resources that it should be compensated for that and not be at a net loss. Doing so would be valuable from the standpoint that if DOI and the

Corporation Counsel ("Corp Counsel") are going to be involved in such cases, they should tap into a source of potential recovery for their related expenditures.

To some extent, the New York City FCA has been subsumed by the state FCA because the state FCA takes into account all governmental levels—state, county, town, city and village. That doesn't mean that the City law has outlived its usage. For one thing, the statute of limitations, by virtue of its earlier passage, reaches back further in time than the state law. And the existence of the act also provides a vehicle for the New York City government to cherry pick which cases in which it wishes to involve itself. Here are some examples. Let's say there is a significant municipal corruption case; you want Corp Counsel and DOI to retain the option of joining that case rather than being pushed to the side because it was filed elsewhere. Let's say there's a significant rip-off of the city government by corrupt contractors; again, you want Corp. Counsel and DOI to retain that option there as well.

So what type of recommended changes might we consider? When the New York City False Claims Act was passed in 2005, it was state of the art, but there have been a series of changes that have been made since to both the New York State and Federal False Claims Acts. With respect to the Federal act, there were the 2010 Fraud Enforcement and Recovery Act and the 2011 Patient Protection and Affordable Care Act amendments. But interestingly, we don't have to look any farther than New York State because the 2010 Fraud Enforcement and Recovery Act ("FERA") amendments in New York State created the most robust False Claims Act in the country—more so than any other state and, frankly, more so than the Federal law. Now people look to the New York State act as a model. The New York State FERA amendments made improvements in the areas of public disclosure, clarification of pleading standards, broader anti-retaliation provisions across industries (i.e. anti-blacklisting provisions), and also -- something particularly worthy of attention -- the lifting of the tax bar.

Typically, False Claims Acts, including New York City's, have excluded tax cases. New York State in 2010 lifted that bar, and that has changed the landscape. In New York State, a whistleblower may file a case alleging a violation of tax laws in New York State if the defendant meets designated income and damages thresholds. While there is no "tax bar" specifically preventing such actions under the City law, some courts in other jurisdictions have barred such actions absent specific enabling legislation. Tracking the language of the amended New York State False Claims Act would solve that potential problem, ensuring New York City's ability to recover tax dollars lost to tax evasion.[1]

New York State made several changes to the public disclosure bar, making it the most efficacious in the nation. Under the state act, whistleblower cases are barred if "substantially the same" allegations or transactions are publicly disclosed in proceedings involving the government; in Federal, New York State, or New York local government reports, hearings, audits, or investigations; or in the news media. In order for government reports to be considered "publicly disclosed," however, they must be broadly disseminated to the general public or on the public record; information obtained through Freedom of Information requests is not considered publicly disclosed. Additionally, information posted on the internet does not necessarily

[1] NYS FCA § 189(4)(a): Liability for Certain Acts. "This section *shall apply* to claims, records, or statements made under the tax law…" (Emphasis added).

constitute "news media." Most importantly, the government can override a defendant's motion to dismiss based on public disclosure. [2]

New York State also adopted the nation's strongest anti-retaliation provisions. The amended New York State False Claims Act extends the law's protections to current and former employees, as well as agents and contractors, and does not require that the person actually filed a False Claims Act lawsuit. The law protects against retaliatory actions by both employers *and* prospective employers, preventing companies from black-listing whistleblowers. Furthermore, whistleblowers may receive double back pay under the statute, in addition to other remedies.[3]

Over the years it has been very interesting being a private practitioner. When someone came to us before 2005 and said, "I have a case that involves New York City," we would tell them, "Well, there's no means to pursue that." Or if someone came to us before 2007, and said, "I have a case that involves New York State," we would say there's no means to pursue it. Now there are. I can tell you there are people who come and they want to pursue tax cases, so that is something that is real and worthy of your consideration.

I believe that the statute would be improved by giving relators and their counsel the right to proceed in declined cases, with the City retaining the right to move to dismiss. The fact of the matter is that it is probably less of an imperative now in New York City by virtue of the fact that you have the overlapping state statute, so if someone were to file simultaneous actions in New York State and New York City, they would likely retain the option to continue working the case from the state perspective, which would overlap with the City.

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[2] New York State False Claims Act, N.Y. State Fin. Law § 190(9)(b) (2010)("NYS FCA"): Civil Actions for False Claims. Certain Actions Barred. "(b) The court shall dismiss a qui tam action under this article, unless opposed by the state or an applicable local government, or unless the qui tam plaintiff is an original source of the information, if substantially the same allegations or transactions as alleged in the action were publicly disclosed:

(i) in a state or local government criminal, civil, or administrative hearing in which the state or a local government or its agent is a party;

(ii) in a federal, New York state or New York local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public; provided that such information shall not be deemed "publicly disclosed" in a report or investigation because it was disclosed or provided pursuant to article six of the public officers law, or under any other federal, state or local law, rule or program enabling the public to request, receive or view documents or information in the possession of public officials or public agencies;

(iii) in the news media, provided that such allegations or transactions are not "publicly disclosed" in the "news media" merely because information of allegations or transactions have been posted on the internet or on a computer network."

[3] NYS FCA, N.Y. State Fin. Law § 191(1) (2010) "1. Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop one or more violations of this article, shall be entitled to all relief necessary to make the employee, contractor or agent whole. Such relief shall include but not be limited to:

(a) an injunction to restrain continued discrimination;

(b) hiring, contracting or reinstatement to the position such person would have had but for the discrimination or to an equivalent position;

(c) reinstatement of full fringe benefits and seniority rights;

(d) payment of two times back pay, plus interest; and

(e) compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."

The Federal, state and city laws are not mutually exclusive. Rather, they overlap. So the best approach, both in terms of prudence and also efficacy, is to file across the board. Not only does that provide supplemental jurisdiction, but it also takes full advantage of the public/private partnership that these laws seek to engender. It allows for synergies to develop among the various governmental units that can work on these investigations and cases. One of the real problems existing in law enforcement, and more generally I think in government -- and in life for that matter -- is that not everyone plays well in the sandbox together. In that regard we are very fortunate in New York City. DOI in particular has been able to reach out and take full advantage of the Manhattan and other local district attorney's offices, the Southern District of New York, and the Eastern District of New York, and we have seen these really rich and powerful cases that have been developed with those overlapping resources. What we are seeing now is the ability to also have that type of relationship with the State AG. The State AG not only has its Medicaid Fraud Control Unit, but last year created a Taxpayer Protection Unit to specifically work on False Claims Act cases that are not Medicaid-related. The Securities and Exchange Commission is also becoming involved, as well as the Commodity Futures Trading Commission. So there are a lot of opportunities for the City and for private citizens to be working alongside each other and creating these very powerful teams.

I want to conclude by saying that I think this statute is a real point of pride. In addition to hopefully extending the legislation, I think everyone should take a moment just to compliment themselves and the City Council for the foresight to pass this law back in 2005. It is still valuable. It should be expanded. I think it would benefit by being conformed with the New York State FCA to take advantage of the legislative improvements that have developed over time. I want to thank the Committee again for the providing me with the opportunity to appear today and for taking upon yourselves a serious examination in determining whether and how best to extend this law.