Testimony of Tristram J. Coffin Regarding the Vermont False Claims Act, H. 120

I am very happy to be here today. Thank you for the invitation. Let me say at the outset that our firm, Downs Rachlin Martin, represents a number of health care and business organizations who could be affected by this legislation. However, I am not representing them here today.

I was asked by our firm to come and share with you some perspectives I have on this legislation. I worked with the federal False Claims Act for many years as a line federal prosecutor and as U.S. Attorney, and I do have some thoughts about this bill which would establish a Vermont state False Claims Act.

Fundamentally, let me say that I believe it is a good thing that Vermont adopts a version of the False Claims Act. Particularly with the incentives established by the Deficit Reduction Act of 2005, Vermont can receive a 10% boost in its Medicaid False Claims Act recoveries if it enacts its own law and proceeds under it.

The federal law has been a strong tool to recover money for the federal Treasury from government contractors who defraud the government. It has recovered billions of dollars, including over 5 billion last year alone.

The U.S. Attorney's Office and the Vermont Attorney General's Office have had a successful partnership for many years working on healthcare fraud matters. The U.S. Attorney's Office has enjoyed an excellent working relationship with the Medicaid Fraud and Abuse Unit, and the Attorney General's Office more generally, and have worked together successfully on a number of cases that have recovered significant funds for the taxpayers.

The basic structure of the proposed state False Claims Act in H. 120 closely tracks the primary provisions of the Federal False Claims Act, which it needs to do to pass muster under the federal law that allows for an increased share of Medicaid recoveries. These are:

-- Triple damages

-- penalties of up to $11,000 per claim

-- a qui tam provision permitting private citizens to bring suit

-- the requirement that relators file these suits under seal first and present them to the Attorney General's Office so it can decide whether or not to intervene in the suit.

But I do want to sound a couple of cautionary notes and also suggest a few modest changes to the bill as proposed.

First, while the federal False Claims Act has been a valuable tool both outside of Vermont and within, it is not completely clear that expansion of this to the State will be without some negative repercussions.

The federal False Claims Act establishes very serious penalties for entities that violate it: Triple damages, penalties of up to $11,000 per claim. It has proven to be a tool powerful enough to extract multi-hundred-million and even multi-billion dollar settlements from huge defense contracting, pharmaceutical and health care corporations for the benefit of the taxpayers. With enactment of the state version of the False Claims Act, these same tools can be deployed against entities that are much smaller and far less well-financed.

The penalty provisions in particular can be onerous. Sometimes these claims for payment are few in number but quite large in the amount of money presented in the claim (say, a bridge or jet aircraft engine), sometimes they are very small in the amount of money per claim but quite large in number. (say, for a routine laboratory test). So for a company that submits hundreds of small claims for payment, the potential penalties if they are found to be false, can mount into the millions when the total value of the money involved is far less, perhaps even under a hundred thousand. And the regulatory framework in which these companies operate, and of which they are charged with knowledge, is increasingly more complex.

Recipients of federal money in Vermont tend to be fairly large in comparison to recipients of state dollars. But even so, at the U.S. Attorney's Office, we would often find ourselves dealing with cases where the federal False Claims Act was just to severe a consequence to use for the nature of the violation. Many recipients of state moneys in Vermont are significantly smaller than entities receiving federal funds, and receive less funds. But the size of the penalty proposed in the new state law would be the same.

While, on balance, I still think this is a good law to adopt, it will require consistent application of prosecutorial discretion to ensure that the substantial penalty structure does not prove too onerous for companies accused of making false claims.

This issue is made further complicated because it is not always the Attorney General of the State of Vermont, who typically uses sound discretion in my experience, who may be making the decision on what cases to bring or not bring. Instead, under the so-called qui tam provision of this law, private citizens, acting as whistleblowers, can bring these suits and pursue them to trial even if the State of Vermont does not think they are worthy of joining. These can be very costly suits to defend, and may help in the economic development of the legal profession a good bit.

So, there are some risks with adopting this law here, but on balance, I believe it is a good thing to do, especially since Vermont will receive a 10% percent increase in the amount of funds it will receive for Medicaid recoveries if it creates its own statute.

I do have a few relatively minor changes to the bill that I would like to suggest that I think would improve it:

<u>Voluntary Disclosure</u>

First, the federal law contains a provision known as the voluntary disclosure provision, 31 U.S.C. § 3729(a)(2), that the proposed state law adopts in part, at § 4302(d), but with one fairly important difference. The federal voluntary disclosure provision permits companies who discover False Claims Act violations before they become aware of an investigation into them to come forward and voluntarily disclose them to the government. Under the federal law, if

companies do this, they are subject only to at least double damages and no False Claims Act penalties – those $11,000 per claim penalties that can mount so fast. The model state law proposed by the Taxpayer's Against Fraud contains essentially the same voluntary disclosure provision as the federal law – double damages and no penalties if a contractor voluntarily discloses false claims violations prior to knowledge of an investigation.

H.120 includes a voluntary disclosure provision, see § 4302(d), but it does not preclude penalties from being assessed if a company comes forward. This goes beyond what federal law and the Taxpayers Against Fraud model state law do. It is not required by the Deficit Reduction Act for Vermont to receive the 10% boost in Medicaid recoveries. Moreover, it threatens to undermine the effectiveness of the voluntary disclosure provision by making companies potentially liable for massive penalties if they turn themselves in. There is not much incentive to self-disclose as the bill is written now, especially where (as may often be the case in state Medicaid recovery actions) the individual claims are not likely to be for costly items and the penalty provisions are what will tend to drive the liability. The voluntary disclosure provisions have worked well in the federal law, and even the Taxpayers Against Fraud bill does not go this far.

Administrative process

The bill also provides that the remedies and penalties can be pursued through an alternative administrative action rather than a court proceeding. See § 4305. I am unclear what this means precislely and would encourage the committee to examine this language more closely. Does it mean that the State can pursue the imposition of these potentially very harsh penalties in something other than a full court proceeding? If it does, then citizens or businesses targeted for this action may justifiably expect to have the full panoply of protections of our judicial system – discovery, trial by jury, right of appeal, fairness protections like the rules of evidence, before being subjected with potentially huge and ruinous liability. This provision is not required by the Deficit Reduction Act for the Vermont law to qualify for the Medicaid boost.

Joint and Several Liability

H. 120 imposes joint and several liability. In other words, if one actor is even just 1% at fault, they can be liable for the whole judgment despite another actor being 99% at fault. At common law, this was the rule in tort cases because the priority was to make the injured party whole. Here, when we are talking about the imposition of penalties, it seems joint and several liability is a concept that doesn't directly apply. Rather, the punishment should fit the crime. Neither the federal FCA nor the model law include this provision and it is not required by the Deficit Reduction Act for Vermont's law to qualify.

Civil Investigative Demands

H. 120 also includes a provision for civil investigative demands, §4313, to be used to gather evidence. This is a sweeping information gathering provision, drawn in part from federal law, but it is not a provision that is necessary to get the 10% Medicaid increase. The provision allows the Attorney General's Office, when it has a "reason to believe" that a violation of the False Claims Act has occurred, to obtain any record or document from a person or company, and require any person to provide sworn testimony in a deposition. Federal law has a similar

provision, but there are many checks on this power in the federal False Claims Act that are not included in H. 120. These include: minimum timeframes for requiring the production of documents and non-testimonial evidence, a mechanism for challenging the scope of the discovery requests, and procedures for how the information should be collected.

In discussing this matter with Mr. Treadwell, he mentions quite rightly that this provision is in some other areas of Vermont enforcement law: regulatory laws, the consumer protection statute for example. It is still a very broad delegation of power to the prosecution. Until recently, each information request under the federal version of the civil investigative demand had to be personally approved by the Attorney General of the United States. Now, that has been delegated to the presidentially-appointed U.S. Attorneys, who are required themselves to personally approve each request. It is not clear that H. 120 would require the Vermont State Attorney General to personally sign off on these CIDS.

One wonders whether a constitutional challenge toward such an intrusion into privacy on such a unilateral and unchecked standard as "reason to believe" would work out? In any event, it would be wise in my view, if this provision is going to be adopted, to also adopt some of the reasonable protections for the rights of the target of the investigation along with this that are contained in the federal False Claims Act. See 31 U.S.C. § 3733.

Conclusion

In summary, in my view the legislation contained in H. 120 is worthwhile for the State of Vermont to adopt, particularly given the boost in Medicaid recoveries that can occur if Vermont adopts its own statute. However, doing so is not a risk-free proposition. It is likely that, over time, this statute will permit significant recoveries by the taxpayers of Vermont from contractors that waste and abuse state money through fraud or recklessly disregarding the truth and accuracy of claims for payment. However, given how substantial the potential penalties are, great care must be taken in how the statute is applied as an act of prosecutorial discretion. And it could be that significant costs will be needlessly be borne by some businesses to fend off meritless suits under the False Claims Act, particularly in situations where the Attorney General has reviewed the allegations and found pursuing them to be not in the public interest. That is a trade-off that this Committee should weigh carefully.

Thank you again for providing me this opportunity to speak before the Committee.

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