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Grassley Expresses Concern Over Health Care Fraud Enforcement

WASHINGTON – Sen. Chuck Grassley, ranking member of the Committee on Finance, today expressed concern to the Department of Justice and the Department of Health and Human Services over whether the government is softening its approach to prosecuting health care kickback and bribery cases under the *False Claims Act*. Grassley is the Senate author of the 1986 whistleblower amendments to the *False Claims Act*.

Grassley today wrote to Robert D. McCallum, Jr., Assistant Attorney General, Civil Division, Department of Justice, and Tommy G. Thompson, Secretary, Department of Health and Human Services. The text of his letters and background on the False Claims Act follow.

June 25, 2002

The Honorable Robert D. McCallum, Jr.
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Dear Assistant Attorney General McCallum:

Thank you for the March 22, 2002, response by you and Mr. Scully to my questions about whether the Centers for Medicare and Medicaid Services (CMS) is cooperating with the Department of Justice (DOJ) in its False Claims Act (FCA) prosecutions.

As the Senate author of the 1986 amendments to the FCA, I believe it is critical that the FCA is used effectively to combat waste of taxpayers' funds. The FCA ferrets out wasteful government spending by rewarding whistleblowers – the people on the inside who are in the best position to catch fraud and abuse.

The FCA is an extremely effective weapon in the war against wasteful spending in Medicare. In part because of the FCA, the percentage of improper payments in the Medicare program is on the decline. Despite this positive trend, Medicare still had a staggering \$12.1 billion in estimated

improper payments in Fiscal Year 2001 (approximately 6.3 percent of all payments). Clearly, while progress has been made in fighting fraud and waste, much more work remains to be done. It is also important to remember that fighting wasteful Medicare spending helps seniors who are burdened by medical costs. For example, a recent FCA case highlighted that seniors were paying more for drugs because of kickbacks that were affecting doctors' decisions regarding prescriptions.

In these efforts to combat fraud through FCA cases, it is vital that CMS provide full and complete cooperation to DOJ. Too often in the past I have seen government agencies place a premium on friendly relationships with their contractors over and above the need to protect the taxpayers' money. This misplaced priority has undermined efforts by DOJ to enforce the FCA and protect the public fisc. It is unacceptable that such a situation should occur in regards to Medicare fraud. It is your responsibility to ensure that the public is given the top priority in enforcing the FCA.

Recent comments by CMS Administrator Thomas Scully have given me great concern that there is an active, ongoing effort under way to change or modify FCA enforcement policy that in my view could significantly undermine the FCA as it relates to combating kickbacks and bribery.

In testimony before the Health Subcommittee of the Senate Finance Committee on March 7, 2002, Mr. Scully said that DOJ's prosecution decisions regarding a specific FCA case were "beyond comprehension." Based on subsequent conversations with my staff, it became clear that Mr. Scully's comments were directed to the government's wide-ranging case against HCA, Inc. (HCA) (formerly Columbia HCA). That case includes allegations that HCA submitted false claims deriving from a kickback scheme. In further discussions with Finance Committee staff, Mr. Scully expressed general criticisms of the federal anti-kickback law and its application under the FCA.

Your joint letter of March 22 states that CMS is cooperating with DOJ regarding the HCA case but given the matter is pending you stated that you could not provide details to my questions. However, my concerns go beyond the case against HCA to general policy matters regarding kickback schemes and the FCA. My primary concern is that there be no policy changes at DOJ or HHS that could weaken or undermine efforts to police and punish kickbacks under the FCA. The government cannot turn a blind eye to kickbacks and bribery.

In light of these concerns, I appreciate your independent response to the following questions:

1. Please provide DOJ's current position regarding the application of the FCA to providers alleged to have engaged in kickback schemes.
2. Does the current position represent a change in position from four years ago? If so, please explain in detail and provide all written documentation that supported this change.
3. Within the last two years, has any HHS employee, with the exception of career staff at the OIG, discussed a change to or modification of FCA enforcement policy with respect to kickback allegations, either in general or in a specific case? If in an ongoing case, please provide a redacted copy of all written materials in the case file, and maintain unredacted copies for forwarding to my office as soon as the case is settled or resolved.
4. Please list all DOJ and HHS employees who have been involved in litigating the case

against HCA, including those employees who have been involved at the line attorney, supervisory and policy levels. Please note those individuals that are involved in analyzing or prosecuting the kickback allegations in the case. In addition, has any political appointee contacted you regarding the FCA's application to alleged anti-kickback violations in general or the case against HCA in particular? If so, please detail these contacts.

5. Please list all DOJ and HHS employees in attendance at the meeting that was scheduled to take place on the afternoon of March 7th with Mr. Scully that he noted in his March 7 hearing testimony. Please provide the list of topics discussed at that meeting as well as any notes that were taken at the meeting.
6. Please list all FCA cases involving alleged violations of the federal anti-kickback law that DOJ has either joined, or declined to join, within the last four years, the declination or intervention date, and the reasons for that decision. Please note any cases that HHS asked DOJ to join or not join. Please provide all court submissions (or relevant portions thereof) by DOJ (including U.S. Attorneys) within the last 12 months that address the FCA's application to violations of the federal anti-kickback law.
7. It is my understanding that there has been a request to U.S. Attorneys to list all pending FCA cases in their districts that involve kickbacks. Please advise as to whether this is the case, and if so, why this is being done.

Finally, I ask that you continue to keep the Finance Committee staff informed on an ongoing basis of any policy considerations or other deliberations that, if enacted, could undermine the effectiveness of the FCA. The FCA is of great importance to me and I was given personal assurances by Attorney General Ashcroft on this matter prior to his nomination – assurances that I expect to be honored.

Please provide this information within 14 days. Thank you for your time and cooperation on this very important matter. If you have any questions, please contact Mr. Dean Zerbe or Mr. Ted Totman of my staff at 224-5315.

Cordially yours,

Charles E. Grassley
Ranking Member

cc: Attorney General Ashcroft

June 25, 2002

The Honorable Tommy G. Thompson
Secretary
Department of Health and Human Services
200 Independence Ave, SW
Washington, DC 20201

Dear Mr. Secretary:

I am writing to you regarding a matter of great concern to me – the Department of Health and Human Services' (HHS) policy as to the False Claims Act (FCA) and the policing of kickbacks and bribery.

As the Senate author of the 1986 amendments to the FCA, I believe it is critical that the FCA is used effectively to combat waste of taxpayers' funds. The FCA ferrets out wasteful spending by rewarding whistleblowers – the people on the inside who are in the best position to catch fraud and abuse.

The FCA is an extremely effective weapon in the war against wasteful spending in Medicare. In part because of the FCA, the percentage of improper payments in the Medicare program is on the decline. Despite this positive trend, Medicare still had a staggering \$12.1 billion in estimated improper payments in Fiscal Year 2001 (approximately 6.3 percent of all payments). Clearly, while progress has been made in fighting fraud and waste, much more work remains to be done. It is also important to remember that fighting wasteful Medicare spending helps seniors who are burdened by medical costs. For example, a recent FCA case highlighted that seniors were paying more for drugs because of kickbacks that were affecting doctors' decisions regarding prescriptions.

In these efforts to combat fraud through FCA cases, it is vital that HHS and all its affiliated agencies, including, among others, the Centers for Medicare and Medicaid Services (CMS) and the Office of Inspector General (OIG) provide full and complete cooperation to the Department of Justice (DOJ). Too often in the past I have seen government agencies place a premium on friendly relationships with their contractors over and above the need to protect the taxpayers' money. This misplaced priority has undermined efforts by DOJ to enforce the FCA and protect the public fisc. It is unacceptable that such a situation should occur in regards to Medicare fraud. It is your responsibility to ensure that the public is given the top priority in enforcing the FCA.

Recent comments by CMS Administrator Thomas Scully have given me great concern that there is an active, ongoing effort under way to change or modify FCA enforcement policy that in my view could significantly undermine the FCA as it relates to combating kickbacks and bribery.

In testimony before the Health Subcommittee of the Senate Finance Committee on March 7, 2002, Mr. Scully said that DOJ's prosecution decisions regarding a specific FCA case were "beyond comprehension." Based on subsequent conversations with my staff, it became clear that Mr. Scully's comments were directed to the government's wide-ranging case against HCA, Inc. (HCA) (formerly Columbia HCA). That case includes allegations that HCA submitted false claims deriving from a kickback scheme. In further discussions with Finance Committee staff, Mr. Scully expressed general criticisms of the federal anti-kickback law and its application under the FCA.

Shortly after the hearing, I wrote to Mr. Scully expressing my concern about his comments

and received a March 22, 2002 reply from both he and Assistant Attorney General Robert McCallum that was heavy on generalities and platitudes but light on substance and answers. This is unacceptable. My interests go beyond the case against HCA to general policy matters regarding kickback schemes and the FCA. My primary concern is that there be no policy changes at DOJ or HHS that could weaken or undermine efforts to police and punish kickbacks under the FCA. The government cannot turn a blind eye to kickbacks and bribery.

I. POLICY

In order to provide a more complete picture concerning this matter, I ask that you please respond to the following:

1. Provide your department's current position regarding the application of the FCA to providers alleged to have engaged in kickback schemes.
2. Does the current position represent a change in position from four years ago? If so, please explain in detail and provide all documentation that supported this change.
3. Within the last two years, has any HHS employee, with the exception of career staff at the OIG, discussed a change to or modification of FCA enforcement policy with respect to kickback allegations, either in general or in a specific case? If in an ongoing case, please provide a redacted copy of all written materials in the case file, and maintain unredacted copies for forwarding to my office as soon as the case is settled or resolved.
4. With the exception of career staff at the OIG, list all HHS employees (name, grade level, title and agency, including political appointees) that have been substantively involved in FCA litigation in the past four years. Please note any employees that are now or have been particularly involved in FCA cases that contain kickback allegations, either as policy drafters, cost report reviewers, analysts or technical staff, and/or as witnesses, deponents, declarants, affiants, etc. in court. For all staff listed, please note any that have been transferred, promoted, demoted or otherwise removed or reassigned from their position during the past four years.

II. ETHICS

I would also like to bring to your attention a related matter. At the March 7, 2002, hearing, Mr. Scully stated that he had "... no knowledge of what is going on in HCA and Columbia."

In light of his time at the Federation of American Hospitals, of which HCA is a member, Mr. Scully himself recognized the need to distance himself from HCA matters. When I asked him about CMS' level of cooperation on the HCA case at the March hearing, he said: "I am not recused from Columbia HCA issues, believe it or not, but I did run the trade association, of which they are members. So, I generally do not get involved in that specific issue at all and leave it to my staff." Given the President's desire to have an administration that conducts itself in a highly ethical manner, it is certainly appropriate that Mr. Scully should distance himself from discussions that would bear directly on the fortunes of HCA.

However, to ensure even fuller public confidence in this matter, please fulfill the following requests:

1. Has Mr. Scully had any conversations or communications with HHS or DOJ officials regarding kickbacks, their application under the FCA, or the case against HCA?
2. List all department employees who have participated in litigating the case against HCA, including those employees who have been involved at supervisory, policy and technical levels, including all political appointees. Provide name, title, grade level and position, and note any employees that have been particularly involved in the case's kickback allegations. Also, note any employees involved in the case against HCA that have been transferred, promoted, demoted or otherwise removed or reassigned from their position during the past four years.
3. Make the individuals listed in I.4 and II.1 above available for interview by Finance Committee staff, the General Accounting Office, and the Department of Health and Human Services Inspector General for the limited purpose of resolving the above concerns.
4. Designate a member of your staff to keep the Finance Committee informed on an ongoing basis of any policy considerations or other matters that have the potential to undermine the effectiveness of the FCA.

Before your confirmation, you assured me that you would do nothing to undermine or in any way jeopardize full enforcement of the FCA. I hope and expect that you will continue to honor these commitments.

Thank you for your time and courtesy on these issues. I request that you please respond within 14 days. If you have any questions, please contact Mr. Dean Zerbe or Mr. Ted Totman of my staff at 224-5315.

Cordially yours,

Charles E. Grassley
Ranking Member

cc: Robert McCallum, Jr.
Assistant Attorney General, Civil Division

Facts on the False Claims Act

- The False Claims Act (FCA), also known as “Lincoln’s Law,” dates back to the Civil War. It was intended to deter profiteers from selling the Union Army shoddy supplies at inflated prices. The original law included so-called *qui tam* provisions that allowed whistle blowers to sue those who defrauded the government and receive 50 percent of any recovery from the defendant.

- In 1986, Senator Grassley authored new amendments to the FCA that strengthened incentives and protections for whistle blowers who expose fraud and abuse by federal contractors, including health care providers. In general, the FCA covers fraud involving any federally funded contract or program, with the exception of tax fraud.
- A broad array of scenarios can constitute FCA violations. For example, a health care provider bills Medicare and Medicaid for services that were not provided, were not necessary, or were provided pursuant to an illegal bribe or kickback scheme. Violators of the FCA are liable for three times the dollar amount that the government is defrauded and civil penalties of up to \$5,000 to \$10,000 for each false claim.
- According to September 2001 Justice Department statistics, the government has recovered \$5.2 billion from 3,623 cases brought by whistle blowers under the FCA since 1986. Of that total, \$2.8 billion came from cases against health care providers.

Facts on the Federal Anti-Kickback Law

- On the books since 1972, the federal anti-kickback law's main purpose is to protect patients and federal health care programs, like Medicare and Medicaid, from fraud and abuse by cutting down on the corrupting influence of money on health care decision making.
- The law is straightforward but broad. It states that anyone who knowingly and willfully receives or pays anything of value to influence the referral of federal health care program business can be held accountable for a felony. Regulatory "safe harbors" immunize certain practices from prosecution. Violations of the law are punishable by up to 5 years in prison, criminal fines of up to \$25,000, administrative civil money penalties of up to \$50,000, and exclusion from participation in federal health care programs.

Anti-Kickback Violations Can Be False Claims Act Violations

- Some federal district courts have concluded that claims for reimbursement deriving from a kickback scheme are false claims, and thus are actionable under the FCA. Others, while not specifically addressing the same question, have leaned against recognizing this type of claim. Notwithstanding this, violations of the anti-kickback law today remain subject to both direct criminal prosecution, or to civil enforcement actions brought by the Department of Health and Human Services Office of Inspector General under their statutory authority, or by whistleblowers under the FCA.