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Via Email Only

The Honorable Jim Jordan, Chairman
Subcommittee on Economic Growth, Job Creation & Regulatory Affairs Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Matt Cartwright, Ranking Minority Member Subcommittee on Economic Growth, Job Creation & Regulatory Affairs Committee on Oversight and Government Reform
2471 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Trent Franks, Chairman
Subcommittee on the Constitution and Civil Justice Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jerold Nadler, Ranking Minority Member Subcommittee on the Constitution and Civil Justice Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Jordan and Franks and Ranking Members Cartwright and Nadler:

The undersigned are partners and co-chairs of the Whistleblower/False Claims Act Practice Group at Cohen Milstein Sellers & Toll, PLLC. For over ten years, we have assiduously represented whistleblowers in legal actions brought pursuant the federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, and its state counterparts in federal and state courts throughout the country. We regularly engage in the evaluation of the viability of potential claims under those statutes and work with relators to combat fraud against the government. We have been asked by committee staff to offer our opinion regarding the effect of the Department of Justice's decision to decline to intervene in the *qui tam* cases of *United States ex rel. Newell v. City of St. Paul* and *United States ex rel. Ellis v. City of Minneapolis, et al.* What follows is that opinion.

On May 19, 2009, Relator Frederick Newell filed his *qui tam* action under the federal False Claims Act against the City of St. Paul in the United States District Court for the District of Minnesota. On February 9, 2012, the Department of Justice advised the court that it declined to intervene in the case. On March 12, 2012, Mr. Newell filed an amended complaint in response to which the City of St. Paul filed a motion to dismiss based, in part, on the Public Disclosure Bar.

At the time that Mr. Newell filed his initial complaint in his action, the False Claims Act provided a jurisdictional bar to a relator's *qui tam* action commonly referred to as the Public Disclosure Bar. Subsequently amended and rendered a non-jurisdictional basis for dismissal in the Patient Protection and Affordable Care Act of 2010, this section, 31 U.S.C. § 3730(e)(4), provided as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the Attorney General or the person bringing the action is an original source of the information.
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> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

On July 20, 2012, the court granted St. Paul's motion to dismiss, finding that it lacked subject matter jurisdiction over Mr. Newell's action because of manifold public disclosures of his allegations predating the filing of his complaint and because he was not an original source of the information on which the allegations were based. Mr. Newell has appealed the dismissal of

his case and his appeal is currently pending before the United States Court of Appeals for the 8th Circuit.

On February 18, 2011, Relators Andrew Ellis, Harriet Ellis and Michael Blodgett filed their *qui tam* action under the federal False Claims Act against, among others, the Cities of Minneapolis and St. Paul in the United States District Court for the District of Minnesota. On June 18, 2012, the Department of Justice filed a Notice of Election to Decline Intervention. The defendants in that case subsequently filed motions to dismiss the Relators' complaints, which the court denied without prejudice. That case remains pending as of the date of this letter.

The effect of the government's decision not to intervene in these two *qui tam* cases is central to the issues presently being considered by your subcommittees. Indeed, it is important to understand that, contrary to conclusory statements set forth in the Congressional Committees' Joint Staff Report of April 15, 2013, the decision by the Department of Justice not to intervene in Mr. Newell's case did not allow the City of St. Paul to move for dismissal of the case "on grounds that would have otherwise been unavailable if the Department had intervened." (Joint Staff Report, p. 58). In fact, the same motion would have been available to the City whether or not the government had intervened in the case. In *Rockwell Intl. Corp. v. United States ex rel. Stone,* 549 U.S. 457 (2007), the United States Supreme Court rejected the argument that government intervention provides jurisdiction to a Relator who is not an original source. Even had the government intervened, Mr. Newell would have been vulnerable to the exact same public disclosure jurisdictional bar.

Likewise, in declining to intervene in Mr. Newell's *qui tam* action, the Department of Justice did not "give up the opportunity to recover as much as $200 million." (Joint Staff Report, p. 4). A declination of intervention has never been recognized by any court as tantamount to the termination of the government's right to pursue the claim asserted in the action. In fact, the federal False Claims Act specifically provides that if the government initially elects not to proceed with the action, it may intervene at a later date upon a showing of good cause. 31 U.S.C. § 3730(c)(3). The government can decline to intervene in one action and, after that complaint is dismissed, decide to intervene in a subsequently filed action. Or the government can institute and pursue its own action under the False Claims Act. Moreover, the dismissal of Mr. Newell's complaint does not affect the government's ability to pursue the same claims itself. Thus, in declining to intervene in the Newell and Ellis actions, the government is not foreclosed from pursuing the claims that Mr. Newell could no longer himself pursue or to intervene at a later date in the Ellis action, nor is it foreclosed from pursuing remedies that might be available under any other statutory or regulatory provisions. In fact, in declining to intervene in these actions, it "gave up" no rights or opportunities whatsoever.

We trust that the foregoing sheds light on the effect of the government's decision not to intervene in the Newell and Ellis *qui tam* actions and that this letter is helpful to the work of your committees.

Respectfully submitted,

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