

Remarks of Senator Chuck Grassley, Chairman, Committee on Finance, at the 6th Annual National Congress on Health Care Compliance Wednesday, February 5, 2003

Good afternoon. I'm glad to be with you today to share a congressional view of health care compliance, and to speak about the Finance Committee's health care oversight agenda for the 108th Congress. But before I do that, I want to begin by acknowledging the work that all of you do.

I'll start by thanking you for your commitment to corporate compliance. I have always believed that compliance should be a core value. I know that all of you share this view. Compliance is a personal responsibility that constitutes an important component of every job description - from the top down.

In many ways, I view my own oversight responsibilities as chairman of the Finance Committee as similar to yours. I am a compliance professional like you. I believe we in Congress have a constitutional responsibility to conduct vigilant oversight over the government programs taxpayers support. I take that oversight responsibility personally, and very seriously. Which means most of the time, people are mad at me.

But that's just fine. If people think I'm too zealous, it's okay with me. It probably means I'm doing my job. My job requires me to ask tough questions, conduct timely and targeted investigations, expose wrongdoing and demand accountability in government. My work is never political. And despite what some people might think, it is never conducted with any personal bias or animus. I pursue Democrat and Republican administrations with equal vigor. The taxpayers deserve nothing less.

Let me turn now to talk about my health care oversight agenda for the Finance Committee this year. Many of our projects will carry over from last year.

False Claims Act Enforcement Policy

My first priority will be to take a hard look at how the False Claims Act is working. It's been over 15 years since I took the lead in the Senate on strengthening the law, and the time is ripe in my view for a detailed check-up. I'll hold hearings in the Finance Committee this year looking into several areas of concern to me.

As many of you know, my 1986 amendments to the False Claims Act strengthened incentives for whistleblowers and improved the partnership between them and the government when it came to ferreting out and prosecuting fraud and abuse. I'm pleased that since then, the taxpayers have recovered over \$10 billion - \$6 billion of which was recovered under the whistleblower provisions.

I believe it is a simple fact that without the courage of individual whistleblowers to come forward and devote time, effort - and sometimes their whole livelihood - to the prosecution of fraud, the United States taxpayers would today be \$6 billion poorer. Yet despite its obvious successes, the False Claims Act is under attack. It is under attack in the Congress, as each session brings new variations of so-called "health care provider bill of rights" legislation designed to water down the Act's strength. It is under attack in the courts, where despite whistleblower victories, hostile corporations in courtrooms as far up the food chain as the United States Supreme Court have chipped away at standing rights and questioned the Act's constitutionality. In circuits across the country, overly restrictive interpretations of what constitutes "public disclosure" are shutting down meritorious cases before they even start. And it is under attack in the Justice Department itself, where an institutional distaste for whistleblowers and their representatives is corroding the working partnership between the government and the whistleblower Congress envisioned in 1986.

That working partnership, and the infusion of private resources it carries with it, were central to my thinking - and in my opinion the thinking of the entire Congress and President Reagan in passing the 1986 amendments.

Simply put, we expected that whistleblowers, many of whom have specialized insider knowledge or industry expertise, would actively provide assistance to the government. We expected, too, that the Justice Department would take full advantage of the insight, knowledge and resources of relators and their counsel. And we expected that where appropriate, whistleblowers would be compensated for their efforts in successful cases.

Against this background, I am troubled by widespread efforts within the Justice Department to curtail the rights of whistleblowers to amend their complaints to add value in the discovery process. I understand that it is almost routine policy now for Justice Department lawyers to extract written “waivers” from whistleblowers as a condition of participating fully in the case.

I believe these anti-whistleblower dynamics flow from an embedded resistance from some corners of the Justice Department to the notion that everyday people and their private attorneys can be private attorneys general. I can say that as a whistleblower advocate and a senator who’s focused on compliance, I encounter some of that same resistance myself when I ask for explanations and information regarding False Claims Act cases. It’s almost as if there’s a mentality of: “don’t call us, we’ll call you” when it comes to getting information out of the Justice Department before cases are settled.

Let me give one example. Last December, the Justice Department issued a statement announcing a “tentative understanding” with the hospital company HCA to settle ten years worth of combined civil and administrative litigation for \$631 million. This statement was announced even after I had raised a series of questions about the influence of the client agency - in this case CMS - and its administrator on the resolution of the case. I made my concerns public in a series of letters to the Justice Department throughout the year, but received incomplete, unsatisfactory responses.

All too often in the past I have seen these client agencies get “cozy” with their contractors, and in turn undermine the Justice Department’s efforts to get a fair settlement. So I was as surprised as anyone to see a proposed settlement on the table last December. When I asked to “see the math” - that is, to see specific mathematical and legal support for the \$631 million figure, I was turned away again. The Justice Department staff told me that until the case is fully resolved, I would just have to “trust them.” The stakes in these kind of long-running, nation-wide cases worth potentially billions of dollars to the government are simply too high, in my view, to trust any one institution, including the Justice Department.

Proposal for Congressional Review of False Claims Act Settlement Decisionmaking

I’m always suspicious anytime anyone in government tells me to “just trust them,” so in instances like this I like to apply President Reagan’s adage to “trust, but verify.” That’s why I intend to propose legislation this year that would put an added layer of verification into the False Claims Act settlement system. Because of the brick walls surrounding the Justice Department’s settlement procedures, I will propose that Congress be given an explicit right to review the facts and figures behind any proposed False Claims Act settlement before it is approved and forwarded to the court for closure.

The idea behind such a congressional “check” on the system is not unprecedented. Federal law already requires the Internal Revenue Service to submit reports to the Joint Tax Committee in cases involving taxpayer refunds in excess of \$2 million. The Joint Tax review allows Congress to learn about specific issues in individual industries and to find problems in the tax code. The Joint Tax review also permits identification of issues that were not handled correctly by the IRS.

When it comes to the settlement of civil False Claims cases, I believe Congress should hold the Justice Department to a similar standard of review. To do this, I will look closely at the Joint Tax model. I will consult with our other congressional support agencies, like the General Accounting Office and the Congressional Budget Office, to develop a process that’s nonpartisan, efficient and fair. I believe my policy will improve the trust of all parties to False Claims Act cases, the most important of which is the taxpayer.

HHS-OIG Management and Performance

I will also continue my investigation into the management and operation of the Inspector General's office. My concerns about Inspector General independence extend to every government agency, including the Postal Service IG and the Defense Department IG.

But I'm concentrating now on the HHS Inspector General's office, which I don't think is functioning properly. I am troubled by both the swift departures of many key senior staff members - who collectively brought many decades of talent to the table - and the impact of those departures on overall institutional morale. I am equally troubled by reports that decision-making has been and continues to be subject to outside influences, both inside HHS and out. In terms of people and policy, the HHS Inspector General office looks and acts far differently today than it did just 18 months ago.

For instance, let's take the once straight and narrow corporate integrity agreement, or "CIA." As you know, CIAs commit healthcare providers who have been caught with their hands in the cookie jar to a corrective action plan in exchange for being able to stay in the Medicare program.

In the past, the OIG has followed an expansionist and uniform approach to settling cases. Tough CIAs were imposed on providers containing specific compliance protocols, reporting obligations and detailed audit responsibilities. Resolving a case without a CIA was nearly unheard of. Today, I am concerned that the OIG is embarking on a policy that will make CIAs too flexible, and too squishy, in my view. In addition to allowing providers to revise and relax their CIAs, a new "kindler, gentler" policy on CIAs - contained in an open letter to providers from the inspector general herself - explicitly states that in various kinds of cases, a CIA may not be necessary at all. It is one I am not at all comfortable with.

Also, the open letter's establishment of a 5 percent "error acceptance rate" is worrisome, because it sets a net error rate for providers, which invites their accountants to play shell games around the truth, as we all saw with Enron and WorldCom. I don't think there should be any set "acceptable" error rate when it comes to the Medicare Trust Funds. The lasting effect of these policies cannot be known yet. I'll let GAO be the judge of that. But I have trouble supporting any policy that gives "credit for good behavior" to companies that have a concrete history of fraud and abuse. I believe that strong corporate integrity agreements, as uncomfortable as they can be, are the best way to correct and control provider misconduct. In the weeks and months ahead I'll continue to ask more questions about this and other policies at the OIG that concern me. I will also continue to ask questions about unexplained, unconventional delays in audits and evaluations. I have asked the GAO to conduct a wide-ranging management review of the IG's office, and I expect that report sometime this spring. I expect the Finance Committee to consider its findings and recommendations shortly thereafter. I won't stop until I'm fully confident that the HHS IG is a strong, functional, and most of all, independent guardian of our federal trust fund resources. Compliance has to start at the top.

Conclusion

In the past I've championed legislation to put cameras in the courtroom, because I believe that government works better when it works in the sunshine, in full public view. I believe that logic applies to all levels and branches of government - congressional, executive and judicial - and almost no one in the federal government should do their job outside of plain view. In closing, I urge all of you compliance professionals to take a similar attitude with respect to the organizations you represent here today, be they public or private. I approach my compliance job from the standpoint of openness and accountability, and I hope you do to. I wish you all well in your efforts in the coming year, and thank you for having me.