TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:
S.B. NO. 2730, S.D. 1, RELATING TO FALSE CLAIMS TO THE STATE.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Tuesday, February 28, 2012 **TIME:** 09:00 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): David M. Louie, Attorney General, or
Michael Parrish, Deputy Attorney General

Chair Ige and Members of the Committee:

The original version of S.B. No. 2730, was an attempt to amend the State False Claims Act in order to comply with changes in federal law. The purpose was to ensure that the State would continue to retain an additional 10% of recoveries where false claims are made to federally-funded State programs. S.B. No. 2730, S.D. 1, attempts to also update the County False Claims Act, which we do not oppose in principal. Our concern, however, which we have discussed with the Ways and Means staff, is that amending this bill to include the County False Claims Act may render it unconstitutional under section 14 of article III of the State Constitution. We understand and agree with the Ways and Means staff that, at this juncture, the better course of action is to remove those portions of S.B. 2730, S.D. 1, that reference and amend the County False Claims Act. We support removal of part II of S.B. 2730, S.D. 1, and respectfully urge that the Committee move forward with parts I and III.

Parts I and III of this bill will bring Hawaii's false claims law into conformance with the Federal False Claims Act. This will let Hawaii meet the federal requirement that state laws contain provisions that are at least as effective in rewarding and facilitating qui tam actions for false and fraudulent claims as those described in sections 3730 through 3732 of the Federal False Claims Act, and provide to individuals the same or greater protections as those established under federal law since part II of chapter 661, Hawaii Revised Statutes (HRS), was enacted in 2000.

The bill will ensure that Hawaii updates its law to comply with section 1909 of the Social Security Act, which was amended by the Fraud Enforcement and Recovery Act, the Federal False Claims Act, the Affordable Care Act, the Patient Protection and Affordable Care Act, and

the Dodd-Frank Wall Street Reform and Consumer Protection Act. It will enable the State to continue to retain an additional ten percent of any civil recovery in cases involving federal programs. Hawaii must update and comply with changes in the federal law by March 31, 2013.

The changes, which bring chapter 661, HRS, in compliance with the Federal False Claims Act, are all designed to give greater protection to individuals who allege fraud against the State. Of particular import is the proposed new section being added to part II of chapter 661, which provides special protection and relief to individuals who try to stop others from committing false claims violations against the State by their own conduct or through the conduct of any of their associates. This section provides to these individuals far greater protection against retaliation than the protections afforded by Hawaii's Whistleblowers' Protection Act. The Whistleblowers' Protection Act, part V of chapter 378, HRS, gives rise to causes of action by **employees** who are retaliated against by **employers** for providing information of wrongdoing. The new section in part II of chapter 661 protects a far greater class of individuals, including **employees, contractors, and agents**, from retaliatory actions by **anyone who has the authority to affect the individual's status as an employee, contractor, or agent**. These categories of protected individuals are not defined, and intentionally left for very broad interpretation. While this is an expanded class of individuals who will receive greater protection, it is limited to only those individuals who file actions under chapter 661 to stop false claims against the State.

Attached please find the letter dated March 21, 2001, from the Federal Office of the Inspector General outlining the mandate and the recommended changes.

Attachment

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

MAR 21 2011

The Honorable David M. Louie
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

Dear Mr. Attorney General:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) previously received your office's request to review the Hawaii False Claims Act, Haw. Rev. Stat. §§ 661-21 through 661-29, under the requirements of section 1909 of the Social Security Act (the Act) and determined that the Hawaii False Claims Act met those requirements. Section 1909 of the Act provides a financial incentive for States to enact laws that establish liability to the State for individuals and entities that submit false or fraudulent claims to the State Medicaid program. For a State to qualify for this incentive, the State law must meet certain requirements enumerated under section 1909(b) of the Act, as determined by the Inspector General of HHS in consultation with the U.S. Department of Justice (DOJ). As explained below, we have determined, after consulting with DOJ, that the Hawaii False Claims Act no longer meets the requirements of section 1909 of the Act.

On May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 (FERA) made numerous amendments to the Federal False Claims Act, 31 U.S.C. §§ 3729-33. On March 23, 2010, the Patient Protection and Affordable Care Act (ACA) amended the Federal False Claims Act. Also, on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) further amended the Federal False Claims Act. These three acts, among other things, amended bases for liability in the Federal False Claims Act and expanded certain rights of *qui tam* relators. As a result of the FERA, the ACA, and the Dodd-Frank Act, the Hawaii False Claims Act is no longer in compliance with section 1909 of the Act. OIG also identified additional provisions in the Hawaii False Claims Act that do not satisfy the requirements of section 1909 of the Act.

Section 1909(b)(1) of the Act requires the State law to establish liability for false or fraudulent claims described in the Federal False Claims Act with respect to any expenditure described in section 1903(a) of the Act. The Federal False Claims Act, as amended by the FERA, establishes liability for, among other things:

- knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval (removing the requirement that the claim be presented to an officer or employee of the Government);

- knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;

- conspiring to commit a violation of the Federal False Claims Act; and

- knowingly making, using, or causing to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the Government.

See 31 U.S.C. § 3729(a). Relevant to the above-described bases for liability, the Federal False Claims Act, as amended by the FERA, includes an expanded definition of the term "claim" and defines the terms "obligation" and "material." See 31 U.S.C. § 3729(b). In contrast, the Hawaii False Claims Act does not establish liability for the same breadth of conduct as the Federal False Claims Act, as amended.

Section 1909(b)(2) of the Act requires the State law to contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false and fraudulent claims as those described in sections 3730 through 3732 of the Federal False Claims Act. The Federal False Claims Act, as amended by the FERA and the Dodd-Frank Act, provides certain relief to any employee, contractor, or agent who is retaliated against because of lawful acts done in furtherance of a Federal False Claims Act action or efforts to stop violations of the Federal False Claims Act. See 31 U.S.C. § 3730(h). The Hawaii False Claims Act does not expressly provide retaliation protection for employees, but such protections are in Hawaii's Whistleblowers' Protection Act, Haw. Rev. Stat. §§ 378-61 through 378-69. Hawaii's Whistleblowers' Protection Act, however, does not provide employees, contractors, or agents with as much protection from retaliatory action as the Federal False Claims Act. In addition, Hawaii's Whistleblowers' Protection Act provides for a shorter statute of limitations for retaliation actions than the Federal False Claims Act, which provides for a 3-year statute of limitations. Therefore, the Hawaii False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act, as amended by the FERA, provides that for statute of limitations purposes, any Government complaint in intervention, whether filed separately or as an amendment to the relator's complaint, shall relate back to the filing date of the relator's complaint, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the relator's complaint. See 31 U.S.C. § 3731(c). In contrast, the Hawaii False Claims Act does not contain a similar provision. Therefore, the Hawaii False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act, as amended by the ACA, provides that the court shall dismiss an action or claim under the Federal False Claims Act, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (2) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (3) by the news media, unless the action is brought by the Attorney General or a person who is an original source of the information. See 31 U.S.C. § 3730(e)(4)(A). In contrast, the Hawaii False Claims Act requires a court to dismiss a broader category of cases based on a public disclosure and does not give Hawaii the opportunity to oppose the dismissal. Therefore, the Hawaii False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

Further, the Federal False Claims Act, as amended by the ACA, defines "original source" as an individual who either: (1) prior to a public disclosure, voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action. See 31 U.S.C. § 3730(e)(4)(B). In contrast, the Hawaii False Claims Act has a more restrictive definition of "original source." Therefore, the Hawaii False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act bars *qui tam* actions that are based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party. See 31 U.S.C. § 3730(e)(3). In contrast, the Hawaii False Claims Act more broadly bars *qui tam* actions that are "based upon allegations or transactions that are the subject of a civil or criminal investigation by the State, civil suit, or an administrative civil money penalty proceeding in which the State is already a party." See Haw. Rev. Stat. § 661-27(e)(3). Therefore, the Hawaii False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Hawaii False Claims Act provides that no *qui tam* may be brought by a present or former employee of the State that is based upon information discovered by the employee during the course of the employee's employment unless the employee first exhausted internal procedures for reporting and seeking recovery of the falsely claimed sums and the State failed to act within a reasonable period of time. See Haw. Rev. Stat. § 661-27(e)(2). The Federal False Claims Act contains no such limitation. Therefore, the Hawaii False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

Section 1909(b)(4) of the Act requires the State law to contain a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of the Federal False Claims Act. As amended by the FERA, the Federal False Claims Act now expressly provides that its civil penalty shall be adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990. See 31 U.S.C. § 3729(a). Pursuant to the Federal Civil Penalties Inflation Adjustment Act, a civil

penalty under the Federal False Claims Act is not less than $5,500 and not more than $11,000. In contrast, the Hawaii False Claims Act provides for a penalty of not less than $5,000 and not more than $10,000. See Haw. Rev. Stat. § 661-21(a).

Hawaii will be granted a grace period, ending March 31, 2013, to amend the Hawaii False Claims Act and resubmit it to OIG for approval. Until March 31, 2013, Hawaii will continue to qualify for the incentive under section 1909 of the Act. Resubmission to OIG of an amended act will toll the expiration of the grace period until OIG issues a letter deeming the act either compliant or not compliant with section 1909 of the Act. To continue to qualify for the incentive after March 31, 2013, or after the expiration of any tolling period, if applicable, Hawaii must amend the Hawaii False Claims Act to meet the requirements of section 1909 of the Act with reference to the Federal False Claims Act in effect on the date of this letter, submit it for review, and receive approval by OIG. If any provision of the Federal False Claims Act that is relevant to section 1909 of the Act is amended further, Hawaii will again be granted a 2-year grace period from the date of enactment of any such amendments in which to amend its act to conform with the amended Federal False Claims Act and resubmit it to OIG for approval.

If you have any questions regarding this review, please contact me or have your staff contact Katie Arnholt, Senior Counsel, at (202) 205-3203 or Tony Maida, Deputy Chief, Administrative and Civil Remedies Branch, at (202) 205-9323.

Sincerely,

Daniel R. Levinson

Daniel R. Levinson
Inspector General