

Senator Grassley's Written Questions for Tony West, to be Assistant Attorney General for the Civil Division, U.S. Department of Justice

WHISTLEBLOWERS

1. Will you provide Congress with accurate and timely information regarding any action taken, administrative or criminal, against individuals who retaliate against whistleblowers?

Answer: If confirmed, I will work with other colleagues at the Department of Justice to provide appropriate information regarding retaliation against legitimate whistleblowers in response to requests from the Judiciary Committee.

2. I have closely monitored the treatment of whistleblowers by the FBI over the years. Could you please address what safeguards you will put in place to ensure that all FBI whistleblowers are not subject to retaliation, be it from the Office of Professional Responsibility or elsewhere within the FBI or DOJ?

Answer: If confirmed, I will work to ensure that legitimate whistleblowers are taken seriously and treated fairly and lawfully.

3. What actions will you personally take to abate any fears of retaliation against individuals who are critical of procedures, practices or policies that do not guarantee or execute the primary mission and goals of both the FBI and DOJ?

Answer: If confirmed, I will clarify to Civil Division management that I will not tolerate unlawful retaliation against anyone in the Civil Division. In addition, I will make clear that the opinions and judgments of career professionals are to be respected and valued and that among our main purposes is to facilitate the ability of career Division employees to execute DOJ's mission.

FALSE CLAIMS ACT

1. If you are confirmed, will you pledge to vigorously enforce the False Claims Act (FCA), and devote adequate resources to investigating and prosecuting FCA cases?

Answer: Yes, I will.

2. Will you pledge to cooperate and support *qui tam* whistleblowers that come forward with allegations of fraud, waste, and abuse under the FCA?

Answer: Yes. If confirmed, I will work with *qui tam* whistleblowers to support viable claims of fraud, waste and abuse of taxpayer dollars.

3. Will you oppose efforts by industry groups, including the health care industry and the defense industry, to weaken the FCA and the *qui tam* provisions of the Act?

Answer: I consider the False Claims Act *qui tam* provisions to be an important weapon that facilitates the Civil Division's ability to address fraud. For this reason, while testifying before the Senate Judiciary Committee, I highlighted the vigorous enforcement of the False Claims Act as one of my primary goals if confirmed. To the extent efforts are made to weaken the False Claims Act, I will, if confirmed, work with Congress and my colleagues at the Department of Justice to oppose such efforts.

4. Do you have any question as to the constitutionality of the FCA and its *qui tam* provisions?

Answer: No.

5. Do you anticipate any decrease in the budget for DOJ's Commercial Litigation section which is responsible for false claims prosecutions? In previous years, DOJ has specifically requested litigation support funds, including funding for accounting experts, for pending false claims cases. Are you committed to securing the funding necessary to successfully litigate FCA cases?

Answer: Based on the information currently available to me, I do not anticipate any decrease in the budget for DOJ's Commercial Litigation branch. If I am confirmed, I will ensure that the Civil Division vigorously enforces the False Claims Act.

6. Will you provide Congress with regular, timely updates on the status of FCA cases, including statistics as to how many are under seal and the average length of seal time?

Answer: If confirmed, I will work with the career professionals in the Department to respond to Judiciary Committee requests for appropriate information about False Claims Act cases.

7. Will you support efforts to utilize the FCA to recover government money lost to fraud or abuse of government bailout funds, including but not limited to funds expended under the Troubled Asset Relief Program and other direct infusions of Government money used to prop up the balance sheets of various financial institutions across the country? Why or why not?

Answer: Yes. As noted above, I consider the False Claims Act to be the Civil Division's primary weapon for fighting fraud. Given the unprecedented amount of taxpayer dollars flowing to the private sector, I believe that effectively using the False Claims Act to ensure accountability is more important than ever before.

8. Recently, a lawsuit was filed alleging that the seal provision of the FCA, codified at 31 U.S.C § 3730(b)(2), is unconstitutional. That provision requires that FCA cases by

qui tam relators be filed in camera and remain under seal for at least 60 days, and not be served upon the defendant until the court orders. This provision was designed to give the Government ample time to investigate an allegation before making the case public, while protecting evidence and the whistleblowers from undue harm or influence. The other benefit of the seal provision is that it allows frivolous complaints to remain under seal without causing harm to a defendant. In the past, I've been a critic of prolonged extensions of the seal. I believe DOJ should use the seal judiciously and not abuse its discretion. I also believe some transparency on the part of DOJ would go a long way to dispelling questions about the seal. That said, I think the seal does a lot of good, especially in protecting whistleblowers against retaliation. Do you believe the seal provision of the FCA is unconstitutional? Why or why not?

Answer: I do not believe that the seal provision of the False Claims Act is unconstitutional. As long as there are reasonable arguments to be made, I will, if confirmed, defend the False Claims Act and the seal requirement against constitutional challenge because the provision strikes the right balance. At the same time, it is important to maximize the effectiveness of the Department's efforts to enforce the False Claims Act. Part of that effort includes protecting legitimate whistleblowers from retaliation and allowing the Government ample time to investigate whistleblowers' allegations. I believe the seal serves those important interests.

9. Will you work cooperatively with me to ensure that legislation I introduced restoring the original intent of the FCA is reviewed by DOJ in a timely manner with constructive input?

Answer: Yes.

10. Last year, the Supreme Court issued a decision interpreting portions of the FCA in *Allison Engine Co. v. United States ex rel. Sanders*. This opinion created a new intent requirement for the Government and *qui tam* relators to prove before liability can attach to certain false claims. Unfortunately, this new requirement has hindered the ability of the Government to recover Government money lost to fraud. My concerns were heightened when a judge in my home state of Iowa dismissed a FCA case on his own motion, despite objections from the Justice Department. I am worried that this case, *U.S. v. Hawley*, is just the start of a series of case dismissals and will endanger the Federal Fisc. Do you agree that the decision in *Allison Engine* is a set back for the Federal Government in prosecuting FCA cases?

Answer: I share your concern about *Allison Engine* and appreciate the Committee's recent efforts to ensure that the liability provision of the False Claims Act (31 U.S.C. § 3729) be revised to reflect the original intent of the Congress, and specifically the effort to address the *Allison Engine* decision in S. 386. I understand that the Department offered proposed revisions to address *Allison Engine* and that the Committee adopted most of those changes. In addition, I share your concern about

the *Hawley* decision and believe it was incorrectly decided. The Department has filed a brief in the Eighth Circuit appealing *Hawley*.

MSP QUI TAM

In the 1980's, Congress enacted the Medicare Secondary Payer (MSP) statute that was designed to protect Medicare expenditures from waste and abuse when Medicare footed the bill for services, but another insurer was supposed to pay. The MSP statute provided a right of action to either DOJ or to private litigants to file suit on behalf of Medicare. This law was based largely upon the successes of other *qui tam* statutes—such as the False Claims Act—and was designed to recover monies that Medicare wrongfully paid out. However, recent court decisions have held that the MSP statute is not a *qui tam* statute for the purposes of recoveries. As a result, any monies recovered by a plaintiff are theirs to keep and they are not required to pay back any share to the U.S. Treasury. This is an inaccurate reading of the statute and creates a result contrary to the purpose of the statute.

Recently, DOJ filed a brief in the Federal District Court for the Western District of North Carolina as an Intervenor defending the constitutionality of a *qui tam* provision that allows relators to file suit on behalf of the Government for misuse of patent markings (35 U.S.C § 292).

In that brief, DOJ stated that Congress has enacted several *qui tam* provisions and expressly noted that the MSP statute (42 U.S.C. § 1395y) provided a *qui tam* cause of action for “failure to pay primary health insurance claims where Medicare is the secondary payer.” Based upon this statement, DOJ currently seems to agree that the MSP statute is a *qui tam* statute similar to those such as the FCA. However, I have yet to get a straight answer from a nominee on this question.

1. Do you believe that the MSP statute is a *qui tam* statute?

Answer: The MSP is a complex statute and the issue of whether Congress provided *qui tam* authority in the MSP is a fairly new issue. If confirmed, I will review the issue with the career attorneys in the Civil Division.

2. Will you continue to support the use of the MSP statute and the *qui tam* mechanism in the statute to help Medicare recover monies expended when Medicare should have been the secondary payer?

Answer: Please see my response to Question 1 above.

ANTI-TERRORISM ACT

In 1990, I sponsored legislation known as the Antiterrorism Act of 1990. This legislation created a civil remedy for any individual, their estate, survivors or heirs, who were injured or killed by an act of terrorism, to sue those who committed the act or sponsored the terrorist act. I drafted this law to empower victims of terrorism to take the fight back to the terrorists and hit them where it counts, in their pocket books and bank accounts. It helps victims seek justice by become an active participant in recovering funds from those who seek to harm Americans at home, or abroad.

This legislation is a vital tool in the war on terror. While money will never bring back a loved one, it can help by taking the money out of the pockets of dangerous terrorists and the state sponsors of terrorism which will help prevent other violent acts against Americans. I am concerned that as judgments against sponsors of terrorism pile up, there may be political efforts to have our government intervene and unduly influence the decisions of the courts or hamper enforcement of court judgments.

1. Do you agree with the purpose and history of the Antiterrorism Act of 1990?

Answer: Yes. I agree that Congress should support victims of international terrorism and I support the cause of action in the Antiterrorism Act of 1990, as codified at 18 U.S.C. § 2333a.

2. Will you pledge to support this law?

Answer: Yes, I will support the Antiterrorism Act of 1990.

3. Will you ensure that DOJ acts in accordance with the original intent of the Antiterrorism Act?

Answer: If confirmed, I will make every effort to ensure that the Department of Justice acts in accordance with the original intent of the Antiterrorism Act as expressed in the statute.

4. Will you pledge to support victims of terrorism who bring forth good faith claims and in judgments against terrorists and state sponsors of terrorism?

Answer: If confirmed, I pledge, consistent with United States law, to support victims of terrorism who have filed legally meritorious claims and obtained judgments against terrorists and state sponsors of terrorism.

5. Will you pledge to resist efforts from other agencies and departments that may seek to have cases dismissed?

Answer: If confirmed, I will review the appropriateness of case dispositions on a case by case basis, and will determine the United States' position consistent with the law.