Neil V. Getnick Remarks

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Good afternoon. I am Neil Getnick, and I am the managing partner of Getnick & Getnick, LLP, a law firm based in Manhattan with a whistleblower, anti-fraud, and business integrity practice. It is my pleasure and honor to be speaking at this year's National Nuclear Security Administration General Counsel Meeting.

As General Counsel for the NNSA's prime contractors, you are all tasked with an immense responsibility: to guide your organizations as they perform work for NNSA so that they adhere to applicable laws and regulations while doing so. Although this is part of any general counsel's job description, when put in the context of the NNSA's mission: to enhance national security through the military application of nuclear science, the importance of your organizations' acting ethically and legally could not be higher.

Today, I will offer my perspective on how approaching legal guidance from the lens of business-driven integrity rather than law-driven compliance can promote best practices and enhance an organization. I will then discuss the federal False Claims Act, a powerful law that can be used to combat fraud when internal safeguards against wrongdoing fail.

Law-Driven Compliance vs. Business-Driven Integrity

In my work, I have often found that a common problem among organizations is that they typically rely on "law-driven" compliance programs rather than "business-driven" integrity programs. To be sure, legal compliance is a baseline requirement for any organization. But law-driven programs may fall into the trap of seeking to avoid punishment by meeting the letter of the law without developing a deeply rooted culture of integrity. In many cases, law-driven programs are only grudgingly tolerated by executives and employees, and they often fail as a result.

By contrast, a business-driven integrity program is much more likely to prove effective because people from the top down (not just the legal department) embrace and promote it as essential to the long-term success of the enterprise. A business-driven program is viewed throughout the organization as a profit center and a competitive advantage, rather than a cost center or an "obstacle."

Organizations that are serious about developing and maintaining a culture of integrity and compliance do so from the top down as well as building from the bottom up. These organizations may naturally use such programs because they truly desire for employees at every level to get the message that senior leadership will not tolerate anything less than integrity and compliance. Organizations with such a culture know that it is the best defense against employees doing things that will get the organization in trouble.

So how does a true business-integrity program act as a profit center? At the most basic level, it prevents the organization from getting into trouble, and paying a significant monetary price, for wrongdoing if it gets caught. Beyond that, organizations can leverage their compliance programs to gain a competitive business advantage, as customers are increasingly looking to

purchase products from companies with a demonstrated track record of corporate responsibility. For institutions relying on federal funding, business integrity programs ensure that the organization will not get denied access to federal funds or disqualified from winning lucrative government contracts for wrongdoing. And on a macro-level, promoting widescale business integrity ensures that federal dollars go towards their intended purpose – in NNSA's case, ensuring our nation's safety – rather than being wasted on fraud and abuse.

When an organization has a true business-driven integrity program, it welcomes internal whistleblowers who report misconduct, vigorously investigates such reports, and shields whistleblowers from retaliation. Here, again, good ethics is good business. When whistleblowers are ignored and penalized, often their next stop is a public prosecutor or a private whistleblower attorney's office.

And that is when the False Claims Act comes into play.

The False Claims Act

The False Claims Act is a powerful tool for combatting fraud. Wrongdoers are subject to harsh penalties, including three times the government's damages; civil penalties up to approximately $27,000 for each false claim; and potential criminal liability. Whistleblowers are crucial to the law's efficacy: to date, the Department of Justice has recovered over $72 billion dollars from False Claims Act cases, with over $50 billion of that amount coming from whistleblower suits.

So what precisely is the False Claims Act? It is a federal statute, with over thirty state counterparts, that the government and private parties can use to file suit against those who are defrauding the government. When private parties file suit under the False Claims Act, they do so on behalf of the government in what is called a "qui tam" action.

Private parties who file qui tam actions – known as "relators" or "whistleblowers" – enter into a public / private partnership with the Government to pursue the case. This partnership enables private parties, their counsel, and the Government to combine resources and have the collective power to go up against large entities that could otherwise evade exposure and pursuit. For their efforts, whistleblowers are entitled to receive up to 30% of the recovery.

The Government may elect to intervene in the lawsuit or decline to do so. If it declines, then the law allows the whistleblower with private counsel to continue to pursue the case, unless the Government actively moves to dismiss, which happens only rarely.

Because of its significant penalties, the False Claims Act has numerous safeguards in place to ensure it is only used against those who commit serious, knowing fraud against the Government.

- First, there are stringent requirements for who can be a whistleblower: whistleblowers cannot rely on public information to bring a qui tam action unless they are the original source of that information; whistleblowers who are criminally convicted for the same wrongdoing they report are disqualified from an award; and whistleblowers who file a case based on the same facts as an existing case are not entitled to an award.

- Second, the Government can dismiss a False Claims Act case over a whistleblower's objection if it intervenes in the case and determines it does not have merit.

- Third, the defendant's wrongdoing must be material and knowing. Mere negligence does not suffice. This does not mean, however, that defendants must actively intend to

defraud the government to violate the False Claims Act. Instead, the Act broadly defines "knowingly" to include: "actual knowledge of the information"; acting in "reckless disregard of the truth or falsity of the information"; or acting in "deliberate ignorance of the truth or falsity of the information," sometimes referred to as "willful blindness." In other words, people cannot bury their head in the sand to ignore signs of fraud and then claim they didn't "know" about it to escape liability.

The False Claims Act also promotes self-reporting to the government. Companies can reduce their liability by one third if they self-report a fraud within thirty days of becoming aware of it and cooperate with any resulting Government investigation.

At the same time, Courts have consistently rejected efforts by would-be wrongdoers to render the law toothless. Three key Supreme Court decisions (including two from this year) demonstrate this:

- In *Universal Health Services v. United States ex rel. Escobar*, 579 U.S. 176 (2016), the Court unanimously held that defendants who knowingly fail to disclose noncompliance with a statutory, regulatory, or contractual requirement that is material to the Government's payment decision can be held liable under the False Claims Act. In so holding, the Court made clear that half-truths can be actionable misrepresentations.

- In *United States ex rel. Schutte v. Supervalu, Inc.*, 143 S.Ct. 1391 (2023), the Court unanimously upheld the False Claims Act's knowledge standard, rejecting a lower court's opinion that a defendant who knew it was acting illegally did not act "knowingly" if it

could demonstrate that a fictitious reasonable person could have thought its actions were legal. As a result, individuals and businesses cannot commit fraud and then come up with after-the-fact justifications that allow them to evade liability.

- In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023), the Court held that the government does not have an unfettered right to dismiss a qui tam action over the whistleblower's objection. Instead, the Government must intervene in the case, and courts should consider both the Government and whistleblower's interests in deciding whether to dismiss the case. In addition, the False Claims Act itself entitles whistleblowers to notice and a hearing on the government's motion. Although the Court noted that the Government's motion would be granted in most cases, the decision affirms that False Claims Act cases may not go away quietly. Instead, where the whistleblower presses the point, there will be a public accounting of the alleged wrongdoing.

Successful False Claims Act cases have ripple effects throughout entire industries. In the best-case scenario, when one company gets brought up, the others look up and often straighten up to avoid a similar fate in the future. In this way, such cases also eliminate a penalty for honesty that some companies suffer when competing against businesses willing to break the rules. Government contractors that engage in bid-rigging, kickbacks, illegal subcontracting, prevailing wage violations, submitting false time records, and other schemes can obtain an unfair competitive advantage over honest competitors when vying for government contracts. The False Claims Act is a great equalizer by reducing these frauds and leveling the playing field so that honest companies can compete successfully for government resources.

Conclusion

In the end, the overriding goal should be the reform of corrupt industries and markets, not just individual entities. That goal is directly linked with NNSA's mission to enhance our nation's security. Through combatting fraud and corruption, we ensure that the public fisc goes toward its intended purposes, thereby allowing our nation to thrive, rather than being wasted by fraud and abuse.

This reform can be achieved only by combining powerful business-driven integrity programs with effective law enforcement. Out of enlightened self-interest if nothing else, we should all support that combined effort enthusiastically.