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April 16, 2012

Statement of Neil V. Getnick
Re: New York City False Claims Act and Other Whistleblower Laws

Good morning Chairperson Brewer, Members of the Committee on Governmental Operations, Counsel Grossman, and staff. Thank you for your invitation to appear here today following up on my appearance at your January hearing. 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.

I am pleased that, after your last hearing, Council Member Brewer sponsored an amendment to the City's False claims Act preserving and extending it (Preconsidered Int. No. ("PIN") § 3, amending 2005 N.Y.C. Local Law No. 53 § 4). I also find it encouraging that so many of the improvements that were discussed at the January hearing are incorporated in this latest proposed version of the City's False Claims Act and the other legislative proposals under consideration today, including: adopting a more flexible application of the public disclosure bar and allowing the City the option to waive its application when it makes sense to do so (PIN § 1, amending N.Y.C. Admin. Code § 7-804 (d)(3)); conforming the relator's share percentages with that of the state and Federal False Claims Acts (PIN §2, amending N.Y.C. Admin. Code (i)(1)-(2)); increasing outreach to whistleblowers (Proposed Int. No. 479-A ("479-A"), creating N.Y.C. Admin. Code § 6-130); and strengthening anti-retaliation protections for whistleblowers (Int. No. 816 ("816"), amending N.Y.C. Admin. Code § 12-113).

I believe the statute would be further improved by conforming the public disclosure bar to that of the amended New York State False Claims Act, which has the most efficacious public disclosure provisions in the nation. You have already improved the public disclosure bar by changing the language to bar actions when based on "substantially the same allegations or transactions," rather than the more general restriction that the complaint not be "derived from" publicly disclosed information. New York State has made several other key changes, however, which I also recommend. In order for government reports to be considered "publicly disclosed," the state requires that they 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 constitute “news media.”¹

As in January, I encourage you to join the State in specifically permitting actions to recover taxes under the City’s False Claims Act. As the largest city in the nation, New York City derives substantial revenue from taxes. While there is no “tax bar” specifically preventing such actions, 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.²

As was discussed at the previous hearing, underutilization of the City’s False Claims Act may be due to the fact that people simply do not know about the law and, importantly, that they would be protected against retaliation by their employer. 479-A, sponsored by Council Member Garodnick and others, takes an important step toward informing would-be whistleblowers of the protections provided to them under the city, state, and Federal False Claims Act, should they wish to report fraudulent behavior, and providing the encouragement that “there is no risk of retaliation to employees who perform such lawful acts.”

816, also sponsored by Council Member Garodnick and others, extends whistleblower protections to employees of city contractors and also takes an impressive step toward protecting those who report fraud by their employers. The City’s expansive definition of “adverse personnel action” creatively addresses one of the practical consequences affecting whistleblowers who bring these cases. It goes beyond preventing “dismissal, demotion, suspension, disciplinary action, or negative performance evaluations,” but also prevents what all too commonly happens to those who report fraud—“loss of staff, office space, equipment or other benefit.” Additionally, I applaud the City’s innovative efforts in creating an additional hammer against whistleblower retaliation: permitting the City to withhold payment on the contract, find the contractor in default, cancel the contract, or otherwise pursue remedies or sanctions under the contract if a company retaliates against a whistleblower and fails to correct that wrong.

¹ 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.”

² 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).

Currently the law requires that the whistleblower specifically request that their anonymity and confidentiality be protected. In order to avoid an inadvertent misunderstanding, the better approach in my view would be to require that protection unless the whistleblower specifically requests otherwise.³

To conclude, I believe that the City False Claims Act and the Council's actions to extend and improve it are a point of pride. This law, first passed in 2005, is valuable and should be expanded. The legislative improvements that have developed over time have pointed the way for positive change. In addition to extending the law, the legislative proposals under consideration today make significant improvements to the Act, and to whistleblower protections more generally. I believe the Act would benefit further from making the additional changes I have proposed today. I want to thank the Committee for the opportunity to appear and for the work that you have done to further improve this law. Most of all, thank you for continuing to support and advance the public-private partnership that makes the City False Claims Act so effective.

³ Int. No. 816 § 2, amending N.Y.C. Admin. Code § 12-113(9)(b)([2.]3.) (“Upon request, the commissioner, council member, public advocate [or], comptroller or chief procurement officer receiving the report of alleged adverse personnel action shall make reasonable efforts to protect the anonymity and confidentiality of the officer or employee making such report.”) We propose striking the phrase “Upon request” at the beginning of that sentence and substituting the phrase “Unless the officer or employee specifically requests otherwise. . .”

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Supplemental Statement of Neil V. Getnick
Re: New York City False Claims Act and Other Whistleblower Laws

In keeping with the strengthened anti-retaliation protections for whistleblowers proposed by Int. No. 816 (“816”), I also strongly recommend that you add provisions emulating those contained in the New York State False Claims Act. The state law expands the scope of the law’s anti-retaliation provision so that it also applies to “contractors” or “agents,” rather than just employees. It clarifies that whistleblowers are protected for undertaking any lawful act to prevent a violation of the False Claims Act. Additionally, the law covers harms by a “prospective employer or contractor” to protect the whistleblower from being blacklisted. It also protects an employee from civil suits by employers for transmitting evidence of fraud to the government, or to private counsel so long as the transmissions were solely an effort to prepare or file a *qui tam* suit. See NY State Finance Law § 191 (2012).⁴

⁴ NY State Finance Law § 191 (2012)

§ 191. Remedies

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.

2. For purposes of this section, a "lawful act" shall include, but not be limited to, obtaining or transmitting to the state, a local government, a qui tam plaintiff, or private counsel solely employed to investigate, potentially file, or file a cause of action under this article, documents, data, correspondence, electronic mail, or any other information, even though such act may violate a contract, employment term, or duty owed to the employer or contractor, so long as the possession and transmission of such documents are for the sole purpose of furthering efforts to stop one or more violations of this article. Nothing in this subdivision shall be interpreted to prevent any law enforcement authority from bringing a civil or criminal action against any person for violating any provision of law.

3. An employee, contractor or agent described in subdivision one of this section may bring an action in the appropriate supreme court for the relief provided in this section.