TAF
THE FALSE CLAIMS ACT LEGAL CENTER
TAXPAYERS AGAINST FRAUD

SUMMARY OF
TESTIMONY OF
JAMES W. MOORMAN, PRESIDENT
TAXPAYERS AGAINST FRAUD
THE FALSE CLAIMS ACT LEGAL CENTER
Before The
SENATE SPECIAL COMMITTEE ON AGING
JULY 26, 2001

Mr. Chairman and Members of the Committee, my name is Jim Moorman and I am appearing today on behalf of Taxpayers Against Fraud, The False Claims Act Legal Center ("TAF"). Taxpayers Against Fraud is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the federal False Claims Act ("FCA") and its *qui tam* provisions. *Qui tam* is a legal mechanism that allows persons and entities with evidence of fraud involving federal programs or contracts to sue wrongdoers on behalf of the Government. The *qui tam* provisions include strong incentives both to report fraud against the Government and to participate in the resulting litigation.

The False Claims Act is the primary tool of the Federal Government for fighting healthcare fraud. The Civil Division and the U.S. Attorneys Offices of the Department of Justice, together with the Office of the Inspector General of the Department of Health and Human Services, have recovered billions of dollars in FCA health care fraud cases. Most of these cases have been initiated by whistleblowers as FCA *qui tam* cases. When a whistleblower reveals a fraudulent scheme to the government, this then permits the government to undertake an investigation, win back the money stolen, plus penalties, and to deploy several other tools that enhance the effectiveness of anti-fraud efforts.

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Many of the government's most fruitful FCA investigations are based on information received from private individuals (e.g., corporate whistleblowers or health program beneficiaries). Overall, *qui tam* actions have returned over $6 billion to the Federal Government since 1986, when the modern FCA was created by Amendments adopted that year. A very substantial share of these recoveries have come from perpetrators of health care fraud through FCA judgments. From September 30, 1986 through September 30, 2000, the government recovered $2.83 billion from defendants in health care related FCA cases. This figure does not include the $745 million settlement with Columbia/HCA in December of 2000, and other recent health-related settlement, which push the recovery number well past $3.5 billion. In 2000 80% of the government's civil fraud recoveries were from *qui tam* FCA cases.

There is evidence that the deterrent effect of the FCA is one of the significant causes in the noticeable tapering off of the rise in Medicare costs in recent years. FCA actions undoubtedly play a very large role in deterring fraud and saving the taxpayers money. FCA judgments change the attitude and actions of other providers, and encourage government efforts to correct systematic problems and thus create additional cost savings. The indirect savings of deterrence and government corrective activities are probably several times the amount recovered directly through case judgments and settlements. When direct FCA recoveries are combined with indirect cost savings attributable to the FCA, the taxpayers are receiving a very large benefit indeed.

Conclusion

The False Claims Act, and its *qui tam* provisions, are a vital component in any

meaningful effort to curtail and deter fraudulent overbilling to Medicare and Medicaid. The fraudulent schemes uncovered by whistleblowers have saved the government billions of dollars. The majority of honest health care providers have nothing to fear from the False Claims Act because the FCA does not punish mere mistakes. But there is an important minority of bad actors in the health care industry who must be deterred by vigorous enforcement of the FCA. It is TAF's position that the Justice Department and the OIG should be more, not less, to be responsive to whistleblowers. Justice should join more *qui tam* cases and make a stronger effort to work closely and cooperatively with the whistleblowers that bring them the bulk of their important health care fraud cases. In summary, I urge the Committee to continue the tradition established by Senator Grassley to encourage the government to work with whistleblowers to uncover fraud and protect the public fisc.

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I. Taxpayers Against Fraud

Taxpayers Against Fraud, The False Claims Act Legal Center ("TAF"), is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the federal False Claims Act ("FCA") and its *qui tam* provisions. *Qui tam* is a legal mechanism that allows persons and entities with evidence of fraud involving federal programs or contracts to sue the wrongdoer on behalf of the Government. The *qui tam* provisions include strong incentives both to report fraud against the Government and to participate in the resulting litigation.

Under the False Claims Act, 31 U.S.C. §§ 3729-3733, those who knowingly submit or cause the submission of false or fraudulent claims for payment of government funds are liable for three times the dollar amount that the Government is defrauded (i.e. treble damages) and civil penalties of $5,000 to $10,000 for each false or fraudulent claim. If the FCA suit is filed by a private party under the *qui tam* provisions, that party can receive between 15 and 30 percent of the total recovery. A *qui tam* suit initially

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remains under seal for at least 60 days during which the Department of Justice investigates and decide whether to join in the action.

In general, the False Claims Act covers fraud involving any federally funded contract or program, with the exception of tax fraud. While many *qui tam* actions in the late 1980s and early 1990s involved Department of Defense contracts, in recent years the majority of *qui tam* actions have been used to fight Medicare fraud and fraud against other federally funded health care programs. A broad array of scenarios can constitute FCA violations. Examples include the following: a contractor falsifies test results or other information regarding the quality or cost of products it sells to the Government; a health care provider bills Medicare for services that were not performed or were unnecessary; or a grant recipient charges the Government for costs not related to the grant.

Overall, *qui tam* actions have returned over $6 billion to the Federal Government since 1986, when the modern FCA was created by Amendments adopted that year.

TAF's mission is to support and promote the FCA. Established in 1986, TAF serves to:

(1) Inform and educate the general public, the legal community, government officials, the media, and other interested groups about the False Claims Act and its *qui tam* provisions;
(2) Contribute to understanding of the Act's nature, workings, and critical importance to the public interest;
(3) Vigorously defend against any attempts to repeal or weaken the Act;
(4) Facilitate meritorious *qui tam* suits;
(5) Advance public, legislative, and government support for *qui tam*;
(6) Document the public policy value and the intellectual and legal foundation of the Act in general and the *qui tam* provisions in particular.

As part of its public outreach, TAF promotes and disseminates information concerning the False Claims Act and *qui tam*. TAF publishes the *False Claims Act and*

Qui Tam Quarterly Review, which provides an overview of case decisions, settlements, and other developments under the Act. TAF maintains a comprehensive FCA library open to the public by appointment, and TAF has an educational presence on the Internet. In addition, TAF has established an information network to assist counsel in their efforts to provide effective representation to *qui tam* plaintiffs.

TAF also files *amicus* briefs on important legal and policy issues in FCA cases, writes articles about the Act and *qui tam,* and has provided testimony to Congress. On a regular basis, TAF responds to inquiries from journalists and government officials as well as the general public.

II. Historical Overview

The FCA dates back to the Civil War. Reacting to allegations of fraud and corruption by private contractors selling supplies to the Union Army, Congress enacted this legislation to stem the frauds perpetuated against the government. It became law at the height of the civil War in March of 1863 at the urging of President Lincoln, and has often been referred to as the "Lincoln Law."

The original legislation subjected violators of the Act to double damages and an award to the government of $2,000 for each false or fraudulent claim submitted. It also contained *qui tam* provisions that allowed private citizens to file suit on behalf of the government. *Qui tam* is the abbreviation for the phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" which translates as "who sues on behalf of the king, as well as for himself." These private citizens or relators as they were called, originally

received 50 percent of the recovery. Republican Senator Charles Grassley, a co-sponsor of the 1986 Amendments to the Act, described the history and purpose of the inclusion of the *qui tam* provisions in the original legislation:

> Included in the anti-fraud arsenal of the False Claims Act was a provision called *qui tam*. *Qui tam* is a concept that dates back to feudal times. It allows private citizens who know of fraud against the taxpayer to bring a lawsuit against the perpetuators. In other words, the citizen acts as a partner with the government. As an incentive, the citizen shares in any monetary recovery to the U.S. treasury.

In one of the most important early cases considering the FCA, *United States v. Griswold* (1885), a federal district court stated its view with regard to the desirability of the *qui tam* provisions:

> The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such

means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

In 1943, in the midst of the Second World War, congress amended the FCA again. The 1943 Amendments, unfortunately, erected substantial barriers to relators and the *qui tam* provisions of the FCA. As a consequence, the FCA fell into disuse.

However, in 1985 and 1986, there were numerous reports and publicity about widespread fraud against the government, especially in the area of defense contracting. The General Accounting Office, the Department of Defense and the Department of Justice produced various estimates of the cost of fraud to the American taxpayer — the highest approaching $50 billion per year. With the government seemingly unable to get inside information necessary to deal effectively with the problem, Congress saw the need to strengthen the FCA

In 1986, FCA Amendments were a bipartisan response to this "growing pervasiveness of fraud" in federal programs and procurement. The desire to strengthen the Act received broad support in Congress, and president Reagan signed the Act into law on October 27, 1986

Congress revitalized the *qui tam* provisions of the Act because it believed "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." Senator Grassley described the purpose of reinvigorating the *qui tam* provisions:

> S. 1562 arises from a realization that the government needs help – lots of help – to adequately protect taxpayer funds from growing and increasingly sophisticated fraud. In the face of our current federal debt crisis, it is more important than ever that we maintain an efficient, fair, and most of all, effective enforcement system to protect our federal dollars from fraud and abuse . . .The expanded *qui tam* provisions in this bill will serve to establish a solid partnership between public law enforcers and private taxpayers in the fight against fraud.

The 1986 amendments to the *qui tam* provisions of the FCA aimed to strengthen these provisions. They guaranteed a role for the private citizen even if the government intervenes and they also increased the percentage of recovery for the relator that was severely reduced by the 1943 Amendments. In actions in which the government intervenes, a relator may now recover 15 to 25 percent of the proceeds of the action or settlement. If the government does not intervene, the relator may recover from 25 to 30 percent. It also provides whistleblowers with protections in the form of a federal cause of action for relators who are discriminated against by their employers for participation or involvement in a *qui tam* action.

The 1986 Amendments also updated other provisions of the Act. It clarified the level of intent necessary to establish a violation of the FCA. It made clear that one does not have to show specific intent to defraud the government. If one submits a false or fraudulent claim to the government with actual knowledge of the information, or acts in deliberate ignorance of the information, or acts in reckless disregard of the truth of

information, then one may be liable under the Act. It also established the burden of proof by which the government must prove its case as a "preponderance of the evidence." One very important aspect of the burden of proof is that mere mistakes are not a basis of liability under the FCA. Thus, those providers afflicted only with billing errors have no grounds for concern about the FCA.

III. The False Claims Act Role In Efforts to Suppress Fraud Against Health Care Programs

The False Claims Act is the primary tool of the Federal Government for fighting healthcare fraud. The Civil Division and the U.S. Attorneys Offices of the Department of Justice, together with the Office of the Inspector General of the Department of Health and Human Services, have recovered billions of dollars in FCA health care fraud cases. Most of these cases have been initiated by whistleblowers as FCA *qui tam* cases. Indeed, most FCA cases involve collaborative efforts of whistleblowers and government agencies in investigations, information sharing, litigation, and settlement activities.

Many of the government's most fruitful FCA investigations are based on information received from private individuals (e.g., corporate whistleblowers or health program beneficiaries). Following the collection of information from these individuals, the agencies typically uncover additional evidence of fraud through audits and investigations. The bulk of government' FCA investigations in the health care area are done by HHS/OIG. The cases are prosecuted by one of the seventy or so attorneys in the Civil Divisions or by one of the Justice Department's 94 U.S. Attorneys Offices. In most cases, where the government joins a *qui tam* case, there is a settlement. When

whistleblowers' cases are not joined by the government, however, whistleblowers are frequently required to go to trial.

IV. False Claims Cases Have A Major Deterrent Effect on Health Care Fraud

The FCA lies at the center of efforts to curb fraud against government health care programs. When a whistleblower reveals a fraudulent scheme to the government, this permits the government to undertake an investigation, to win back the money stolen, plus penalties, and to deploy several tools that enhance the effectiveness of anti-fraud efforts.

First: FCA cases facilitate criminal prosecution, where appropriate

Criminal investigations often derive from and benefit from civil FCA investigations and cases, as fraudulent activities can implicate both civil and criminal liability. As a result, FCA settlements with corporations often include additional criminal fines and/or criminal prosecutions of individuals (many of whom ultimately go to jail). As in most white-collar areas, criminal liability is a significant deterrent.

Second: FCA cases facilitate Corporate Integrity Agreements ("CIA's")

Most government settlements of FCA cases in the health care field now require healthcare providers to adopt Corporate Integrity Agreements, or CIA's. In general, CIA's mandate strict corporate compliance programs and extensive reporting requirements. CIA's, are typically monitored for five years, are tailored to each provider's situation and activities, and usually require a compliance officer, written standards and policies, a comprehensive employee-training program, audits of billings to federal health care programs, a confidential disclosure program, restrictions on employment of ineligible persons, and reports to the OIG.

As direct outgrowths of FCA investigations and case settlements, CIA's should be instrumental in deterring corporate fraud. The strict oversight inherent in CIA's should work to enhance compliance by the providers under such agreements. The imposition of CIA's should also have a spillover effect on other providers now that the details of CIA's have been widely publicized.

Third: The settlement of FCA cases against some nursing homes have resulted in greatly improved quality of care. This Committee is well known for its strong bipartisan concern about the quality of nursing home care purchased by Medicare and Medicaid with federal taxpayer dollars. This concern has been a priority of some United States Attorneys Offices, as well as the Office of Inspector General. Notably, the Eastern District of Pennsylvania, using the False Claims Act, has resolved a number of nursing home quality of care cases by negotiating settlements designed to improve the quality of the services for which Medicare and Medicaid are paying. For example, in a case settled last November involving federal payments to a nursing facility for the provision of allegedly inadequate nutrition and wound care, the nursing facility agreed (1) to spend $100,000 (from non-federal funds) over 2 years to improve the quality of life for residents, (2) to implement a weight monitoring program, (3) to adhere to clinical guidelines in the treatment of pressure ulcers, and (4) to retain at its expense a third-party monitor selected by the government to oversee its compliance with these requirements. Thus, as a result an FCA settlement, the quality of care at this facility will improve dramatically, to the benefit of federal taxpayers and the facility's patients.

Fourth: The Federal Government has recovered substantial money from perpetrators of health care fraud through FCA judgments. From September 30, 1986

through September 30, 2000, the government recovered $2.83 billion from defendants in health care related FCA cases. This figure does not include the $745 million settlement with Columbia/HCA in December of 2000, and other recent health-related settlements, which push the recovery number well past $3.5 billion.

These recoveries have virtually all come since 1993. From 1986 through 1992, health care FCA recoveries probably only totaled about $50 million. Since 1997, however, health care related recoveries have been particularly significant, representing the majority of FCA recoveries. Of particular importance are *qui tam* FCA cases initiated by whistleblowers. Since 1986, 48 percent of all FCA cases filed by whistleblowers have been healthcare cases. (32% have been defense contractor cases). *Qui tam* FCA cases now account for the overwhelming majority of FCA recoveries. Thus, in 2000 80% of the government's civil fraud recoveries were from *qui tam* FCA cases

Obviously, the large dollar amount of FCA judgments, coupled with ancillary CIA's and criminal liability, is having a powerful deterrent effect on the billing culture in the health care area. There is evidence that this effect is one of the significant causes in the noticeable tapering off of the rise in Medicare costs in recent years. The impact of FCA actions to increase compliance and deter fraud beyond actual monetary recoveries would be difficult to quantify. Nevertheless, FCA actions undoubtedly play a very large role in deterring fraud and saving the taxpayers money. FCA judgments change the attitude and actions of other providers, and encourage government efforts to correct systematic problems and thus create additional cost savings. Upon learning of fraud schemes revealed by whistleblowers, the government takes many initiatives to close the loopholes or government practices which facilitated fraud. The indirect savings of

deterrence and government corrective activities are probably several times the amounts recovered directly in case judgments and settlements. When direct recoveries are combined with indirect cost savings attributable to FCA actions, the taxpayers are receiving a very large benefit from the FCA indeed.

V. The Nature of Fraud in the Health Care Field

Because much has been said about the complexity of Medicare regulations, I believe it would be useful to invite the Committee's attention to the simplicity of health care fraud. More often than not, you don't have to understand much about regulations to understand the fraudulent schemes involved. A few examples will suffice.

- Corporate officials told their employees to charge twice the nursing hours to Medicare patients as to all others. To make this happens, "1s" on nurses' logs were altered to "4s" and "3s" to "8s".
- A kidney dialysis service company paid doctors to prescribe an intravenous dietary supplement to patients on dialysis, which it then charged Medicare, even though the supplement is medically unnecessary 85% of the time. (This case is an example of why the anti-kickback statute is important and illustrate how it meshes with the FCA to suppress fraud).
- A medical lab manipulated doctors into ordering blood tests they didn't want or need, then charged Medicare for the tests.
- A hospital charged Medicare for all its emergency room patients at the high end of a system of five codes graded for the severity of the emergency.
- A doctor charged for visits and consultations that never occurred.

In these, and many other schemes where dishonest health care providers have fraudulently deprived the taxpayers of large amounts of money, the basic idea behind the fraud is simple. Health care providers engaged in cheating frequently cloak their fraud in a cloud of confusion, citing bureaucratic rules, and claiming mistakes. But if these are just mistakes, you would think they would go both ways: against providers as often as against the government. Why is it that almost all the so-called mistakes cost taxpayers money? The truth is, we have been plagued by a cottage industry of consultants that have taught many in the health care industry how to game the Medicare system to increase cash flow at taxpayers expense. Far from being flummoxed by complex rules, they have learned the rules intimately for the purpose of manipulating them.

Conclusion

The False Claims Act, and its *qui tam* provisions, are a vital component in any meaningful effort to curtail and deter fraudulent overbilling to Medicare and Medicaid. The fraudulent schemes uncovered by whistleblowers have saved the government billions of dollars. The majority of honest health care providers have nothing to fear from the False Claims Act because the FCA does not punish mere mistakes. But there is an important minority of bad actors in health care who must be deterred by vigorous enforcement of the FCA. It is TAF's position that the Justice Department and the OIG should do more, not less, to be responsive to whistleblowers. The Justice should join more cases and make a stronger effort to work closely and cooperatively with the whistleblowers that bring them the bulk of their important health care fraud cases. In summary, I urge the Committee to

continue the tradition established by Senator Grassley to encourage the government to work with whistleblowers to uncover fraud and protect the public fisc.

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The False Claims Act

- **History**
  - Enacted in 1863 at President Lincoln's request to fight fraud against the Union Army
  - Fell into disuse after a 1943 Amendment
  - Revived by the 1986 Amendments sponsored by Senator Grassley and Congressman Berman and signed into law by Ronald Reagan

- **Accomplishments**
  - $5 Billion recovered since 1986 Amendment
  - $1.5 Billion recovered in Fiscal Year 2000

- **How it works**
  - Whistleblowers (called "relators") file suit under seal, give their evidence to the Justice Department
  - DoJ and defrauded Agency investigate; DoJ may intervene and take over the case.
  - If the case is won, the defendant is liable for a civil penalty of $5,000 to $10,000 per false claim, plus treble the amount of the damages to the Federal Government
  - Whistleblowers are awarded from 15 to 30% of recoveries (average is 16.2%)

- **Areas of significant Activity**
  - Medicare, Medicaid and other health care fraud (60% of recoveries since 1986)
  - Defense contractor Fraud (about 30% of recoveries since 1986)

- **Types of Medicare Fraud Uncovered by Whistleblowers**
  - Billing Medicare for unallowable costs by disguising them as allowable costs
  - Billing Medicare for laboratory tests not ordered by physicians
  - Billing Medicare for services more expensive than those actually provided ("upcoding")

- **Excluded from the Act**
  - Tax Fraud
  - Actions by whistleblowers based upon allegations of fraud disclosed in the news media or in Congressional or administrative reports, hearings, audits or investigations, unless the whistleblower is an "original source" (as defined by the statute)

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Taxpayers Against Fraud

The False Claims Act Legal Center

Mission

- To combat fraud against the Federal Government through the use of the False Claims Act
- To facilitate whistleblowers' use of the qui tam provisions of the False Claims Act
- To defend the False Claims Act against weakening amendments
- To promote public understanding of the False Claims Act

Activities

- Publishes reports and other matereials about the False Claims Act
- Tracks litigation involving the False Claims Act
- Maintains a library of False Claims Act materials and cases
- Provides technical, litigation, and other assistance to whistleblowers' attorneys

About TAF

- A non-profit public interest organization (501 (c)(4) tax exempt status)
- James W. Moorman, President and Chief Executive officer
- For further information, see TAF's website www.taf.org

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JAMES MOORMAN

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Mr. Moorman was appointed to head Taxpayers Against Fraud ("TAF") in January of 2000. TAF was founded in 1986 shortly after Congress enacted amendments To strengthen the False Claims Act. The Act enables ordinary citizens to file suits Concerning fraud and abuse against Medicare and other Federal programs, and to Share in the recovery of public funds. These citizens are generally considered as "whistleblowers." TAF provides information and assistance to whistleblowers and their lawyers. TAF also seeks to educate the public and the legal community about the Act, documenting public policy values of the False Claims Act approach and building a constituency to support the law.

As President and CEO of TAF, Mr. Moorman is responsible for the organization's various programs, including government affairs, press relations, publications, and policy studies, all of which relate to the promotion and well-being of the FCA. He is also responsible for fundraising and the various activities of TAF directed to the support of whistleblowers and their attorneys.

Prior to assuming his duties at TAF, Mr. Moorman was a partner in the Washington, D.C. office of Cadwalader, Wickersham and Taft. At Cadwalader, Mr. Moorman served as the head of the firms environmental law practice, with a widely varied practice of national scope. Mr. Moorman's matters literally encompassed the nation from Northern Alaska to Southern Florida.

Prior to his service at Cadwalader, Mr. Moorman served as an Assistant Attorney General of the United States Department of Justice in charge of the Land and Natural Resources Division (1977-1980). In that capacity, Mr. Moorman was responsible for the division's 26,000 plus cases on behalf of EPA, the Departments of the Interior, Agriculture, Energy, and Army, and virtually every other department and agency of the United States Government.

At an earlier period in his career Mr. Moorman served as a Staff Attorney in the General Litigation Section of the Lands And Natural Resources Division (1966-1969). At that time Mr. Moorman's practice emphasized water resource cases, mostly in California, Colorado, and Nevada.

From the years 1971-1977 Mr. Moorman served as Staff Attorney and Executive Director of the Sierra Club Legal Defense Fund in San Francisco and from 1969-1971 as a Staff Attorney at the Center for Law and Social Policy in Washington, D.C. At SCLDF and the Center Mr. Moorman was involved in a number of landmark case, including one that led to the ban of DDT.

Mr. Moorman attended Duke University as an undergraduate and as a law student. In law school he served on the Board of Editors of the Duke Law Journal. After graduating from Duke School of Law in 1962, Mr. Moorman served a brief term in the Army, then three years at the New York firm of Davis, Polk, Wardwell, Sunderland & Kiendel (1993-1995).