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PROTECTING AMERICAN TAXPAYERS: SIGNIFICANT ACCOMPLISHMENTS AND ONGOING CHALLENGES IN THE FIGHT AGAINST FRAUD

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WEDNESDAY, JANUARY 26, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:41 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Klobuchar, Franken, Coons, Grassley, Hatch, and Coburn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, everybody. By Washington standards, a snowy morning; by Vermont standards, a light dusting. Some of you have heard me tell the story of being home a while ago and turning on the radio in Vermont. They were giving the news, and they said, "In other news today, we expect a light dusting of snow, no more than 5 or 6 inches," then went on to something else.

I want to have this hearing, and I first wanted—and we will do this formally at our executive meeting tomorrow. I want to welcome my friend Chuck Grassley, who is here. Chuck and I have served together for decades. We have worked on issues from agriculture to criminal fraud. We have had a lot of either Grassley-Leahy or Leahy-Grassley bills that have been passed. We are considering a vital issue today on an issue that Senator Grassley and I have worked together with great success: the fight against fraud.

One of the first major bills the Senate Judiciary Committee considered last Congress—it was actually one of the very first bills the President signed into law—was the Leahy-Grassley Fraud Enforcement and Recovery Act. It gave fraud investigators and prosecutors the tools and resources to better hold those who commit fraud accountable and, just as importantly, to recover taxpayer money.

Working together, we strengthened the False Claims Act, which empowers whistleblowers to find fraud and recover stolen tax dollars that would otherwise go undiscovered. We worked on key provisions to fight fraud in the Affordable Care Act and the Wall Street Reform Act. Those new laws are already paying off, and I think it is safe to say that Senator Grassley and I will be watching

how well they do. And we have a number of Senators in both parties who are very interested in this.

We will hear today about the historic successes in anti-fraud efforts. In the last fiscal year alone, the Department of Justice recovered well over $6 billion through fines, penalties, and recoveries from fraud cases. Since January 2009, the Department has recovered $6.8 billion of taxpayer dollars in False Claims Act cases, and I had the staff check and I find that is far more than any other 2-year period.

Now, I would like to reinvest a small amount of these recoveries back into fraud enforcement. I think it is a good deal for America as we get greater recovery of taxpayer funds without any new spending of taxpayer money.

In addition to recovering billions of dollars in penalties and fines, I think the Department of Justice has to focus on holding individuals accountable for their fraud crimes.

I was pleased to learn that the Financial Fraud Enforcement Task Force has secured charges against 343 criminal defendants and 189 civil defendants for fraud schemes that harmed more than 120,000 victims. I am referring to Operation Broken Trust. The Health Care Fraud Prevention and Enforcement Action Team created by the Justice Department and Department of Health and Human Services have had similar victories.

We are going to learn today about ongoing challenges that law enforcement officers face in investigating and prosecuting fraud. The FBI, to their credit, has recently more than doubled the number of agents investigating fraud and has created the National Mortgage Fraud Team, in part thanks to our legislation and the appropriations that came with it. But I am disturbed by ongoing reports of fraud in the mortgage foreclosure process—fraud that has affected every single State in this country, certainly every State that is represented on this Committee, where so many Americans are finding themselves in this challenging economy and facing fraud and mortgage foreclosure. I want to know whether the Justice Department needs new tools and greater resources to root out those responsible.

I have got to say I want people who are doing this, who are committing these frauds, obviously fined, and I want to see people go to jail. We have got to make it very clear. If you get some kid that steals a car, they might go to jail. You have somebody who steals tens of millions of dollars, they ought to, too.

The President and Attorney General Holder have enthusiastically supported legislative initiatives to bolster fraud enforcement; they have spearheaded important new efforts on mortgage fraud, health care fraud, and financial fraud. And I think that commitment to fraud enforcement is shown by our witnesses here today, and I am glad to see Assistant Attorneys General Lanny Breuer and Tony West back here.

Major fraud cases take time to investigate and prosecute. I think the push we have seen will continue to yield significant results. But we have to keep giving law enforcement the tools and resources necessary to root out fraud so that they can continue to recoup losses to taxpayers. Every day taxpaying Americans deserve to know their Government is doing all it can to hold responsible

those who committed fraud and to prevent future fraud, particularly with so much taxpayer money at risk, and I compliment the administration for pushing hard on this. We want to make sure we are giving you all the tools so you can push.

Americans are worried about their budgets at home. We have to protect their investment in Government. So I look forward to working with Senator Grassley on this and other areas as we have for so many other things.

Chuck, I will yield to you.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, let me thank you for the welcome that you gave me, and you accurately have described the very close working relationships we have had on some pieces of legislation. I think more important than the few pieces of legislation or a lot of pieces of legislation we worked on—and we have some philosophical differences, but the most important thing for me is in the 30 years that I have been on this Committee with you, there has not been one confrontation that I can remember, and I am sure I would remember it.

[Laughter.]

Chairman LEAHY. That is a midwestern understatement.

Senator GRASSLEY. Okay. And so I think that that best describes our relationship, the fact that you and I can disagree on some things, agree on a lot of things, and still work together and try to solve problems, and that is our job here. So I want to thank you for that welcome.

The Committee has a lot of work to do, and our work could not come at a more critical time for our country. Every move that we make must take a painstaking look at the fiscal realities of our time, the constitutional responsibilities that we hold, and the will and desires of the American people that we represent. I am going to have more to say tomorrow at our first markup, but I look forward to working with you as we move this Committee forward in a productive manner, consistent with our relationship over the years.

Today's hearing is a good way to start—and probably my way of characterizing this hearing is a whole lot different than the way you characterized our working together on fraud. But it is a good way for me to start my new responsibilities as Ranking Member. Fighting fraud is something that you and I have worked on together over many years in the Senate. I am glad to be in this chair as we begin the 112th Congress and focus on continued efforts to protect Federal tax dollars from fraud. As the author of the 1986 amendments to the Federal False Claims Act, which have recovered nearly $28 billion back to the taxpayer, I have spent a great deal of my time in the Senate working to combat fraud against taxpayers. I welcome the opportunity to begin this Congress on this very important issue.

Combating fraud obviously is not a partisan issue. It is an American taxpayer issue and one that every Senator and Member of Congress should focus on. As Congress looks for ways to cut Federal spending and reevaluates which Federal programs are worthy

of hard-earned taxpayer funds, we need to be cognizant that every dollar lost to fraud is a dollar of funding siphoned off from legitimate programs. Last Congress, as Chairman Leahy just said, he and I worked together and crafted this Fraud Enforcement Act to address the number of problems with Federal fraud fighting. Today's hearing offers another opportunity to follow up on the Justice Department's implementation of the Fraud Act and to ask questions to help us determine what is and is not working.

Monday, the Department announced health care fraud recoveries for fiscal year 2010. The civil recovery numbers were impressive in our great victory in the fight against fraud. However, these recoveries only represent a small fraction of the estimated $40 to $60 billion in annual health care fraud.

There are a number of topics on health care fraud I would like to cover today, including the questions of paying and chasing fraud, privacy of physician billing information in the Health Care Fraud and Abuse Act, and the HEAT programs. Additionally, I am interested in talking about transparency in the False Claims Act settlements by requiring the Department to report a number of statistics to Congress annually. This will help alleviate concerns I have had for years that these settlements may simply become the cost of doing business for these large corporate fraudsters.

I also want to ask the witnesses about security fraud and some high-profile settlements with the SEC signing off last year. Specifically, I want to know what the Justice Department knew about these settlements in advance and whether they signed off on them or otherwise agreed to them. I want to learn more about why so many of these complex financial fraud cases seemed to end in settlements where shareholders are punished and yet there are so few ending in criminal prosecution where the senior executives ought to be held accountable.

Finally, I would like to note that, regardless of the substantive laws that we pass, Mr. Chairman, the investigative and law enforcement resources appropriated and the prosecutions brought so far, criminal fraud will not be deterred until we revisit the Supreme Court's decision in *United States* v. *Booker*, and that obviously deals with child pornography, fraud cases, the type that we are discussing here today. If potential fraudsters view the lenient sentences now being handed down as merely the cost of doing business, efforts to combat criminal fraud could be undermined.

I appreciate the opportunity to raise these important issues today with the witnesses and look forward to working with the Chairman.

Could I ask, Mr. Chairman, that some time about 5 minutes to 12, Senator Harkin and I are honoring Medal of Honor winner Staff Sergeant Giunta from our State, and we have to go together to do that. So I will——

Chairman LEAHY. I would stop anything for a Medal of Honor recipient. Feel free. We will start then with Lanny Breuer, who is the Assistant Attorney General for the Criminal Division of the United States Department of Justice, and I thank you for your kind words, Senator Grassley.

Mr. Breuer started his career as an assistant D.A. in New York City, prosecuted offenses ranging from violent crime to white-collar

crime. He later joined Covington & Burling, where he served as co-chair of the White-Collar Defense Investigation Group. He was Special Counsel to President Clinton from 1997 to 1999, where we got to know each other better. He got his undergraduate degree from Columbia and his law degree from Columbia Law School.

Mr. Breuer, please go ahead, sir. What we will do is we will hear from Mr. Breuer, then we will hear from Mr. West, then we will go to questions.

STATEMENT OF HON. LANNY A. BREUER, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. BREUER. Thank you. Good morning, Mr. Chairman, Ranking Member Grassley, and distinguished members of the Committee. Thank you for inviting me to speak with you today about the many ways in which the Department of Justice protects American taxpayer dollars by bringing criminal fraud prosecutions. I am honored to appear before you on behalf of the Department and along with my colleague and friend, Assistant Attorney General Tony West.

Together with the United States Attorney's Offices, our important partners in the Inspector General community, and our many other law enforcement partners, the Criminal Division, whose nearly 600 lawyers I am privileged to lead, is investigating and prosecuting fraud cases all across the country. We are holding fraudsters accountable for bilking the American people, and we are seeking sentences designed to punish and deter them.

We are also aggressively working to recoup the money these criminals have stolen, whether from individual investors through investment fraud schemes or from our taxpayer-funded public programs, such as Medicare.

As a result of our efforts over the past year, the Criminal Division, the United States Attorney's Offices, and our colleagues in the Civil and Antitrust Divisions have prosecuted thousands of defendants for fraud crimes and obtained judgments and settlements amounting to billions of dollars in fraud and corporate corruption proceeds. In fiscal year 2010, for example, in criminal matters in which the Criminal Division participated, we obtained approximately $3.4 billion in judgments and settlements.

The Department is grateful for the many resources Congress has provided to support and enhance our criminal fraud enforcement efforts. Beyond providing expanded statutory tools, Congress has authorized critical funds through various means, including in the Fraud Enforcement Recovery Act, FERA, which, of course, Chairman Leahy and Ranking Member Grassley sponsored. In addition, last year in the Affordable Care Act, Congress authorized additional, critical funding for use in health care fraud enforcement.

Congress's financial support of our criminal investigations and prosecutions is critical to protecting the American taxpayer's hard-earned money. And the amount of taxpayer money restored to the United States Treasury through our criminal enforcement efforts far exceeds—far exceeds—what we spend to recover that money.

In September 2010, when I last testified before the Committee on the subject of financial fraud, I described numerous significant

prosecutions that we had recently brought in the areas of investment fraud, mortgage fraud, bank fraud, and fraud in disaster programs. Since that time, we have continued our aggressive push to investigate and prosecute fraud in all its forms.

For example, we have expanded our aggressive efforts to prosecute those who seek to defraud the Medicare program. The Healthcare Fraud Prevention & Enforcement Action Team (HEAT)'s Medicare Strike Force, which now operates in seven U.S. cities, has led this effort.

In fiscal year 2010 alone, the Strike Force filed 140 indictments involving charges against 284 defendants who collectively billed the Medicare program more than $590 million in just those seven cities. We have also been working closely with the Special Inspector General for the taxpayer-funded Troubled Asset Relief Program, TARP, and our other law enforcement partners to hold accountable fraudsters trying to pilfer TARP funds.

In addition, as described in greater detail in my accompanying written testimony, we have been working hard to investigate and prosecute perpetrators of investment fraud schemes, procurement fraud schemes, securities fraud schemes, and mortgage fraud schemes. In many of these cases as well, we work closely with our many partners, including the Financial Fraud Enforcement Task Force, on which I serve as co-chair of the Commodities and Securities Working Group, the Recovery Act Working Group, and the Rescue Fraud Working Group.

As I have told this Committee before, prosecuting fraud is a high priority of the Department of Justice. Every day Federal prosecutors and agents across the country are working hard to investigate and prosecute those intent on defrauding American taxpayers or otherwise undermining the transparency and integrity of our markets. We are absolutely committed to continuing these efforts.

Thank you for this opportunity to provide this Committee with this brief overview of the Department's efforts to combat fraud. I look forward to working with the Committee further, and I am happy to answer any questions.

Thank you.

[The prepared statement of Mr. Breuer appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

We will next hear from Tony West, who is the Assistant Attorney General for the Civil Division of the United States Department of Justice. Prior to his time at Civil Division, Mr. West was a partner at Morrison & Foerster, representing individuals and companies in civil and criminal matters. Before that he served as Special Assistant Attorney General for the State of California. He started his career at the Justice Department. He spent 2 years working on crime policy issues as Special Assistant to the Deputy A.G., and later 5 years working as Assistant U.S. Attorney for the Northern District of California. That is a job where you do not get too much time to yourself, I know.

Mr. WEST. That is true.

Chairman LEAHY. He earned his bachelor's degree from Harvard University, his J.D. from Stanford University Law School.

Assistant Attorney General West, we are delighted to have you here, sir.

STATEMENT OF HON. TONY WEST, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. WEST. Thank you so much, Mr. Chairman and Ranking Member Grassley and members of the Committee. It is good to be with you again. It is a great privilege to appear before you with my good friend and colleague, Assistant Attorney General Lanny Breuer, to discuss the Civil Division's work to fight fraud and recover taxpayer dollars on behalf of the American people.

The Civil Division, as you know, represents the United States in courts throughout the Nation in a wide variety of matters and is the Justice Department's largest litigating component. We handle cases that touch upon nearly every aspect of the Federal Government's operations and this administration's domestic, national security, and foreign policy priorities. And central to our mission is the recovery of taxpayer dollars lost to fraud, waste, and abuse.

The primary enforcement tool that we use to achieve this important objective is the False Claims Act, a landmark piece of legislation that is well known to the members of this Committee. And essential to our success has been the ability to enlist the aid of whistleblowers pursuant to the Act's qui tam provisions—provisions that in 1986 were substantially strengthened due to the successful efforts of Ranking Member Grassley and Representative Howard Berman.

Indeed, Mr. Chairman and Ranking Member Grassley, thanks to your crucial leadership not only in promoting the False Claims Act but in substantially strengthening it in 2009 with the FERA amendments, the Justice Department today has better enforcement tools, better resources, and a better ability to pursue fraud perpetrated on the American people, better tools than we have ever had before.

In fact, since January 2009, the Civil Division, working with our partners in U.S. Attorney's Offices around the country, secured over $10 billion in fraud settlements, judgments, fines, and penalties under the Division's many statutory authorities—a staggering amount that represents the largest 2-year Civil Division fraud recovery in the history of the Department of Justice.

Now, while the largest share of this record-breaking sum represents the Department's vigorous efforts to fight health care fraud, something I will discuss in just a moment, that amount is also comprised of a wide variety of fraud cases we have pursued and resolved over the last 2 years, from procurement fraud cases involving substandard supplies to our men and women in uniform, to the ongoing cases involving suppliers of defective bulletproof vests that not only cheated the taxpayers but, more importantly, put our men and women in law enforcement at risk.

What is more, our success over these last 2 years highlights the results we can achieve when we combine enhanced resources for enforcement purposes and more effective coordination between the Justice Department and our sister Federal agencies with appropriate but aggressive enforcement strategies aimed at deterring il-

legal conduct and holding responsible actors accountable. Nowhere is this more evident than in our fight against health care fraud.

Now, when I was asked to appear before this Committee in October 2009, I said that we in the Justice Department recognized the urgency posed by a health care problem that undermined the quality, integrity, and safety of patient care. And now just over a year later, I am pleased to report that the Department of Justice has never been more aggressive or more successful in its fight against health care fraud.

Since January 2009, the Civil Division has—again, working with the Nation's U.S. Attorneys—opened more health care fraud matters, secured larger fines and judgments, negotiated higher settlements, and recovered over $8 billion for the taxpayers in health care fraud cases. This, too, is a record representing more health care fraud monies recovered than in any other 2-year period in history.

And even beyond the recovery of billions of dollars, this anti-fraud effort reflects a commitment by the Attorney General and the Civil Division to pursue cases that span the broad spectrum of health care fraud, including sophisticated corporate overbilling schemes, heart-wrenching cases of preventable patient neglect in nursing homes, large pharmaceutical companies that provide illegal kickbacks to physicians, and individual doctors who endanger the lives of those in their care just to bump up their Medicare reimbursements.

Indeed, ours is a commitment which recognizes that while most health care providers, companies, and individuals who do business with the Government are dealing fairly, playing by the rules, and are careful with the taxpayer dollars they receive, we know that there are those who cut corners, who take advantage, who put profits over patient safety. And, Mr. Chairman, it is those individuals and those corporations who attract our enforcement attention.

Finally, let me briefly touch upon the Civil Division's work to protect consumers by pursuing economic fraud. At the cornerstone of our efforts in this area is the interagency Financial Fraud Enforcement Task Force that Assistant Attorney General Breuer talked about. And the Mortgage Fraud Working Group, which I co-chair, is at the core of the task force's mission to combat mortgage fraud, from foreclosure rescue fraud and loan modification schemes to systematic lending fraud in the nationwide housing market. And our aggressive enforcement efforts have significantly increased recoveries in housing and mortgage fraud matters.

Last June, Attorney General Eric Holder announced the results of a nationwide mortgage fraud sweep, Operation Stolen Dreams, which resulted on the civil side in over 190 civil enforcement actions involving recoveries of almost $200 million.

Mr. Chairman, I look forward to working with you and the members of this Committee as we continue to tackle the challenges that are posed by fraud on the American taxpayers. Thank you for the opportunity to be with you, and I am happy to answer any questions you may have.

[The prepared statement of Mr. West appears as a submission for the record.]

Chairman LEAHY. Well, thank you, and I hear some of these stories. I have followed with interest the one on the bulletproof vests. Former Senator Ben Nighthorse Campbell and I had worked together in getting bulletproof vests for our law enforcement, and on an Appropriations Committee I worked very hard to get more body armor for our troops in the field. This is just one area of fraud. You assume when you are protecting our people who protect us that you are giving them the best. And I think it is as malicious thing as possible when they do that.

Obviously, you have talked about the mortgage fraud. When you have somebody who is out of work, they are facing enough other problems, and to have somebody try to reap an illegal benefit on that, it is Dickensian in its action.

You talk about civil and criminal fraud recoveries for the last fiscal year, over $6 billion; recoveries since January 2009, $10 billion. We are talking about real money, and that is money coming back, lost taxpayer money, lost frauds coming back as protecting Americans' investment in their Government.

Would you agree with me that the money we spend on fraud enforcement has not only paid for itself, but it is a pretty good return on investment? And this kind of money, if we continue to spend this money on fraud enforcement, we are going to continue to see returns. Mr. Breuer, would you agree with that?

Mr. BREUER. Mr. Chairman, I absolutely would agree. If you look at the number for the Criminal Division, our budget is a small, small fraction of the $3.4 billion that we were involved in recovering for the United States last year. Putting aside the deterrence and putting aside every other aspect, I do not think there is a question that what the Department is doing—the Criminal Division and the Civil Division—is showing that it is a remarkable return, as we are stewards of the taxpayer dollars.

Chairman LEAHY. Mr. West, do you feel the same?

Mr. WEST. Absolutely. I think there is no question that that is some of the best money that we spend in terms of enforcing our laws against fraud. There is no question that we bring back a multiple amount of money for every dollar we spend when it comes to anti-fraud enforcement.

Chairman LEAHY. And I would assume that, again, the deterrent effect when people actually think, wait a minute, they are going to come after us, that must have some effect.

Mr. WEST. I think that is absolutely right. As Assistant Attorney General Breuer noted, clearly nothing focuses the mind quite like jail time, and there has been great success on the criminal side. And we are intent—going to Ranking Member Grassley's comments earlier this morning, when it comes to holding corporate defendants responsible, we want to make sure that we are sending the message that this is not just a cost of doing business. We want to create a financial disincentive to those who would perpetrate fraud.

Chairman LEAHY. Mr. Breuer, let me ask you on that, again, we have a lot of former prosecutors on this Committee, and we have always agreed that nothing focuses your criminals' attention more than the fact that the bars may close on them. In the past, we have heard people who have committed fraud that sometimes when they get a fine, it is considered a cost of doing business.

What are we doing about real jail sentences? Obviously, I want to get money back for the taxpayers. Obviously, you want to get the fines. But what about putting some of these people in jail?

Mr. BREUER. Well, Mr. Chairman, we are putting them in jail. Let us use one example, a discrete one. The health care fraud prosecutions, the Medicare Fraud Strike Forces, we are talking about doctors, we are talking about nurses, we are talking about assistants. The average sentence in a health care fraud case is approximately 40 months. These are cases that we are bringing in remarkable time. We are bringing them quickly, swiftly, and efficiently. That is one example.

And if we look at all kinds of fraud cases, Mr. Chairman, there is no question that the defendants are going to jail for lengthy periods of time. Depending on the crime, depending on the seriousness of it, we are putting people in jail. We are extraordinarily focused on it.

If you look at the FCPA area, we have put more people in jail, and we have indicted more people there than we have ever done in history. That is true, really, with every aspect of fraud.

Chairman LEAHY. Again, I mentioned what Senator Grassley and I did—I was going to say "bipartisan." It was actually a nonpartisan matter. We had people support it across the political spectrum in the Fraud Enforcement and Recovery Act. I think it is the most significant anti-fraud legislation in more than a decade. We have talked about the resources for Justice, FBI, and other agencies. We did this on the Affordable Care Act, the Wall Street Reform Act. We did it with the idea that it was going to make it easier for you, and one of the reasons for having the hearing, we want to know if it has made it easier for you and if there are other things that we should be doing.

Mr. BREUER. There is no question, Mr. Chairman, that what you and Senator Grassley did with FERA was enormously important. It has provided us with extraordinarily helpful tools. By, for instance, expanding commodities, options, and futures to constituting securities fraud under 1348, we have been able to bring cases of securities fraud that we have never been able to bring before, and we have already done so. Making "financial institution" include private mortgage lending businesses has also provided us a very important tool. And, frankly, making fraud under the TARP a major fraud and making mortgage lending businesses, applications to them constitute false statements when you make a false statement, have all been tools that we are using. So both with respect to the monies received and the broadened statutory interpretations that you provided us, you have enhanced very substantially our ability to bring fraudsters to justice.

Chairman LEAHY. I am going to have some follow-up questions that I may just pass on to you. I appreciate the fact that both of you have always been available anytime either my staff or I have called.

I yield to Senator Grassley.

Senator GRASSLEY. I am going to repeat something I said in my opening statement, that health care fraud is a pervasive problem, and to the tune of about 5 to 8 percent of Federal expenditures.

And obviously I am acquainted with this because of my leadership on the Senate Finance Committee for a long period of time.

I want to refer to a recent Wall Street Journal series examining fraud of health: "Medicare often fails to stop questionable payments up front" because of the pay and chase system occurring for a number of reasons. It is a major vulnerability. I authored legislation last year to correct some of this, and I think that is the next logical step in combating health fraud.

Additionally, the Wall Street Journal article pointed out how a three-decade-old court decision made in 1979 protects physician privacy by limiting the release of physician billing records. A former Department of Justice official is quoted in the article as saying that, "We should make these records public. At least I think it is time to revisit this issue and bring some transparency to this whole thing."

Mr. Breuer and Mr. West, do you agree that we should consider revisiting the privacy protections for physician billing records in Federal health care programs? And if not, why not?

Mr. BREUER. Well, Mr. Chairman, I want to begin by thanking and applauding you for your leadership, and we take that very much to heart. In our prosecutions we use the tools you have provided for us, and we are very pleased with how our Medicare Fraud Strike Forces are working.

We would absolutely want to work with you on these kinds of issues and have the dialog, but we also do believe, I should say, that we do have right now, because of your work and others, the resources that we need and are able to get the information that we need for prosecutions. But we always are open for more, and the more enhanced tools we get, the better our job can be.

Senator GRASSLEY. Would you chime in, Mr. West?

Mr. WEST. Sure, Senator, and I would actually echo Assistant Attorney General Breuer's thanks for your leadership on these issues because it really has provided us in the Civil Division with the tools we need to be able to pursue not just health care fraud but all types of fraud. And we very much welcome the opportunity to talk about any tools that can enhance our ability to identify fraud and to go after it and recover taxpayer dollars. And so I know we have had an ongoing conversation, our staffs, and we look forward to continuing that dialog.

Senator GRASSLEY. On another point, just for Mr. Breuer, the HCFAC program cost over $7 million last year. Do you believe that suspending provider payments up front for entities that are under Federal investigation for fraud is a better investment compared to continuing to pay and chase fraud via law enforcement?

Mr. BREUER. Well, Senator, you have my word that we will be zealous in our prosecutions, but I will be the first to acknowledge we cannot prosecute our way out of this problem. I noted that Secretary Sebelius the other day talked about new steps that she and her people were taking. And so, of course, we do believe that our friends at HHS, the steps that they are taking on the front end will be the most effective way of stopping the fraud. But when the fraud occurs, we will be there.

Senator GRASSLEY. Okay. Mr. Breuer again. I have a letter, a response from DOJ and HHS I received Monday. About 66 percent

of all False Claims Act cases pending allege health care fraud. The letter also stated that 180 of these cases involved the pricing and marketing of pharmaceuticals. Additionally, the letter stated that 726 criminal convictions and plea bargains occurred in fiscal year 2010.

Could you tell me—and if you cannot, I would take it in writing—how many of those criminal convictions involved individuals employed by pharmaceutical manufacturers?

Mr. BREUER. Well, Senator, it may make sense for my colleague Assistant Attorney General West to take the lead on this, because I think he is handling the False Claims Act cases more than we are.

Mr. WEST. With regard to the—and these are cases that will often involve, as you know, Senator, the Food, Drug, and Cosmetic Act. We would be happy to get you a breakdown of which of those convictions involved individuals employed by pharmaceutical companies.

Senator GRASSLEY. Okay. And then I hope this is for you, Mr. Breuer, but over the last several years, a number of pharmaceutical companies have paid billions of dollars in fines and penalties for illegal marketing of their products or their drugs, some pleading guilty to criminal cases, yet individuals were not held accountable for breaking the law.

Did the Department of Justice consider prison terms as a deterrent in these cases? And if not, why not?

Mr. BREUER. Senator, my good friend Tony West may be annoyed with me, but I think that is also one that he is going to have to answer. They are taking the lead with respect to the pharmaceutical companies in this space.

Mr. WEST. I will take that on. Let me start by saying that we consider in all appropriate cases the whole panoply of criminal and civil penalties when it comes to these types of cases involving pharmaceutical companies. And we do not hesitate—if individual culpability indicates and the facts are there and the law supports it, we will not hesitate to prosecute those cases. And we have actually quite a few good examples in the last 2 years where we have held individuals accountable.

For instance, just three off the top of my head. There are two physicians that we have gone after individually because of their actions, physicians, their actions with regard to actions they took which were substandard care issues. We, I guess just 3 months ago, indicted the associate general counsel of a major pharmaceutical company for allegations of obstruction of justice when it came to an FDA investigation.

And so, you know, the message that we have been giving quite consistently, both Assistant Attorney General Breuer and myself, is that we will look at individuals and we will pursue individuals when the facts and law allow.

Senator GRASSLEY. Okay. And, Mr. Chairman, just one more short question in this series?

Chairman LEAHY. Of course, of course.

Senator GRASSLEY. Again, I do not know; Mr. Breuer, I thought it was you. According to the same letter, 80 False Claims Act cases are under investigation involving hospitals. How many of the 726

criminal convictions or pleas involve the individuals employed by hospitals? And if you cannot answer that, if you could answer it in writing.

Mr. BREUER. Absolutely. And, again, the False Claims Act is my friend.

Senator GRASSLEY. You could easily conclude that I do not know what each of——

[Laughter.]

Mr. WEST. It is confusing, but I do think it is a sign of the close collaboration that we are sometimes doing so much together.

We will get you the breakdown that you are asking for in terms of how many of those individuals were employed by hospitals.

Senator GRASSLEY. Okay. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Grassley.

Senator Whitehouse, another former prosecutor, U.S. Attorney, Attorney General, it is all yours.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

I have a comment that I would invite you to respond to off-line because if we go down this road, we will take up every minute of my time on it. But I wanted to sort of put out a marker that I view that America is right now on the losing end of the biggest transfer of wealth through theft and piracy in the history of humankind, and that it is happening in cyberspace, and that our law enforcement particular investigative resources to address that problem are nowhere near adequate, off by orders of magnitude at this point. And I know that you all are deep into your interagency process that is supposed to conclude, I hear, in a matter of weeks, maybe a month or two, and I just want to put a marker down that I very much hope that you are pushing for the kind of resources that this problem demands. If you actually sort of see it in all its dimensions, as I have had the ability to do on the Intelligence Committee, it is really big and most Americans really do not see it because it is either classified or protected by corporations that do not want the public and shareholders and regulators to know how badly they are being scooped. So that is the point that I want to make.

The question that I have for you both is about predictive modeling and how engaged you are with making sure that that is an effective investigative and prosecutorial tool. I come at this on two fronts. We had a long fight with DEA about trying to get off paper records for controlled prescriptions—pharmaceuticals—because it disabled e-prescribing networks to require people to have a paper one next to their electronic one. And after 3 years of struggle, that battle is finally won, and DEA has changed it position, and we now have a new regulation in place. I wish it had taken 3 months and not 3 years, given what was at stake. But that is, I guess, the nature of bureaucracy.

At the same time, we have the LeMieux-Whitehouse bill that has authorized the Secretary of HHS to engage in and hire firms to do predictive modeling through the Medicare data bases, and I gather those are coming up to bid with contracts very shortly, maybe in, I think my notes say, in April. And what I am hoping is that you all are talking to Secretary Sebelius and that you see this predictive modeling technology as a really good way for highlighting

discrepancies and anomalies, things that suggest that, you know, suddenly a doctor goes from no prescriptions of Percocet to a hundred a week may be worth an inquiry, or the same patient is getting prescriptions from five different doctors. That is just in the prescriptions phase. Then you get into billing and starting to develop the signs of fraud. I think it can be a hugely effective tool, both in e-prescribing and in regular Medicare billing. And if you could tell me a little bit about how engaged you are in that process that is happening over at HHS so we do not get to a position where that is done and they have met all of their goals by doing it, and you are looking at it say, oops, this does not work for us because you were not sufficiently engaged in that process.

So are you really looking forward to these predictive modeling tools? Do you think they are valuable? And how engaged are you with those who are developing them?

Mr. BREUER. Absolutely, Senator Whitehouse. First, even though you told me not to comment, I just want to make sure you know how committed I am and how committed we are on the first issue you spoke about. Indeed, one of my deputies testified——

Senator WHITEHOUSE. Provide it in writing, and go on to predictive modeling.

Mr. BREUER. Okay. I will put it in writing.

Senator WHITEHOUSE. Thank you.

Mr. BREUER. With respect to predictive modeling, I absolutely am a fan and believe in it. Our Medicare Fraud Strike Forces that I mentioned before in our seven cities have been stunningly successful, and in no small part because of that very modeling. When we find out that Dr. A is billing at an exorbitant rate higher than Dr. B, and they are near one another, we look at Dr. A right away. That is why we have been able to bring cases literally in months. So we are huge fans of that.

Moreover, in the Recovery Act, Earl Devaney, the Chair of the Recovery Act Board, to some degree is doing exactly that right now, and we would like to think that is one of the reasons why fraud appears to be as low as it is. We are very aware of that. We are having ongoing dialogs. The FBI I know was very involved in that. I meet with the FBI, and they have a very data-driven process in place that I think is very successful.

With respect to ongoing discussions with HHS, I will have to get back to you to what degree we are having those, and——

Senator WHITEHOUSE. There are two contracts that are expected to be awarded in April, I believe, and then on July 1, the use of the new technology should kick in, which basically does it kind of—it is like a search function as opposed to doing it in individual identified cases.

Mr. BREUER. Well, I am pretty good about butting myself in places, so I will find out.

Senator WHITEHOUSE. Please make sure you are comfortable with what they are doing.

Mr. BREUER. Absolutely. But more generally, the notion of predictive modeling is something that we very much agree with.

Senator WHITEHOUSE. Very good. My time has expired, so sorry, Tony.

Mr. WEST. That is all right.

Senator WHITEHOUSE. [Presiding.] Senator Franken is next.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. I want to thank Senator Grassley and Senator Leahy, Chairman Leahy, for their leadership in this area, and I think it is especially fitting that this is our first hearing with you as Ranking Member, because you have been a leader in this area for so long. I enjoyed serving on this Committee with Senator Sessions as the Ranking Member, but I am very much looking forward to working with you in this capacity, Senator.

Mr. Breuer, as you may know, I have a longstanding interest in making sure that we hold Government contractors to a higher standard. If the Federal Government chooses to contract with a company, we have an obligation to make sure that contractor is not defrauding American taxpayers, and that means vigorously investigating allegations of contractor fraud. But it also means thinking twice before we award any new contracts to a company that has been indicted or convicted of fraud. I do not know about you, but if I hired a contractor to work on my house and he charged me a ton of extra money for work he did not do, I would not use that contractor again. And I would make sure that my friends knew not to use him either. It seems like the same should be true of Government contractors.

As Chair of the National Procurement Fraud Task Force, what are you doing to make sure that Federal agencies are collaborating on suspension and debarment actions if a contractor is convicted of procurement fraud? How can we make sure that contractors that we know we cannot trust are not awarded new contracts?

Mr. BREUER. Thank you, Senator. As an aside, the National Procurement Fraud Task Force has been folded into the Financial Fraud Task Force.

Senator FRANKEN. Okay.

Mr. BREUER. But we are still covering it.

Obviously, the Department of Justice itself is not the debarring official, and so we cannot make that decision. But, of course, what we are is absolutely transparent in our cases, and I have had many meetings with IGs and in the IG community. We value them tremendously. So, ultimately, after we pursue these corporations—and I would like to think we are doing it aggressively and we are doing it in a targeted manner—that information is there for the debarring officials.

I agree with your premise that if you commit a fraud against the United States, you should not have a right to continue doing business. But, ultimately, that part of it is not our decision. That is the part of the department or agency that actually provides the contract, and they all have debarring officials who make those ultimate decisions.

Senator FRANKEN. Okay. Well, I can see this is not your ultimate decision, but I am particularly worried that Federal agencies are giving a free pass to large contractors. According to the Project on Government Oversight's Records, over the past 15 years, there have been only five suspension actions and zero debarment actions of the Government's top 100 contractors, which receive 55 percent of all contracts. I think part of the problem is that we are too de-

pendent on a handful of very large contractors, particularly when it comes to the wars in Iraq and Afghanistan, and that too many contractors maybe now are too big to fail.

Mr. BREUER. Senator, I share your concern and, like you, feel very deeply about procurement fraud, so much so that you may know that I literally have three prosecutors on detail from the Inspector General in charge of Iraq who literally work in my fraud section. We are prosecuting fraud in Iraq, in that area, and in Afghanistan. And so I agree with you that those numbers seem very low.

Senator FRANKEN. How frequently is DOJ putting in settlements, specific language that can be used to prevent debarments and suspensions?

Mr. BREUER. I do not think we ever do, Senator. I do not think we would do it for the very reasons you said. I do not think the Department of Justice believes that it is our role to determine whether someone should be debarred or not because we do not have the expertise of the department of agency who has to decide how valuable this particular contractor is.

Senator FRANKEN. Okay. I am running out of time. I just want to ask something about return on investment. The FBI estimates that health care fraud may be as high as 10 percent of all health care expenditures, which means this type of fraud may cost the Nation more than $220 billion annually. But you were able to recover $2.5 billion from health care fraud judgments and settlements this year. I think there is some estimate that for every dollar invested in investigations, we get back $17. And what I am wondering is, would you like more resources? Can that return on investment mean that we are actually reducing our deficit by spending more money on these——

Mr. BREUER. Right. Well, Senator, I will say this: I mean, our budget in the Criminal Division is a bit under $200 million. Now, we do get other monies that are targeted to us, but we were responsible for approximately well over $2 billion just by ourselves and $3.4 billion working with other U.S. Attorneys. So I think there is absolutely no question that we, the Civil Division, the Department, are a remarkable return on investment. We are being very efficient and targeted in our work and will continue to be, and we are being very aggressive about getting dollars back and returned to the U.S. Treasury.

Senator FRANKEN. Thank you.

Sorry, Mr. West.

Mr. WEST. That is all right.

Senator FRANKEN. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Franken.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I also welcome Ranking Member Grassley from our neighboring State of Iowa, and I am glad that he is in his position. I also enjoyed working with Senator Sessions.

I first have a question—since we are going to be very focused in the next few months on budget issues—for Mr. Breuer. In your written testimony, you mentioned that you have obtained approximately $3.4 billion in judgments and statements, which is truly an

extraordinary figure. Do you have any sense of how this compares with past year?

Mr. BREUER. I do, Senator. It is clearly higher than in our past years. Last year, it was $3.4 billion. In fiscal year 2009, I think it was, candidly, probably half that amount of money. It was probably just under $2 billion. So it is by far a record year.

Senator KLOBUCHAR. And I think you have heard some of the budget proposals out there. I personally have favored caps and things like that. But some of the proposals would hit particularly hard on the Department of Justice, something like one of them I heard would cut FBI agents by 4,000. And I just wondered what you think of that and what would happen to our prosecutions if that were to occur. And I guess also at one point in your written testimony you said the money you have obtained in the criminal prosecutions has more than paid for the cost of investigating them. Do you have specific numbers? And how will you use that argument if you want to protect some of these criminal—or some of us want to protect these criminal justice resources?

Mr. BREUER. Well, Senator, without going to any particular provision, I just think it is inescapable that if you take our prosecutors away and if you take our FBI agents away, we will not be able to protect the American people in the way we are now protecting. We will not be able to recover the funds in the way we are recovering them. And every day in the United States we see victims of all kinds of fraud and other kinds of crime.

I could not be more proud of the lawyers in our Criminal Division and our U.S. Attorney's Offices. I could not be more proud of the investigators in all of the agencies. I deal with them all the time. And it is just the reality that when—we think we are, of course, a great return on investment. We also think we perform a remarkably important function, and if there are fewer of us, we will be able to do less.

Senator KLOBUCHAR. Okay. Well, I think it will be very important to be armed with those statistics as we go into some of these negotiations, because I do believe, having seen some of these cases in the white-collar area, that you can actually pay for the investigation, not to mention what you are preventing from happening in the future.

In the health care fraud area, I again commend you for that. You mentioned that through the work of the Medicare Strike Force, 146 defendants were sentenced to prison terms with an average sentence of more than 40 months. Would you say that there is a renewed focus on prison time as a punishment in the health care fraud area?

Mr. BREUER. Well, whether renewed or not, there is an enormous focus on prison time. It is insidious that people are trying to defraud the Medicare program and trying to steal taxpayer dollars. So our prosecutors are very zealously fighting for jail time, and they are getting it in the vast majority of cases. And, of course, often these are, again, people who have never gone to jail in their lives and often people who have no records. They are white-collar people who have decided that for whatever reason they ought to try to defraud the program, and we are seeking and getting jail time.

Senator KLOBUCHAR. Very good. One last thing I wanted to mention. We had another hearing on this; I think it was Senator Specter's last hearing that he chaired on the Foreign Corrupt Practices Act. I think we both know it is an important statute both in theory and in practice. But I have to tell you I have heard from several companies, and it turned out a lot of other Senators have heard this, too, in their State that are trying very hard to comply with this, but because of some increased enforcement efforts, they do not feel like they have the guideposts to know exactly how they comply. I think you know that many companies self-report FCPA violations when they discover them, and as we discussed at that hearing whether or not the DOJ is considering providing guidelines for self-reporting or Senator Coons and I are working on some potential legislative changes to update that statute. As you know, they define a foreign official very broadly, and in today's China, a nurse could be construed as a foreign official because they work for the state. So how—just if you have given some thought or if you would go back and give some thought and talk to people about the guideposts with that statute, the need for some guidance for our companies who are really trying to do the right thing as well as some potential statutory changes.

Mr. BREUER. So, Senator, we are always willing to engage in dialogue and absolutely will. But I do not really accept that premise. I believe that there is much guidance with respect to the FCPA. It is the one statute, for instance, that provides an opinion release. If you have a question, we will give you an opinion on it.

If you look at our website in the Fraud Section, we have every document that we have filed in court right up there. Myself, my fraud chief, many speak on this area all the time. So if there is a subtle issue that you really feel you do not understand, we are happy to explain it. But if you look at the cases we have brought, these are not subtle cases. We do not want——

Senator KLOBUCHAR. Could I—I have no dispute with the cases you have brought. It is just that the investigations that are taking place oftentimes, I am sure, find nothing wrong that are wreaking havoc in terms of companies trying to do business consistent with the President's focus on doubling exports where they find out a nurse comes to a seminar on how to use some health care third quarter, the Metro is closed down, they give her money to take a cab back, and then they get a major investigation.

Mr. BREUER. Well, Senator, I do not think that they are getting major investigations. And one other point there: More than half the companies that we are investigating and prosecuting actually are foreign-based companies. So we are very proud of our work. But absolutely we are always willing to engage in dialogue and will continue to do so.

Senator KLOBUCHAR. All right. Thank you very much.

Chairman LEAHY. Thank you. Normally I go next, but I know that Senator Grassley has an important meeting with a Medal of Honor recipient, so I will yield to you, Senator Grassley.

Senator GRASSLEY. Thank you.

Mr. West, last year Congress revised what is known as the public disclosure bar, the False Claims Act. It was amended so that it is no longer a jurisdictional issue for the courts that can be raised by

a defendant. Instead, the courts shall dismiss claims under the new public disclosure provision unless it is opposed by the Government. This provision is meant to have a significant impact on qui tam whistleblowers if it is not properly administered by the Department.

Has the Department developed guidelines concerning when it will and will not oppose such motions?

Mr. WEST. Well, first let me say, Senator, this was part of the FERA amendments, of course, that you and the Chairman led that have helped us in our enforcement capability. And this was one of the important changes so that there is this amendment to the whistleblower—to the public disclosure bar so that whistleblower suits are not inordinately tossed out of court because of that. And this is something that we are working as we—we have an open dialogue with the relators bar, and we work often very closely with them to make sure that these cases are being brought in a way that not only reflect meritorious investigations but are ones that ultimately can be successful.

Senator GRASSLEY. Well, then, if the guidelines have not been developed yet, do you anticipate developing such guidelines? And if you did develop guidelines, will the guidance be made public or available to Congress for oversight purposes?

Mr. WEST. Well, certainly, I mean, to the extent that there are any guidelines that we would be sharing with the relators bar or with anyone else, we would make those public, and we would share those with Congress. I think, you know, that would be our practice if we were going to share them both with outside counsel.

Senator GRASSLEY. Before I get to the next question, I would like to note as a follow-up to Mr. Breuer's response to Chairman Leahy's question about putting fraudsters in jail, while it is true that some health care defendants get jail time, this does not seem to be the case in securities fraud where sentences, aside from Bernie Madoff, have been light or non-existent, at least not putting bigfish corporate America people in jail.

My question here is in regard to the SEC. If the Justice Department fails to act in a case where the Government finds a hedge fund paid hush money to someone to get them to withhold crucial information, does this not send the message that perjury to the SEC will be tolerated? And I had a page and a half here background to that question, but I do not want to take time to read it. I think you understand what I am up to here.

Mr. WEST. Yes, Senator, and actually I am going to do what Assistant Attorney General Breuer did to me earlier, because he actually handles referrals from the SEC in the area of securities fraud. His Division handles that.

Mr. BREUER. Senator, if I may, just to begin, I just want for a moment to take issue with what I think sometimes is a misimpression. If you just look over the last few months in the area of securities fraud, you will see that Mr. Dickson for securities fraud got 2 years in jail. Mr. Mott for securities fraud got 8 years in jail. Mr. Wolf got 4½ years in jail. The UBS trader got 5 years in jail. Joseph Collins of Refco got 7 years in jail.

Senator, those were all sentences over the last months.

Senator GRASSLEY. Can I bring up a case then where I and former Senator Specter were involved in over a period of years? The Pequot founder paid $28 million to settle the SEC case. The SEC says he paid a former employee over $1 million of hush money. There has been no prosecution of that person.

Mr. BREUER. So, Senator, my only point and issue was just to suggest—I just wanted to make it clear that securities fraudsters are going to jail. Without talking about a particular case, what I can tell you is that my partnership with Rob Khuzami, the Director of Enforcement, is extraordinarily close. Our teams meet on a regular basis. It is extraordinarily collaborative. And in any case where we believe we can prove beyond a reasonable doubt that a crime was committed, we are bringing those cases.

Obviously, the SEC has a different standard of proof because they pursue their cases civilly. But where we can bring a criminal case, we will. And where incarceration is appropriate, we seek it, and we do that in quite a number of cases.

Senator GRASSLEY. Did the Securities and Exchange Commission consult the Department of Justice before entering the Goldman Sachs settlement?

Mr. BREUER. We collaborate with the SEC, but they do not seek our guidance when they resolve their cases. They do that independently.

Senator GRASSLEY. Maybe one last question—well, no, I will stop there because I think I have to go right now. So I will submit questions for answer in writing.

Chairman LEAHY. In fact, I will keep the record open for any other questions until the close of business.

[The questions of Senator Grassley appear under questions and answers.]

Chairman LEAHY. Senator Whitehouse, you had other questions.

Senator WHITEHOUSE. I did want to follow up. Thank you, Chairman.

The first thing I wanted to follow up on was perhaps unfairly I drew the conclusion from the delay, what one might actually describe as foot dragging—from at least my perspective, it seemed that way; maybe it is just the way the bureaucracy operates—that the Drug Enforcement Administration did not see any value in going to electronic prescribing records. They made the case that, you know, it might put at risk their ability—you know, you can see the old agent sitting next to the prosecutor at the table, and one by one entering those handwritten scripts into evidence and thinking that is how you made drug diversion cases. And that seemed to be the sort of model that they were proceeding from, and they did not seem, to me anyway, to have any appreciation of how incredibly valuable having this information electronically so that you can make cases and find these anomalies and things so much more rapidly.

And so in addition to a sort of general question of do you support this, can you vouch for the fact that there has been a change of heart at DEA or that I was mistaken about this and that, in fact, they do get what a valuable tool they will acquire for investigation?

Mr. BREUER. Senator, I do not want to speak for the DEA, nor should I. What I can tell you is that I meet with the Administrator,

Michele Leonhart, who is a great patriot, incredibly devoted to the agency and to serving the American people. I find DEA to be very forward leaning. I will be happy and will speak to her about this very issue.

It has been my impression over the last 2 years that DEA is very open to new approaches and being as vigorous as it can be, and I will speak with her about that.

Senator WHITEHOUSE. Good. I appreciate that. And then because time was short—I was not sure we would get a second round—I cut you off on the comment that you were prepared to make on the cybersecurity issue, and I just wanted to give you an opportunity to go ahead and make that comment now that we have a little bit more time at our disposal.

Mr. BREUER. I just wanted to reassure you that it is very much on our mind as well. I could not be more proud of our CCIPS unit, our Computer Crime and Intellectual Property unit. The Deputy who oversees that section testified yesterday. We are very aware of these approaches. We are speaking within the administration a lot about that, and I just wanted you to know it is very much on our mind. And we will be vigorous and also look at this as an issue of remarkable import for the American people.

Senator WHITEHOUSE. Good. I appreciate that, and I certainly did not want anything in my comment to deprecate the extraordinary work that is being done in this area by you all, in some cases in close conjunction with other services. I am familiar with it, I am proud of it. It is extremely impressive. But when you scale it against the dimensions of the problem that we are facing, I think it is an order of magnitude too small. I know that is not your problem. I think you all are doing a wonderful job with the resources that we have given you, and so the thrust of my question is to make sure that you are not shy about coming back to us making a strong case for what resources are really needed to protect the cyber infrastructure of our country, particularly around critical infrastructure; to protect the intellectual property that resides on our cyber infrastructure and that is being looted wholesale by foreign competitors; to protect our banks from electronic robbery; to protect against massive trademark and, you know, music, film, other property being sold at will without paying licensing.

There is just a lot of that, I think, going on, and I think it relates in scale to the type of criminal problem we face from the narcotics industry, for instance. It relates in scale to what the Alcohol, Tobacco and Firearms jurisdiction presents as a risk to our country. And so I think the scale that we are going at it on, which is our fault not yours, is way too small. But I want you to engage with us vigorously in that if you come to agree that we need to ramp up the scale of the very wonderful work that you all are doing right now.

Mr. BREUER. Yes, Senator, and as you may know, this is a great priority of Attorney General Holder's. We all work closely with Victoria Espinel, the IP czar, and we will absolutely do that.

Senator WHITEHOUSE. I appreciate it.

Chairman, thank you for the extra time. I appreciate it very much.

Chairman LEAHY. Thank you. And, gentlemen, I will have some questions to submit, but my staff and I will be following up. I want to indicate that it was not by coincidence that this was the first hearing of the Senate Judiciary Committee this year. I want to emphasize that it is a matter of great importance to the Committee. I want to see real enforcement. We have worked hard to give some bipartisan tools. If we need more tools, we will give them. If there are areas where there are things that should be changed, be very candid and let us know, and we will work on that.

There is no way either for the American taxpayers or just as a country we should be allowing this kind of fraud. Obviously, we have an advantage if we are able to recover huge amounts of money for the taxpayers. But I am also thinking of the fact that there are thousands and thousands of people out there who need our protection. They are not going to be able to do it on their own. We can do it for them. So keep in touch with us. I think you are going to have a welcome Committee here.

Thank you very much, and we stand in recess.

Mr. BREUER. Thank you, Mr. Chairman.

[Whereupon, at 11:55 a.m., the Committee was adjourned.]

[Questions and answers and submissions to follow.]

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QUESTIONS AND ANSWERS

Questions for the Record
Assistant Attorney General Lanny Breuer
Criminal Division
United States Department of Justice

Committee on the Judiciary
United States Senate

"Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud"
January 26, 2011

Questions Posed by Senator Patrick Leahy

1. **I am concerned about ongoing reports that prescription drug abuse is on the rise, and that the availability of counterfeit pharmaceuticals exacerbates this problem. We took steps in the last Congress to stop the problem of rogue online pharmacies, but we can do more. We can make further progress by ensuring that the Department of Justice has the tools to enforce the current laws, and that appropriate penalties exist to deter this behavior.**

   As I understand it, today the Department of Justice has the authority to investigate and prosecute offenses relating to trafficking in counterfeit pharmaceuticals under both the federal criminal counterfeiting laws (18 U.S.C. §2320), and the Federal Food, Drug and Cosmetic Act (21 U.S.C. §301 et seq.). The latter of these provides for relatively weaker penalties.

   Mr. Breuer, does the Criminal Division prosecute cases relating to trafficking in counterfeit drugs using the criminal counterfeiting laws? If not, why not?

Response:

The Criminal Division and the U.S. Attorneys' Offices regularly prosecute cases involving counterfeit drugs under 18 U.S.C. § 2320, which prohibits trafficking in counterfeit goods generally. Statistics for prosecutions under this and other criminal intellectual property statutes are provided annually to Congress as an Appendix to the Department's Annual Performance and Accountability Report (FY 2010 data may be found here: http://www.justice.gov/ag/annualreports/pr2010/p253-284.pdf). Specific examples of counterfeit pharmaceutical prosecutions are also provided in the report of the Department submitted pursuant to the PRO-IP Act (the FY 2010 Report may be accessed here: http://www.justice.gov/criminal/cybercrime/proipreport2010.pdf).

Using the counterfeit goods statute, the Department has been able to convict distributors of counterfeit medicines including experimental cancer treatments, as well as brand names such as Plavix and Lipitor (heart attack/stroke prevention), Ziprexa (schizophrenia), Tamiflu (treatment and prevention of influenza), and Cialis and Viagra, and has obtained sentences as high as 78 months' imprisonment for these crimes.

The recent conviction following trial of En Wang in Houston is a good example of the use of the counterfeit goods statute in a prosecution against a defendant trafficking in counterfeit pharmaceuticals. In that case, based upon an undercover investigation conducted by Immigration and Customs Enforcement (ICE) and prosecution by the U.S. Attorney's Office for the Southern District of Texas, Defendant Wang was convicted in September 2010 of conspiring to bring more than 7,000 counterfeit Viagra tablets into the United States. Wang faces a ten-year prison sentence and $250,000 fine at his sentencing on March 28, 2011.

As another example, Mark Hughes was recently sentenced to 46 months' incarceration and ordered to pay restitution for trafficking more than 11,000 doses of counterfeit Viagra and Cialis. Hughes's sentencing on February 9, 2011 was the result of a prosecution brought by the U.S. Attorney's Office for the Eastern District of Missouri, following a joint investigation involving ICE, Customs and Border Protection, the Postal Inspection Service and the Food and Drug Administration.

Questions Posed by Senator Tom Coburn

2. **What further tools do you need to go after perpetrators of Medicare and Medicaid fraud and why? Please explain how your recommendations are different from the tools you already have.**

Response:

The Patient Protection and Affordable Care Act of 2010 (Affordable Care Act) provides the Department with several additional statutory tools that are enhancing federal law enforcement's ability to combat health care fraud. Among the changes in the new law, the Affordable Care Act:

- Directs the United States Sentencing Commission to amend the Sentencing Guidelines with respect to calculating loss in health care fraud cases and increase the guideline ranges for health care fraud schemes involving a loss of $1 million or more.
- Clarifies that the term "willfully" found in the health care fraud and anti-kickback statutes does not require proof that the defendant knew of the existence of, or intended to violate, those specific statutes.
- Amends the anti-kickback statute to provide that a claim that includes services or items resulting from a violation of the statute would constitute a false or fraudulent claim for purposes of the False Claims Act. The Act also adds the anti-kickback statute to the definition of "Federal health care offense" in 18 U.S.C. § 24.
- Clarifies the obstruction of justice statute, 18 U.S.C. § 1510(b), to make clear that it applies to health care fraud subpoenas issued pursuant to 18 U.S.C. § 3486.
- Confers new subpoena power on the Attorney General for the investigation of claims under the Civil Rights of Institutionalized Persons Act.
- Makes several significant changes to the law governing employee group health benefit plans subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and multiple employer welfare arrangements (MEWAs) regulated by ERISA by prohibiting false statements in the sale or marketing of employee health benefits by MEWAs and adding certain ERISA offenses concerning the sale and marketing of employee group health benefit plans to the definition of "Federal health care offense," 18 U.S.C. § 24.

There may well be other specific legislative changes that could enhance the Department's ability to fight fraud. We look forward to continuing to work with Congress and the Committee on effective strategies for prosecuting health care fraud in all its forms.

3. **Do you think states conduct sufficient program integrity oversight of Medicaid?**

Response:

The Department is not in the best position to opine whether or not the states conduct sufficient program integrity oversight of Medicaid, as DOJ does not have direct oversight responsibility for Medicaid program administration or for the state Medicaid Fraud Control Units. As noted in the Health Care Fraud and Abuse Control (HCFAC) program report to Congress for FY 2010, however, we continue to work closely with our state counterparts to return money to the public fisc that is diverted as a result of health care fraud.

4. **On May 20, 2009, DOJ and HHS announced the Health Care Fraud Prevention & Enforcement Action Teams (HEAT) initiative and the HEAT initiative has been touted by the administration as a great success. In fact, the FY2011 budget submitted to Congress by President Obama included a request for an additional $60.2 million to "allow the Strike Forces to continue to expand into additional cities in the near future."**

   a. **What metrics are you using as the basis for your determination that HEAT is successful?**

Response:

In measuring the success of the components of the HCFAC program, we continue to report our achievements through the annual HCFAC report submitted to Congress. Our most recent HCFAC program report to Congress includes several performance metrics that the Department has reported to Congress annually since the inception of the HCFAC program in 1997, and that reflect the success of our HEAT teams. First, the federal government's health care fraud prevention and enforcement efforts recovered and restored more than $4 billion to the U.S. Treasury, the Medicare Trust Funds, other Federal agencies administering health care programs, and private persons in FY 2010. This is the highest annual amount ever recovered from healthcare fraudsters. Moreover, the $4.02 billion in transfers represents an increase of $1.47 billion, or 57 percent, over the previous record of $2.55 billion in HCFAC transfers in FY 2009. Second, the $683.2 million transferred separately to the Treasury as a result of our Medicaid fraud enforcement efforts in FY 2010 also was a record amount, exceeding the previous record of $441 million set in FY 2009 by $242 million, which represented a 55 percent increase. Third, a record high total of 931 health care fraud defendants were charged during FY 2010, reflecting a 16% increase over the prior fiscal year. Fourth, a total of 726 health care fraud defendants were convicted of health care fraud related offenses last year – another record – representing a 23 percent increase over the previous high number of convictions. Finally, the heightened cooperation and collaboration between DOJ and HHS resulting from HEAT has improved and enhanced HHS's ability to use information that DOJ prosecutors learn about Medicare's fraud vulnerabilities to seek and develop programmatic changes to improve Medicare's fraud prevention efforts and authorities. For example, several of the fraud-deterring provisions that were included in the Affordable Care Act, such as enhanced screenings and enrollment requirements, increased data sharing across government, expanded overpayment recovery efforts, and greater oversight of private insurance abuses, reflect this heightened cooperation.

   b. **Can you explain how these metrics demonstrate that HEAT is working?**

Response:

As demonstrated by these metrics, the HEAT initiative has had a demonstrable impact on total health care fraud financial recoveries, the number of defendants charged and convicted in criminal health care fraud prosecutions, and the number of administrative changes made to implement new prevention measures. The additional discretionary resources that Congress provided to DOJ through the HHS budget to support the HEAT initiative enabled the Department to hire additional civil attorneys, criminal prosecutors, and support staff to expand our civil and criminal caseloads during fiscal years 2009 and 2010. As a result, we have produced record high numbers of federal financial recoveries and have charged and convicted a record high number of total defendants for health care fraud violations during both of the fiscal years since the announcement of HEAT in May 2009.

c. What is the connection between the numbers and the HEAT program? Can you actually connect the two?

Response:

The results described in the two most recent HCFAC reports to Congress point to HEAT's impact on federal health care fraud enforcement efforts. The additional discretionary resources that Congress provided to DOJ through HHS's budget enabled the Department to hire additional civil attorneys and criminal prosecutors, which in turn allowed us to expand our civil and criminal caseloads and increase financial recoveries and the number of defendants charged and convicted.

d. What is the average sentence for a conviction in which HEAT is to credit?

Response:

The average prison sentence for Strike Force defendants sentenced to prison terms since the announcement of HEAT on May 20, 2009 is 40.8 months.

e. Why did you only expand HEAT to seven cities this year instead of 20 as projected?

Response:

On February 17, the Attorney General and HHS Secretary announced the latest Strike Force expansion to Chicago and Dallas – resulting in a total of nine Strike Force cities – using available funding from mandatory and discretionary sources. We will continue to expand to additional cities to the extent additional funding becomes available. In Fiscal Year 2011, the President's Budget request included an increase of $60 million in discretionary HCFAC resources for DOJ, bringing the total FY 2011 discretionary request for DOJ to $90 million. The then Acting Deputy Attorney General testified before Congress in March 2010 that part of the additional $60 million in discretionary funding that DOJ requested would be used, among other things, to expand the current number of Strike Force cities from seven to as many as 20 locations throughout the Nation. The Continuing Resolution for FY 2011, however, provides discretionary funding for DOJ at the FY 2010 amount of $29.79 million. The President's Budget

request for FY 2012 includes an increase of approximately $63 million in discretionary resources for DOJ, which would enable deployment of the additional Medicare Strike Force teams as sought in the FY 2011 Budget and would allow DOJ to focus additional resources on fraud by pharmaceutical and medical device manufacturers.

5. **Last summer, Attorney General Holder and HHS Secretary Kathleen Sebelius held what they called the "first in a series of Regional Health Care Fraud Prevention Summits" in Miami, Florida. Summits were also held in L.A. and Brooklyn, NY, and are planned in Detroit, Boston, Philadelphia, and Las Vegas. How much do these summits cost, including flying the Attorney General and HHS Secretary and their staffs and security to these locations?**

Response:

The table below shows the Department of Justice costs associated with attending and participating in the four health care fraud prevention summits held through January 26, 2011, the date of Assistant Attorney General Lanny Breuer's testimony.

Health Care Fraud Prevention Summit Costs

Department of Justice [1/]

	New York	Boston	LA[2/]	Miami	Total
Total Summit Attendees [3/]	11	9	5	5	**30**
Total Flight Costs [4/]	$0	$11,038	$52,976	$25,844	**$89,858**
Total Travel Costs [5/]	$4,397	$4,719	$3,656	$4,238	**$17,011**

1/ The costs reflect only the flight costs associated with the AG security detail. Other costs of the security detail, such as personnel and non-personnel costs, are not included as they are classified.

2/ The Los Angeles and Miami summits were dual-purpose trips for the AG. The flight costs for the Los Angeles summit are captured, but the per diem costs are not as they were incurred in a separate city.

3/ DOJ summit attendees include personnel from components who prosecute health care fraud, such as Civil Division, Criminal Division, and the Executive Office of the U.S. Attorneys. These personnel attended the summits to lead and participate in panel discussions with participants on DOJ's efforts to address health care fraud.

4/ Total Flight Costs only include the flight costs of the Attorney General, his security detail, and any staff travelling with the Attorney General.

5/ The total travel costs do not include local U.S. Attorney's Office Staff who may have participated in the event. Their participation would have resulted in no additional costs to DOJ.

6. **There are currently over 4,000 offenses that carry criminal penalties in the United States Code. That is a record number, and reflects a one-third increase since 1980. Previous studies conducted in 1989, 1996, and 1998 all reported "explosive" growth in the number of offenses created by Congress in the years since 1970. Yet, the rate of enactment has continued unabated since 1970.**

   You mention a large number of fraud schemes that were prosecuted using a variety of federal criminal statutes, such as mail fraud, wire fraud, securities fraud, money laundering, and bank fraud.

   a. **Would you have been unable to prosecute any of these cases before the Fraud Enforcement Recovery Act of 2009 was passed into law?**

Response:

The enactment of the Fraud Enforcement Recovery Act (FERA) gave the Department important additional tools to combat financial fraud. In particular, FERA provided for specific tools to prosecute fraud schemes involving commodities, options, and derivatives by including them within the scope of 18 U.S.C. § 1348. FERA also made it a crime, under 18 U.S.C. § 1014, to make a materially false statement or to willfully overvalue a property in order to influence any action by a mortgage lending business. (Previously, section 1014 only applied to Federal agencies, banks, and credit associations and did not necessarily extend to private mortgage lending businesses, even if they were handling federally-regulated or federally-insured mortgages.) Furthermore, by amending the definition of "financial institution" in the criminal code (18 U.S.C. § 20), FERA extended federal fraud laws to mortgage lending businesses that are not directly regulated or insured by the federal government. This change applies the federal fraud laws to private mortgage businesses, just as they apply to federally insured and regulated banks.

Because FERA amended existing statutes as opposed to creating new sections of Title 18, it is difficult to quantify precisely how many criminal cases have been brought as a direct result of FERA's passage – cases brought both prior to and subsequent to FERA's enactment continue to be charged under the same sections of the criminal code. Further, because FERA's primary impact in the mortgage fraud context was to change the definition of "financial institution" under 18 U.S.C. § 20 and to amend 18 U.S.C. § 1014 to include non-bank mortgage lenders, this prospective change did not impact the thousands of historical origination mortgage fraud cases involving pre-FERA conduct from 2005 to 2008 that largely make up the existing mortgage fraud docket at the Department. In other words, certain of FERA's important benefits in combating mortgage fraud and other schemes will be realized in the future.

Nevertheless, the Department can report that in FY 2008, the 94 United States Attorney's Offices (USAOs) brought 3,126 financial fraud cases against 4,493 defendants, and in 2009, the USAOs brought 3,069 financial fraud cases against 4,545 defendants. In FY 2010, those numbers jumped to 3,476 financial fraud cases filed against 5,093 defendants. Although the Department does not separately track mortgage fraud prosecutions made possible by FERA, the volume of mortgage fraud prosecutions by the Department has seen an even more dramatic increase across the same time period. Specifically, in FY 2008, USAOs filed 88 mortgage fraud cases against

216 defendants, while in FY 2009, there were 248 cases filed against 492 defendants. Those numbers increased in FY 2010 to 632 mortgage fraud cases filed against 1,197 defendants.

In addition to these case statistics, it is apparent that FERA has provided, and will continue to provide, other tangible benefits in the fight against financial fraud. First, our money laundering prosecutions have benefitted from FERA's "*Santos* fix," which clarified that, in order to prove a money laundering violation under 18 U.S.C. §§ 1956 or 1957, prosecutors need only prove that a defendant laundered proceeds of a specified unlawful activity as opposed to having to prove that profits were laundered. Further, as a direct result of FERA's change to the definition of a financial institution, the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") has issued a notice of proposed rulemaking that would require all non-bank mortgage lenders to file Suspicious Activity Reports (SARs). The information gleaned from future SAR filings will help uncover fraudulent activities otherwise unknown to law enforcement. Last, the Department expects that FERA's amendments to 18 U.S.C. §§ 20 and 1014 will prove useful in bringing to justice those engaged in mortgage fraud rescue scams and other fraudulent schemes that have been perpetrated since the enactment of FERA but are still being investigated.

7. **Fundamental to the rule of law is the notion that criminal statutes have to be clearly written in order to give notice to citizens of what is criminal and to control the power of police and prosecutors. Otherwise, a statute is unconstitutionally vague.**

   a. **Do you agree that vague "fraud" statutes could kill jobs, hurt our economy, and hinder American competitiveness by forcing honest, hard-working entrepreneurs and small business owners across the country to spend countless sums of money to avoid investigation, prosecution, and imprisonment?**

Response:

Federal fraud offenses require a showing of knowledge or willfulness to engage in fraudulent conduct. This requirement prevents the use of fraud statutes, including mail and wire fraud, in a manner that would unfairly target honest individuals, including honest businessmen, who may have acted unknowingly or even negligently, but not criminally. The enforcement of federal fraud statutes has an overall positive effect on responsible business owners in that it deters those who would exploit the streams of commerce and the securities markets for illicit gain, which helps to maintain confidence among investors and consumers in the markets.

   b. **Do you agree that a vague criminal statute would allow an activist judge to, in effect, apply the statute in a way that amounts to making an ex post facto crime?**

Response:

Under the Constitution, courts may not interpret criminal statutes in a manner that imposes "ex post facto" liability and punishment. In addition, through the process of judicial review, a defendant always has the opportunity to challenge his or her conviction by making the argument that the statute under which he or she was convicted lacks sufficient definiteness to ensure that ordinary people can understand what conduct is prohibited.

c. What steps is the Department of Justice taking to ensure that its activities are consistent with the rule of law and that prosecutors are not taking advantage of vague statutes?

Response:

Department prosecutors are required to adhere to the Department's "Principles of Federal Prosecution" and "Principles of Federal Prosecution of Business Entities," which provide clear guidance to prosecutors on the exercise of discretion in making charging decisions. *See* USAM §§ 9-27.000 to 9-28.1300, Prosecutors are also required by Justice Department guidelines to consider the collateral consequence of any criminal action to be taken against business entities before charging such entities. These guidelines are available to the public and provide guidance to defense counsel, including those representing the business community. In addition, the Department's resolutions against business entities are generally available to the public and provide guidance to defense counsel about the nature of offenses prosecuted, the types of penalties imposed for certain offenses, and the factors relevant to the particular disposition.

Questions Posed by Senator Chuck Grassley

8. **At the hearing, I asked a series of questions concerning the Department's criminal prosecutions for health care fraud. My questions sought a comparison of criminal cases filed as compared to the number of civil False Claims Act cases filed for specific types of health care fraud. Mr. Breuer responded that these were questions for Assistant Attorney General West to respond to because they involved the False Claims Act. Mr. West indicated he would reply in writing to these requests. I reiterate those requests here:**

   a. **According to a letter response from DOJ and HHS I received Monday, 66 percent of all FCA cases pending allege health care fraud. The letter also stated that 180 of these cases involve the pricing and marketing of pharmaceuticals. Additionally, the letter stated that 726 criminal convictions and plea bargains occurred in FY2010. How many of those criminal convictions involved individuals employed by pharmaceutical manufacturers?**

Response:

The Department's case management system does not maintain data that tracks information about each defendant's employment status and whether the defendant's employer was a pharmaceutical manufacturer, hospital, or other type of health care provider. Accordingly, we are unable to provide an answer to this question without a re-examination of each individual case.

   b. **Over the last several years, a number of pharmaceutical companies have paid billions of dollars in fines and penalties for illegal marketing of their drugs, some pleading guilty in criminal cases, yet individuals were not held accountable for breaking the law. Did DOJ consider prison terms as a deterrent in these cases? If not, why not?**

The Department of Justice has charged and obtained convictions of corporate executives and other individuals engaged in illegal activity in connection with the sale and marketing of pharmaceuticals and devices. The Department is committed to vigorously prosecuting those responsible for committing health care fraud. Consistent with Department policy, upon conviction, we advocate for sentences of imprisonment within the advisory Sentencing Guidelines range in all but extraordinary cases. This policy reflects the Department's belief that the Sentencing Guidelines provide the best framework for achieving tough, fair, and consistent sentences in the federal criminal justice system. Before discussing specific cases and individuals, however, it may be helpful to explain the process and factors that DOJ prosecutors must consider, and some of the challenges that are associated with prosecuting individuals in our corporate health care fraud matters.

In determining whether charges should be brought against corporations and their executives, federal prosecutors weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the

probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. Consistent with Departmental guidance in the U.S. Attorney's Manual, Chapters 27 and 28, prosecutors make their charging decisions based on an "assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." *See* U.S.A.M. § 9-28.1200B. Attorney General Holder reaffirmed these principles in recent guidance. Department Policy Concerning Charging and Sentencing (May 19, 2010).

To obtain a felony conviction of a corporate executive of a pharmaceutical or medical device company engaged in illegal conduct relating to its products, the United States is required to prove, beyond a reasonable doubt, that the individual had the requisite intent to commit the crime. Corporate executives are not vicariously liable for the felonious conduct of employees within the corporation. Therefore, a conviction of the company for feloniously misbranding a prescription drug product, for example, would require proof beyond a reasonable doubt that the executive had personal knowledge of the misbranding activity and that the individual possessed the requisite *mens rea* for the crime. In large organizations it can be very difficult to prove, beyond a reasonable doubt, that high level executives had knowledge of the illegal activity of their subordinates and possessed the mental state to commit the crime.

Frequently, we learn of the allegations of criminal activity from the filing of a *qui tam* lawsuit by a company insider. The allegations are often about conduct that has occurred years before the lawsuit is filed. As a result, charging decisions are also affected by the approaching statute of limitations.

Despite these challenges, the Department of Justice has charged and obtained convictions of individuals, including senior executives, engaged in misconduct at pharmaceutical and medical device companies. The following cases are examples of such prosecutions:

United States v. Marc Hermelin (E.D. Mo.) On March 10, 2011, Marc Hermelin pleaded guilty to two misdemeanor counts of introducing a misbranded drug into interstate commerce. Hermelin was the chairman of the board and CEO of KV Pharmaceutical Company and an officer of Ethex Corporation, a KV subsidiary that branded and distributed generic drugs. Hermelin admitted that KV introduced misbranded morphine sulfate tablets into interstate commerce. Morphine sulfate is a pain relief drug and opiate. The morphine sulfate included some oversized tablets, which contained more active ingredient of morphine than was specified in its labeling, making it misbranded under the Food, Drug, and Cosmetic Act (FDCA). In May 2008, KV received complaints about oversized morphine sulfate tablets, and in June 2008, KV disclosed the discovery of the oversized morphine sulfate tablets to the Food and Drug Administration (FDA) and publicly recalled various morphine sulfate lots. At the same time, although KV knew of other oversized tablets that were made on the same pill press machine that made the oversized morphine sulfate tablets, the company did not inform FDA of the other oversized tablets. By virtue of his roles at KV and Ethex, Hermelin was a "responsible corporate officer" with the authority and responsibility to prevent and correct FDCA violations at both companies. Hermelin was ordered to pay a $1 million fine, forfeit $900,000, and serve 30 days in jail.

United States v. Synthes, Inc. and Norian Corp. (E.D. Pa.). On November 30, 2010, Norian Corp. and its parent company Synthes, Inc., and four executives pled guilty to charges relating to the unauthorized clinical trials of the medical devices Norian XT and Norian SRS – bone cements used in treating fractures. The companies marketed the devices even after tests indicated the cement caused blood clots. Three patients died after being implanted with the cement, after which the companies stopped marketing the products but did not issue a recall or notify FDA. As part of the agreement, Norian paid $22.5 million in criminal penalties and Synthes paid $669,800 in criminal fines and forfeiture. The individuals pled guilty to misdemeanor offenses as responsible corporate officers and are awaiting sentencing.

United States v. W. Scott Harkonen (N.D. Cal.). On September 29, 2009, a jury convicted Harkonen, the former CEO of InterMune, Inc., a biopharmaceutical company in Brisbane, California, of wire fraud. Harkonen's conviction stemmed from an August 28, 2002 InterMune press release that described the results of a clinical trial that tested InterMune's drug Actimmune as a treatment for the fatal lung disease idiopathic pulmonary fibrosis (IPF). Despite the trial failing completely, Harkonen wrote the press release to falsely portray the trial results as showing that Actimmune helped IPF patients live longer, claiming in his defense that a "subgroup analysis" of the test results justified the claim. In addition to distributing the press release to the public generally, InterMune's sales force used the press release with doctors to increase sales of Actimmune. The annual cost of Actimmune for one IPF patient was $50,000. The vast majority of InterMune's sales of Actimmune were for the purpose of treating IPF even though Actimmune was not approved by the Food and Drug Administration as a treatment for IPF. Sales of Actimmune made up 90% of InterMune's revenues. In 2006, InterMune entered a deferred prosecution agreement related to this drug, and paid nearly $37 million to resolve criminal and civil liability. Harkonen was sentenced on April 1, 2011.

United States v. Purdue Pharma et al. (W.D. Va.): On May 10, 2007, The Purdue Frederick Company, Inc., and three corporate officers including the President/CEO, Executive Vice President, and Chief Legal Officer, pled guilty to misdemeanor charges related to the misbranding of the drug OxyContin. Purdue used misleading clinical data and graphs to convince physicians and other healthcare professionals that OxyContin was less addictive, less likely to be abused, and less likely to cause withdrawal and drug tolerance than other pain medications. Under the plea agreements and a civil settlement, the company paid $600 million in criminal and civil fines, forfeitures, and penalties, and entered into a corporate integrity agreement. The three executives disgorged bonus payments of approximately $34.5 million. As a result of their misconduct, the Department of Health and Human Services' Office of Inspector General excluded the three officers from participation in federal health care programs for 15 years. The three officers appealed the exclusion decision, and their exclusion was upheld both at the administrative level and in the U.S. District Court for the District of Columbia, although it was reduced to a period of 12 years.

United States v. Ross Caputo and Robert Riley, (N.D. Ill.). On September 13, 2006, a jury convicted Caputo and Riley of selling misbranded and adulterated medical devices (a device used to sterilize medical instruments), mail fraud, and fraud on the FDA, the last count based in part upon their falsely telling FDA during the approval process that they would limit their marketing of their sterilizer to the FDA's approved uses. In fact, they promoted a larger

autoclave device for uses beyond the clearance granted by FDA. Caputo was sentenced to 10 years in prison and Riley was sentenced to six years. In February 2008, the Seventh Circuit affirmed their convictions.

c. According to the same letter, 80 FCA cases are under investigation involving hospitals. How many of the 726 criminal convictions or pleas involved individuals employed by Hospitals?

Response:

The Department's case management system does not maintain data that tracks information about each defendant's employment status and whether the defendant's employer was a pharmaceutical manufacturer, hospital, or other type of health care provider. Accordingly, we are unable to provide an answer to this question without a re-examination of each individual case.

d. During the Judiciary Committee hearing, I asked why, when pharmaceutical companies plead guilty for illegal marketing of their drugs, individuals were not also held criminally accountable. Mr. Tony West responded that there were quite a few cases where individuals have been held accountable. Please provide a detailed breakdown of the following for FY 2006, FY 2007, FY 2008, FY 2009 and FY 2010:

(1) Number of criminal cases filed involving pharmaceutical pricing fraud
(2) Number of criminal cases filed involving unlawful marketing of pharmaceuticals
(3) Number of criminal cases filed involving unlawful marketing of medical devices
(4) Number of individuals charged under each of the above category of cases
(5) Number of individuals convicted under each of the above category of cases

Response:

The Department's case management system does not maintain data that tracks detailed information about the allegations of each health care fraud scheme, such as whether the violations involve pharmaceutical pricing fraud, unlawful marketing of pharmaceuticals or medical devices, or the defendant's unique role in the scheme(s). The response to Question 8(b) above provides some detailed information about individuals who have been held criminally accountable for their roles in pharmaceutical fraud and illegal marketing schemes.

e. In a DOJ press release dated November 22, 2010, announcing the recovery of $3 billion in False Claims cases in fiscal year 2010, DOJ stated that "the Civil Division's Office of Consumer Litigation (OCL) brings civil and criminal actions for violations of the FDCA [Food, Drug, and Cosmetic Act]. Together with their partners in the U.S. Attorneys' Offices around the country, OCL pursues such matters as the unlawful marketing of drugs and devices, fraud on the FDA, and the distribution of adulterated products. In fiscal year 2010, those efforts

yielded more than $1.8 billion in criminal fines, forfeitures, restitution and disgorgement, the largest health care-related amount under the FDCA in department history. Since January 2009, OCL has successfully pursued cases resulting in 25 criminal convictions and more than $3 billion in fines, forfeitures, restitution and disgorgement." How many of those criminal convictions involved individuals employed by pharmaceutical manufacturers and how many involved individuals employed by medical device manufacturers?

Response:

Although the Department's case management system does not maintain data that tracks information about each defendant's employment status, through an examination of each of these cases, we were able to determine that of the 25 convictions secured since January 2009, as reported in the November 22, 2010 press release, 4 were convictions of individuals employed by medical device manufacturers and 4 were convictions of individuals employed by pharmaceutical companies.

9. **According to the Fiscal Year 2010 Department of Health and Human Services (HHS) and Department of Justice (DOJ) Annual Report on the Health Care Fraud and Abuse Control (HCFAC) Program, the U.S. Attorneys Offices received about $42.9 million in HCFAC funding to support civil and criminal health care fraud and abuse litigation. There are 93 U.S. Attorneys, each assigned to a judicial district, with one U.S. Attorney assigned to both Guam and the Northern Mariana Islands.**

   a. **For FY 2006 – FY 2010, please specify how much HCFAC money was distributed in each year to each of the U.S. Attorneys' Offices and the judicial districts.**

Response:

Please see attachments A and B

   b. **Which office and individual(s) within DOJ determine how much is allocated to each district?**

Response:

HCFAC monies were first distributed to the USA community in Fiscal Year 1997. A working group of United States Attorneys reviewed relevant data on each district and formulated a proposed allocation of the Health Care Fraud (HCF) resources. Attorney General Janet Reno approved the recommendations. Since that time, some districts have received one-time allocations based on extraordinary litigation costs associated with particular cases. A group of HCF Assistant United States Attorneys review the requests to determine how much each district will receive.

   c. **According to information received by the Judiciary Committee, four districts did not file any health care fraud cases and four districts filed only one health care fraud case during FY 2005 through FY 2009. Please list any districts that**

receive HCFAC funding that did not open or file health care fraud cases in any one or more of the last five years. Please indicate each year in which a district did not open or file a health care fraud case and the amount of HCFAC funding received for that year. Please explain why these districts are receiving HCFAC dollars and how they are spending those dollars.

Response:

EOUSA searched our records and found that every district that received HCFAC funding in FY 2006 through FY 2010, opened or filed a HCF case in each of those years. It appears that the districts that you referenced do not receive an annual HCFAC allocation.

d. What is DOJ doing to effectively and efficiently target HCFAC resources?

Response:

Each district that receives HCFAC funding reports annually on their use of the HCFAC allocation. The reports are collected and reviewed by EOUSA. HCFAC funding can only be used by the districts for HCF efforts. Any unused district HCFAC funding is returned to EOUSA and used to cover centrally funded expenses for employee benefits and overhead (i.e. rent, security, telecomm, etc.), as well as one-time requests from districts with extraordinary litigation expenses related to HCF prosecutions, that cannot be covered from within their base allocation. To ensure the best use of this unused district funding, one-time requests are reviewed and approved by a team of experienced HCF Assistant U.S. Attorneys.

10. In a letter response dated January 24, 2011, DOJ and HHS reported the number of criminal health care fraud investigations opened by DOJ, FBI and HHS Office of Inspector General.

a. What percentage of the reports of potential health care fraud received by each of these agencies result in open investigations?

Response:

The FBI receives reports of potential health care fraud from various sources, including individuals who contact the FBI, Department of Health and Human Services Office of Inspector General (DHHS/OIG) referrals, and sources developed by FBI personnel.

Complaints received from individuals who contact the FBI are maintained as FBI records on FBI form FD-71. In FY 2010, the FBI received 207 complaints recorded on the FBI form FD-71; 94 (45.4%) of those complaints resulted in the opening of investigations or were associated with on-going investigations.

In FY 2010, the FBI received 4,848 referrals from DHHS/OIG. Ninety-five of these referrals (2.0%) resulted in the opening of investigations. The FBI has received more than 800 such referrals during the first quarter of FY 2011; these referrals are under review to determine whether cases should be opened.

b. Is that data collected and reported? If not, please explain why not. To the extent that such data is available, please include it in future HCFAC reports.

Response:

The FBI collects and manages health care fraud complaints arising from individuals who contact the FBI, from DHHS/OIG referrals, and from sources developed by FBI personnel. These sources include health care beneficiaries, health care providers, oversight personnel, private business owners, and others with potential knowledge of health care fraud. This information is collected and reported using various means, including reports of interview, electronic communications, Confidential Human Source reporting, and other means. The FBI does not track the number of occasions on which potential health care fraud is raised in these documents.

The number of health care fraud investigations opened by the FBI is included in DOJ reporting and is reflected in the Health Care Fraud and Abuse Control report by fiscal year.

11. Last year, HHS and DOJ officials stated that some of the resources supporting the HEAT initiative will be devoted to expanding the Medicare Strike Forces from 7 cities to a total of 20 cities.

a. What is the status of that expansion?

Response:

As noted above, on February 17, the Attorney General and HHS Secretary announced the latest Strike Force expansion to Chicago and Dallas – resulting in a total of nine Strike Force cities – using available funding from mandatory and discretionary sources. We will continue to expand to additional cities to the extent additional funding becomes available. In Fiscal Year 2011, the President's budget request included an increase of $60 million in discretionary HCFAC resources for DOJ, bringing the total FY 2011 discretionary request for DOJ to $90 million. The then Acting Deputy Attorney General testified before Congress in March 2010 that part of the additional $60 million in discretionary funding that DOJ requested would be used, among other things, to expand the current number of Strike Force cities from seven to as many as 20 locations throughout the Nation. The Continuing Resolution for FY 2011, however, provides discretionary funding for DOJ at the FY 2010 amount of $29.79 million. The President's budget request for FY 2012 includes an increase of approximately $63 million in discretionary resources for DOJ, which would enable deployment of the additional Medicare Strike Force teams as sought in the FY 2011 budget and would allow DOJ to focus additional resources on fraud by pharmaceutical and medical device manufacturers.

b. Is there a lead coordinator within DOJ for the Medicare Strike Forces? Is so, please provide the name and title of that coordinator.

Response:

Several of the Department's litigating components provide the leadership for and coordination of the Strike Force teams. Primarily, the Department's Criminal Division and each USAO where

Strike Force prosecution teams are deployed, under the supervision of Assistant Attorney General Lanny Breuer and each United States Attorney, as well as the Deputy Attorney General who chairs the HEAT Task Force, lead the enforcement efforts in each Strike Force city. In the Criminal Division, the Strike Force teams are further supervised by Acting Deputy Assistant Attorney General Greg Andres; Denis McInerney, Chief of the Fraud Section; and Hank Walther, the Deputy Chief of Health Care Fraud Unit within the Fraud Section.

c. For all the attention that the Administration gives to the HEAT Task Force, is it really an innovative approach to enforcing Medicare fraud that is unique to this administration, or is it an expansion of the Bush Administration's Medicare Strike Force teams?

Response:

HEAT has reemphasized that fighting Medicare and Medicaid fraud is a Cabinet-level priority for both DOJ and HHS. To improve the coordination of HHS and DOJ health care fraud prevention and enforcement activities under the HCFAC program, Attorney General Holder and HHS Secretary Sebelius announced the creation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT) – a senior-level, joint task force in May 2009. The HEAT Task Force is led by the Deputy Attorney General with his counterpart, the HHS Deputy Secretary, and is designed to marshal the combined resources of both agencies in new ways to combat all facets of the health care fraud problem. HEAT's mission is to:

1) ***Marshal significant resources across government to prevent waste, fraud and abuse in the Medicare and Medicaid programs and crack down on the fraud perpetrators who are abusing the system and costing us all billions of dollars.*** This has included expansion of civil and administrative enforcement activities, as well as expanding the Strike Force. The recent HCFAC report to Congress reflects the success of our efforts – returning over $4.0 billion to the Medicare Trust Fund, U.S. Treasury, Medicaid, and other health care victim agencies and private persons in FY 2010.

2) ***Reduce skyrocketing health care costs and improve the quality of care by ridding the system of perpetrators who are preying on Medicare and Medicaid beneficiaries.*** In addition to the increased number of enforcement actions through HEAT, the Affordable Care Act provides new authorities for HHS to improving screening and background checks for high-risk applicants for participation in Medicare, as well as authority to implement several other significant program administration improvements.

3) ***Highlight best practices by providers and public sector employees who are dedicated to ending waste, fraud and abuse in Medicare.*** Following a successful National Summit on Health Care Fraud in January 2010, DOJ and HHS initiated a series of regional fraud prevention summits around the country, including in Miami (July 2010), Los Angeles (August 2010), Brooklyn (November 2010), Boston (December 2010), and Detroit (March 2011) to improve the exchange of information with partners in the public and private sectors, and to educate

beneficiaries, providers, and the public on how to better identify and prevent health care fraud. Fraud prevention summits will take place in additional cities in 2011.

4) ***Build upon existing partnerships between DOJ and HHS, such as our Medicare Fraud Strike Force, to reduce fraud and recover taxpayer dollars.*** HEAT members are working to identify new enforcement initiatives and areas for increased oversight. DOJ and HHS have expanded improved information sharing procedures to get critical data and information into the hands of law enforcement to track patterns of fraud and abuse, and increase efficiency in investigating and prosecuting complex health care fraud cases. Both departments also have increased training to prevent mistakes and help stop potential fraud before it happens, and have expanded the use of regional and local health care fraud task force meetings to further coordinate anti-fraud efforts. In addition, HHS has launched a new educational media campaign to educate Medicare beneficiaries about how to protect themselves against fraud.

d. Aside from additional resources in additional sites, what distinguishes the HEAT initiative from the previous Medicare Strike Task Forces?

Response:

The Medicare Fraud Strike Force addresses one very important dimension of the health care fraud problem by targeting individuals and groups who are actively involved in ongoing fraud. HEAT combines the supplemental criminal enforcement provided by the Strike Force with aggressive civil enforcement activity (including use of the False Claims Act, the Food, Drug and Cosmetic Act, and the Anti-Kickback Act), stepped up administrative enforcement and prevention activities of CMS and its contractors, and public education and outreach to heighten awareness of fraud, waste, and abuse and to improve prevention, detection, and enforcement.

12. In a response dated January 24, 2011, DOJ and HHS stated that in 2009, approximately 242 Assistant U.S. Attorneys attended 4 health care fraud training sessions and in 2010, approximately 350 Assistant U.S. Attorneys attended 5 training sessions.

a. Who provides those training sessions?

Response:

The Executive Office for U.S. Attorneys' (EOUSA) Office of Legal Education (OLE), as well as the Department's Civil Division, provides this health care fraud training. The faculty includes experienced health care fraud attorneys from the Department.

b. How does DOJ ensure that its attorneys are adequately trained to identify and investigate health care fraud cases?

Response:

OLE trains prosecutors on health care fraud issues through several live courses given each year at the Department's Training Center in Columbia, South Carolina, as well as through training programs broadcast through OLE's training network. OLE also has health care fraud training videos available in its online video library, accessible to all AUSAs and DOJ litigating attorneys from their desktop computers. New training videos are added to the library each month. OLE looks to EOUSA's Office of Legal and Victim Programs (OLVP) and the USAOs for guidance on what training is needed; receives input from the instructors and the students on course effectiveness; and incorporates these suggestions into future courses. In addition, OLVP hosts monthly webinars, focusing on cutting-edge health care fraud topics, accessible to all health care fraud prosecutors and civil attorneys.

13. **On January 24th, DOJ and HHS released their annual report on the Health Care Fraud and Abuse Control Program (HCFAC). In a letter I sent DOJ and HHS on December 17, 2010, I detailed my concern with an apparent decline in the conviction rate of health care fraud cases. I calculated the conviction rate using numbers provided by last year's HCFAC report by dividing the number of convictions by the number of defendants. This was the only public information available. In the response to my letter, DOJ and HHS pointed to additional information, the number of defendants in closed cases. This number, along with the overall conviction rate, was not part of the public report. I agree with the calculation DOJ used in the response, but I am curious why these numbers—specifically, defendants in closed cases and the overall conviction rate—are nowhere to be found in the public report.**

    a. **Why has DOJ traditionally avoided making this information public?**

    b. **Will DOJ add these numbers to future HCFAC reports? If not, why not?**

Response:

The Department's Executive Office for United States Attorneys (EOUSA) publishes the number of federal defendants in closed cases and dispositions (guilty, not guilty, dismissed, transferred, etc.) by type of federal offense in the U.S. Attorneys' annual statistical report. Statistical data for health care fraud defendants in closed cases, along with defendant dispositions, is provided in Table 3 (see "terminated" columns) of the annual statistical report. This information has been published and publicly available since EOUSA implemented the current program category code system for classifying the types of federal criminal offenses beginning in FY1992. (Health care fraud is one of the "White Collar Crime" program categories.) A link to the website with the EOUSA annual statistical reports is at www.justice.gov/usao/reading_room/foiamanuals.html. Table 3 does not include "conviction rates," but does provide the underlying data from which conviction rates may be calculated for health care fraud as well as other federal offenses.

14. **The SEC brought a fraud case against Goldman Sachs for failing to disclose a conflict of interest in the way that it had teamed up with a leading short seller to design an investment that would fall. At the time, Prof. Coffee, a leading scholar of**

securities law, stated that the charges were "very severe" and that it was "not impossible" to believe that the case could lead to criminal charges.

a. Did the SEC consult the Department of Justice before entering into that settlement?

Response:

The SEC did not consult the Department of Justice about the terms of its settlement with Goldman Sachs concerning the Abacus 2007-AC1 CDO before entering into it. On the day the settlement was announced, and prior to its announcement, the SEC informed the Department that an agreement had been reached and apprised the Department of some of the general terms of the agreement. At various times prior to entering its settlement with Goldman Sachs, the SEC discussed the evidence it compiled in its investigation with the Department. At no point, however, did the SEC seek, or did the Department provide, input concerning the scope or terms of the settlement.

b. If so, did the Department of Justice ask that the settlement be undertaken in such a way as to preserve the right of the Department to bring criminal charges, if warranted?

Response:

As noted above, the SEC did not consult the Department about the terms of its settlement with Goldman Sachs concerning the Abacus 2007-AC1 CDO before entering into it. At no point did the SEC seek, or did the Department provide, input concerning the scope or terms of the settlement. That said, as with all settlements reached by the SEC, the settlement in connection with the Goldman matter does not present any legal bar to the filing of criminal charges, if warranted.

c. The settlement of $550 million represented about two weeks of Goldman Sach's 2009 earnings and it effectively halted any other actions that other Goldman Sachs clients could have brought based on other conflicts of interest. I am concerned that this shows that large financial companies can view the penalties for committing fraud as a cost of doing business. Is there any reason to think otherwise?

Response:

Because the Department was not a party to the SEC's settlement with Goldman Sachs, we cannot comment on it. As a general matter, the Department, in coming to its own resolutions with corporations, is cognizant of the need for any criminal penalty imposed to serve the purpose of effective deterrence. The Department's imposition of criminal penalties on corporations is guided by Chapter 8 of the U.S. Sentencing Guidelines, which instructs prosecutors to take into consideration, among other factors, the loss caused by the corporation's offense, any illicit gain to the corporation, whether the corporation had a pre-existing compliance program, the pervasiveness of wrongdoing within the corporation, the corporation's willingness to accept

responsibility, and the corporation's timely cooperation with the Department's investigation. These guidelines, and those articulated in the Department's Principles of Federal Prosecution of Business Organizations, see United States Attorney's Manual ("USAM") § 9-28.000 *et seq.*, are designed to promote certain public interests, including: "protecting the integrity of our free economic and capital markets" and "protecting consumers, investors, and business entities that compete only through lawful means." The USAM notes that "[i]n this regard, federal prosecutors and corporate leaders typically share common goals. . . . The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal cases are designed to serve." *Id.* at § 9-28.100.

d. Why was a settlement allowed for such significant charges that did not contain a master (as at AIG), a deferred prosecution agreement, or any other external measure to help ensure that Goldman Sachs did not engage in future fraudulent activities?

Response:

This question is directed specifically at the terms of the SEC settlement with Goldman Sachs. Because we are not a party to that settlement, we cannot comment on it. We note that as a general matter, the Department's corporate criminal resolutions require a corporation to commit to necessary remedial measures to ensure that the offense does not occur in the future, which may or may not require the use or engagement of a monitor.

15. Speaking at a recent legal conference, Securities and Exchange Commission Enforcement Director Robert Khuzami spoke about parallel investigations between the SEC and DOJ. According to a transcript from the event, he stated "we are going to try to get answers whether ... there is criminal interest in the case so defense counsel can have as much information as possible in deciding whether ... to sign up their client."

a. In these communications between the DOJ and the SEC, how can you avoid the appearance that the SEC is providing promises of protection from criminal liability in exchange for cooperation that leads to civil monetary settlements for the SEC?

Response:

The Department and the SEC are acutely aware of the importance of preserving the distinction between their criminal and civil roles, respectively. To this end, each pursues its investigation for its own criminal or civil enforcement goals. Although the Department and the SEC share information or evidence consistent with applicable legal principles, neither the Department nor the SEC negotiate or communicate any offer of settlement or protection from prosecution or enforcement action on behalf of the other agency. Accordingly, discussions of an individual's status in connection with an investigation by the Department of Justice are conducted exclusively by the Department and not by the SEC.

b. Is it proper for the DOJ to agree not to criminally prosecute a defendant in exchange for their reaching a monetary settlement with an agency?

Response:

No. The Department does not enter non-prosecution agreements (NPAs) with defendants – or agree to seek immunity or to decline prosecution – to encourage resolution of other agencies' investigations. The Department's charging decisions for individuals and corporations are based on the factors in the USAM. Among the factors that the Department examines are the gravity of the offense, the sufficiency of the evidence, and the goals to be served by criminal prosecution, even where civil remedies are available.

c. Is it appropriate for the SEC to be communicating the investigative and/or prosecutorial plans of the Justice Department to defense counsel?

Response:

No. It is the Department's understanding and experience that SEC enforcement staff will decline to comment about the investigative and/or prosecutorial plans of the Justice Department, including as to whether a criminal investigation exists, and will instead advise individual and corporate defense counsel to contact criminal authorities (generically and without reference to any specific prosecutorial office unless otherwise authorized) when counsel inquire about whether their client is the subject of a criminal investigation.

16. In 2007, the Department of Housing and Urban Development (HUD) Office of Inspector General (OIG) began investigating allegations that Beazer Homes USA defrauded the Federal Housing Administration and millions of borrowers. Soon after, the Department of Justice took over the investigations, told the OIG to stand down, and turned the inquiry over to Beazer's Board of Directors, which retained a major law firm to conduct an internal investigation.

Response:

The question mischaracterizes the initiation and course of the Beazer investigation. HUD-OIG did not initiate the investigation. The federal Beazer investigation was initiated by the Federal Bureau of Investigation, which at all times has served as the lead investigative agency. The United States Attorney's Office (USAO) did not resist HUD-OIG's participation. In fact, HUD-OIG's Greensboro, North Carolina office became part of the investigative team at the invitation of the USAO.

Other agencies involved in the joint investigation included the Internal Revenue Service, the Postal Inspection Service and North Carolina state agencies. None of these agencies were prohibited from conducting an investigation. A United States Attorney has no power to forbid an investigative agency from pursuing an investigation. A USAO may, however, request that an agency limit activities which conflict with the activities of other investigating agencies involved in a multi-agency investigation or which impinge upon the authority of the USAO to decline, or negotiate the resolution of criminal charges.

Beazer conducted an internal corporate investigation. Internal investigations by corporate entities are routine in corporate fraud cases, and the Department has no authority to forbid such investigations. In fact, the United States Attorneys' Manual encourages corporations to conduct internal investigations and provide the results to the United States. See USAM § 9-28.75. Where a large corporation agrees to provide unfettered access to its internal investigation of wrongdoing, the investigation often saves significant agent time, eliminates legal controversies over measures used to obtain evidence and highlights documents which might otherwise go undiscovered or remain unnoticed among voluminous records.

While Beazer conducted an internal investigation, the USAO did not "turn the inquiry over to Beazer's Board of Directors." An internal corporate investigation does not replace a thorough investigation by law enforcement agents. Here, agents from all agencies (including HUD-OIG) continued their investigation while the internal investigation proceeded, simultaneously benefitting from the information provided by the internal investigation. Agents also must follow up on the information provided, and determine whether the corporate investigation was truthful and complete. That is what happened in the Beazer matter.

The HUD OIG was shut out, and over the next three years the law firm proceeded to bill Beazer Homes over $12 million in legal fees. Including other firms, Beazer's legal bill grew to more than $30 million. No criminal prosecutions had taken place, and Beazer had agreed to enter into a deferred prosecution agreement and shut down the subsidiary that engaged in the fraud.

Repeatedly during this process, the HUD IG attempted to contribute to the process but his efforts were rebuffed.

a. **How can Inspectors General to contribute to the fight against fraud if the Justice Department tells them not to investigate and instead relies on a multimillion dollar internal inquiry paid for by the company suspected of the fraud?**

Response:

HUD-OIG did contribute to the successful resolution of the corporate portion of the Beazer case. The criminal and civil settlements are providing tens of millions of dollars to Beazer's victims, including the FHA. HUD-OIG continues to contribute to the ongoing investigation of individuals. All agencies involved in joint investigations must understand that disagreements over the course of the joint investigations may arise among the agencies involved, and that no individual agency will have its views prevail in all instances. None of the other agencies involved have complained about the course of the investigation.

The USAO was not involved in Beazer's decision to hire certain law firms, and had no role or awareness of negotiations regarding what legal fees were paid. Fee decisions were made solely by the Beazer Board of Directors and its Audit Committee. It is not unusual for legal fees in corporate cases to be significantly higher than in other types of cases.

b. Why is it fair to only hold the Beazer shareholders accountable rather than the individuals who acted on behalf of the company in committing the fraud?

Response:

A corporate prosecution is not a substitute for holding individuals responsible for their criminal behavior. The Beazer investigation has always focused on both corporate and individual conduct. In fact, as a result of the investigation, Beazer's Chief Accounting Officer, Michael T. Rand, is currently under indictment on felony charges related to accounting and securities fraud. This action vindicates the rights of Beazer shareholders, who were the victims of that fraud.

Toward the end of 2009, two partners from Beazer's law firm were nominated to be the US Attorneys for the Eastern and Western districts of North Carolina. Anne Tompkins was confirmed on April 22, 2010 as the US Attorney for the Western District, the office leading the case against Beazer. While at the law firm, Tompkins billed Beazer Homes nearly 2,000 hours while working on the internal investigation. She failed to recuse herself from Beazer-related investigations until July 19, 2010, nearly three months after becoming U.S. Attorney. The Department acknowledged the OIG's concerns over "a potential conflict of interest" in US Attorney Tomkins' case.

c. Why would it be appropriate for her to wait three months before recusing herself?

Response:

The United States Attorney did not wait three months before recusing herself. Immediately after her swearing in as United States Attorney, the USAO took steps to formalize her recusal from the Beazer case and all other cases in which she had participated during her time in private practice. While the recusal was being formalized, Ms. Tompkins and the USAO treated her as recused. Ms. Tompkins' recusal was made formal on May 19, 2010. Confusion was caused by an error in a Department communication with the Inspector General which gave an erroneous date. We regret the error. Ms. Tompkins has never participated in the Beazer case in any manner on behalf of the United States.

17. President Obama created the Financial Fraud Enforcement Task Force in November 2009, and cited mortgage fraud as a priority investigation. The Department of Justice was established as the leader of the task force and thus has significant autonomy to institute guidelines for accepting criminal investigations for potential prosecution.

a. What has the Attorney General conveyed to the 93 U.S. Attorney's Offices regarding the priority of mortgage fraud investigations and prosecutions?

Response:

In FY 2009, 59 new AUSAs and 17 new paralegal positions were made available to USAOs, which were instructed to use these positions solely for "mortgage fraud and related financial crimes." In FY 2010, USAOs received authorization to hire 35 additional AUSAs and 7 additional support staff and were instructed to use these positions to "enhance efforts in the areas of mortgage fraud, bankruptcy, affirmative civil enforcement and white collar crime." The Attorney General's commitment to combating mortgage fraud prosecutions during this time period has produced a measured increased in mortgage fraud prosecutions and convictions. For example, in FY 2008, USAOs filed 88 mortgage fraud cases against 216 defendants. In FY 2009, there were 248 cases filed against 492 defendants, with those numbers increasing in FY 2010 to 632 mortgage fraud cases filed against 1,197 defendants.

b. Do you feel that the Attorney General's guidelines have been appropriately adhered to by the U.S. Attorneys?

Response:

Yes. See response to question 17(a) above.

c. Attorney General Holder stated one goal of the Financial Fraud Enforcement Task Force is to "not just hold accountable those who helped bring about the last financial meltdown, but to prevent another meltdown from happening." As such, the Task Force focuses on four areas, mortgage fraud, securities fraud, Recovery Act and rescue fraud, and discrimination. If the goal is preventing the next meltdown, why is discrimination a priority of the Task Force?

Response:

The Department is committed to ensuring that all financial markets, including the mortgage lending markets, are free from discrimination and other conduct that violates federal law. While there are many factors that may have contributed to the current financial crisis, discriminatory conduct, such as charging minorities higher prices for credit, providing less favorable financial services to minority neighborhoods, and steering minorities to more expensive loan products, contributed to the harm done to homeowners and communities. The Executive Order establishing the Task Force, which was signed by the President in November 2009, set forth the goals of the Task Force and directs it to focus on a broad array of fraud, including discrimination and the enforcement of antidiscrimination laws. Exec. Order No. 13519, 74 Fed. Reg.60,123 (Nov. 17, 2009). Accordingly, the Non-Discrimination Working Group, chaired by Tom Perez, Assistant Attorney General of the Civil Rights Division, is focusing its efforts on preventing discriminatory conduct in the lending markets.

Questions Posed by Senator Amy Klobuchar

18. When you testified that the DOJ brings over half of its FCPA actions against "foreign-based companies," does that include actions against foreign subsidiaries of U.S. companies as well as actions against U.S. subsidiaries of foreign companies? If so, how might that impact U.S. companies?

Response:

In the last year, about half of the Department's FCPA-related actions were brought against foreign companies that were not subsidiaries of U.S. corporations (Daimler AG, BAE Systems plc, Technip S.A., Snamprogetti Netherlands B.V., ABB Ltd., Panalpina World Transport (Holding) Ltd., Shell Nigeria Exploration and Production Co., and Alcatel-Lucent S.A.). The other FCPA-related actions brought against "foreign-based companies" last year were brought against foreign subsidiaries of U.S. companies. We also brought one case last year against a U.S. subsidiary of a foreign corporation as part of an enforcement action that also included a case against the foreign corporation itself. Our prosecution of U.S. companies and foreign companies that fall within U.S. jurisdiction helps level the playing field for U.S. companies.

19. The DOJ itself warns that an FCPA advisory opinion "shall have no application to any party which does not join in the request for the opinion." Does this limit the utility of these advisory opinions, since non-party companies cannot rely on their guidance?

Response:

Even though advisory opinions do not bind the Department as to any party that did not join the request for the opinion, we believe that the guidance provided in advisory opinions is quite useful to non-parties to the request. Each opinion lists the factors that were relevant in the Department's determination, and opinions often provide guidance on how the Department interprets different provisions of the FCPA. Opinions receive wide coverage in the FCPA legal community, demonstrating the usefulness of the opinions as guidance. To the extent that after reviewing the guidance in existing opinions, case law, and enforcement actions, a company is uncertain as to whether contemplated conduct would violate the FCPA, it can submit its own opinion request and receive a binding opinion from the Department.

20. Has DOJ issued any guidance on what entities may be considered "instrumentalities" of a foreign government?

Response:

The Department has provided significant guidance regarding what entities may be considered "instrumentalities" of a foreign government such that their employees are "foreign officials" under the FCPA. The Department has issued at least five publicly available advisory opinions concerning whether a party fits within the definition of "foreign official," all of which are available on the Department's FCPA website: http://www.justice.gov/criminal/fraud/fcpa/. In

addition, the Department has made publicly available numerous charging documents that clearly identify those whom the Department views as foreign officials. Similarly, the Department has been consistent and clear for many years in its charging documents that state-owned and state-controlled enterprises constitute "agencies" and/or "instrumentalities" under the FCPA.

Questions Posed by Senator Jeff Sessions

21. The DOJ reports that amounts recovered under the False Claims Act since January 2009 are higher than any previous two-year period, totaling $6.8 billion. You explained that health care fraud recoveries under the False Claims Act accounted for $5.4 billion of that total. However, according to the Administrative Office of the U.S. Courts, government-related False Claims Act cases have dropped 16.5% since 2009, with the number of cases decreasing each year since 2006.

a. How do you reconcile your increase in recoveries with the drop in overall False Claims Act cases?

b. Please explain the steady decline of these cases?

c. Has the Department's emphasis on health care fraud diverted disproportionate amounts of time and resources from other types of False Claims cases?

Response:

We are unfamiliar with the False Claims Act statistics attributed to the Administrative Office of United States Courts. Since Fiscal Year 2006, the total number of new matters (both *qui tam* and non-*qui tam*) alleging False Claims Act violations has increased by 56%. The totals are as follows:

Fiscal Year	Non-Qui Tam	Qui Tam	TOTAL
2006	71	384	455
2007	129	365	494
2008	161	379	540
2009	132	433	565
2010	138	574	712

While it is true that the Department devotes significant resources to the fight against health care fraud, it is not at the expense of other types of False Claims Act matters. It should be noted that the False Claims Act requires that the Attorney General diligently investigate all *qui tam* matters filed by whistleblowers, or "relators" as they are called under the False Claims Act. 31 U.S.C. § 3730. Since 1986, *qui tam* actions filed by relators that allege health care fraud have constituted approximately 55% of the total number of *qui actions* filed. In Fiscal Year 2010, relators filed 383 actions alleging false claims submitted to government health care programs compared to only 56 such actions alleging false claims implicating the Department of Defense, the second largest category of False Claims Act matters. Nevertheless, last year the Department recovered over $522 million in non-health care matters and since 1986 has recovered more than $8 billion in such matters.

22. When Congress enacted FERA in May 2009, it authorized $266 million annually in 2010 and 2011 to hire hundreds of prosecutors, agents, and other federal officials to pursue financial fraud; however, the vast majority of successful civil recoveries were not recovered under FERA.

a. How has the Department used the resources provided by FERA, and why do we not see higher numbers of cases brought under the Act?

Response:

FERA's enactment gave the Department important additional tools to combat financial fraud. In particular, FERA provided for specific tools to prosecute fraud schemes involving commodities, options, and derivatives by including them within the scope of 18 U.S.C. § 1348. FERA also made it a crime, under 18 U.S.C. § 1014, to make a materially false statement or to willfully overvalue a property in order to influence any action by a mortgage lending business. (Previously, Section 1014 only applied to Federal agencies, banks, and credit associations and did not necessarily extend to private mortgage lending businesses, even if they were handling federally-regulated or federally-insured mortgages.) Furthermore, by amending the definition of "financial institution" in the criminal code (18 U.S.C. § 20), FERA extended federal fraud laws to mortgage lending businesses that are not directly regulated or insured by the federal government. This change applies the federal fraud laws to private mortgage businesses, just as they apply to federally insured and regulated banks.

Because FERA amended existing statutes as opposed to creating new sections of Title 18, it is difficult to quantify precisely how many criminal cases have been brought as a direct result of FERA's passage – cases brought both prior to and subsequent to FERA's enactment continue to be charged under the same sections of the criminal code. Further, because FERA's primary impact in the mortgage fraud context was to change the definition of "financial institution" under 18 U.S.C. § 20 and to amend 18 U.S.C. § 1014 to include non-bank mortgage lenders, this prospective change did not impact the thousands of historical origination mortgage fraud cases involving pre-FERA conduct from 2005 to 2008 that largely make up the existing mortgage fraud docket at the Department. In other words, certain of FERA's important benefits in combating mortgage fraud and other schemes will be realized in the future.

Nevertheless, the Department can report that in FY 2008, the 94 USAOs brought 3,126 financial fraud cases against 4,493 defendants, and in 2009, the USAOs brought 3,069 financial fraud cases against 4,545 defendants. In FY 2010, those numbers jumped to 3,476 financial fraud cases filed against 5,093 defendants. Although the Department does not separately track mortgage fraud prosecutions made possible by FERA, the volume of mortgage fraud prosecutions by the Department has seen an even more dramatic increase across the same time period. Specifically, in FY 2008, USAOs filed 88 mortgage fraud cases against 216 defendants, while in FY 2009, there were 248 cases filed against 492 defendants. Those numbers increased in FY 2010 to 632 mortgage fraud cases filed against 1,197 defendants.

In addition to these case statistics, it is apparent that FERA has provided, and will continue to provide, other tangible benefits in the fight against financial fraud. First, our money laundering

prosecutions have benefitted from FERA's "*Santos* fix," which clarified that, in order to prove a money laundering violation under 18 U.S.C. §§ 1956 or 1957, prosecutors need only prove that a defendant laundered proceeds of a specified unlawful activity as opposed to having to prove that profits were laundered. Further, as a direct result of FERA's change to the definition of a financial institution, FinCEN has issued a notice of proposed rulemaking that would require all non-bank mortgage lenders to file Suspicious Activity Reports (SARs). The information gleaned from future SAR filings will help uncover fraudulent activities otherwise unknown to law enforcement. Last, the Department expects that FERA's amendments to 18 U.S.C. §§ 20 and 1014 will prove useful in bringing to justice those engaged in mortgage fraud rescue scams and other fraudulent schemes that have been perpetrated since the enactment of FERA but are still being investigated.

23. According to the Administrative Office of the U.S. Courts, mail fraud cases have declined by 4.4% since 2009. Is this a result of decreases in referrals, a lack of resources, or insufficient legal authorities to bring the cases?

Response:

A review of the USAOs' internal case tracking system (the "LIONS database"), indicates that in FY 2009, USAOs brought 1,020 mail fraud cases (under 18 U.S.C. § 1341) against 1,540 defendants, while in FY 2010 the USAOs brought 1,011 mail fraud cases against 1,650 defendants. Although the volume of cases slightly decreased from FY 2009 to FY 2010, the increase of 110 defendants charged demonstrates that USAOs filed a higher number of complex, multi-defendant mail fraud cases in FY 2010 than in FY 2009.

24. According to the Administrative Office of the U.S. Courts, false statement cases have declined by 32.5% since 2009. Is this a result of a lack of resources, insufficient legal authorities, or a lack of priority by the DOJ?

Response:

A review of the LIONS database indicates that in FY 2009, USAOs brought 1,149 false statement cases (under 18 U.S.C. § 1001) against 1,310 defendants, while in FY 2010 the USAOs brought 1,038 false statement cases against 1,183 defendants. While USAOs continue to make false statement cases a priority, USAOs only received 1,363 false statement matters from investigating agencies in FY 2010, compared to 1,588 false statement matters received in FY 2009. One potential explanation for the decrease in false statement matters received and cases filed from FY 2009 to FY 2010 is the fact that the statute of limitations began to run during this time period on most of the fraud committed in the aftermath of Hurricanes Katrina and Rita, much of which was investigated and charged under 18 U.S.C. § 1001.

25. According to the Administrative Office of the U.S. Courts, cases involving conspiracy to defraud the U.S. have dropped 12.4% since 2009. Is this a result of a lack of resources, insufficient legal authorities, or a lack of priority by the DOJ?

Response:

A review of the LIONS database indicates that in FY 2009, USAOs brought 1,825 conspiracy cases (under 18 U.S.C. § 371) against 4,022 defendants, while in FY 2010, the USAOs brought 1,856 conspiracy cases against 4,277 defendants. This represents a 1.7% increase in conspiracy cases filed and a 6% increase in defendants charged with conspiracy between FY 2009 and FY 2010.

26. Bankruptcy cases filed in federal courts went up from 1,402,816 cases in FY2009 to 1,596,355 cases in FY2010, an increase of 13.8%. However, the number of bankruptcy fraud cases filed only increased from 51 total cases to 57. Is this a result of a lack of resources, insufficient legal authorities, or a lack of priority by the DOJ?

Response:

Only with the passage of time will it become apparent whether there was an increase in bankruptcy fraud cases that can be correlated to the 13.8% increase in bankruptcy filings in FY 2010. Allegations of bankruptcy fraud do not arise until after a bankruptcy petition is filed, and, sometimes not until the bankruptcy proceeding is complete. After matters are referred for investigation, additional time is routinely required for investigation. Therefore, it is unlikely that the number of bankruptcy fraud cases related to FY 2010 bankruptcy filings will be known for several years.

27. Has the Department encountered challenges to prosecuting fraud cases based on statute of limitations issues? If so, could you explain to the Committee what changes you would recommend in this regard and if particular categories of fraud have greater statute of limitations complications than others?

Response:

The Department has faced challenges in charging individuals and companies with complex financial crimes because these types of matters take significant time and resources to investigate fully. FCPA cases face additional hurdles beyond those facing domestic complex financial crime because much of the evidence of the foreign bribery often is located in foreign jurisdictions. While the Department has methods available to extend the statute of limitations in certain cases (either pursuant to a tolling order based on a pending request for mutual legal assistance or pursuant to a tolling agreement entered by the subject of the investigation), such remedies are at times insufficient to address the prosecutorial challenges the Department currently faces in investigating and successfully prosecuting individuals who participate in complex frauds or violate the FCPA. The Department anticipates that if the statute of limitations for FCPA violations were extended to ten years, the Department would be able to bring additional successful prosecutions of individuals and companies who violate the FCPA.

28. Your testimony mentions proceeds recovered last year by the DOJ under the FCPA. What happens to the proceeds of FCPA settlements? Do the DOJ and SEC publicly report where these funds ultimately end up? Are any portions of these settlements

retained by the enforcing agencies for victim compensation funds or other programs?

Response:

Most FCPA matters are presently resolved through a criminal fine or monetary penalty rather than "recovery" of the proceeds of the misconduct. The purpose of criminal fines and penalties is to punish and deter criminal conduct. Both criminal fines and penalties are paid to the U.S. Treasury. In cases involving an issuer, the SEC generally seeks disgorgement of the profits earned by the issuer company as a result of its FCPA violations. The monies received as part of SEC settlements also are paid into the U.S. Treasury. DOJ and SEC do not retain the funds for victim compensation funds or other programs. DOJ, however, can apply to receive up to 3% of the payments made in the previous year in certain criminal cases, including FCPA cases; such funds, if granted, are used in support of ongoing FCPA cases and investigations.

29. **Do the essentially private agreements (Deferred Prosecution Agreements, Non-prosecution Agreements) used to settle FCPA enforcement actions against companies undermine the rule of law by depriving the Department's legal arguments of meaningful testing in a judicial forum?**

Response:

We do not believe that the use of deferred prosecution agreements (DPAs) and NPAs undermines the rule of law by depriving the Department's legal arguments of meaningful testing in a judicial forum. The Department's legal positions are subject to meaningful judicial testing in cases brought against individual defendants, as well as in corporate cases resolved with guilty pleas (of which there were fifteen in 2010). Six FCPA cases with more than 30 defendants (one of which is a corporation) are currently pending trial in four different judicial districts. In addition, three FCPA cases are presently on appeal in three different circuits. Moreover, DPAs and NPAs typically are the result of extensive settlement negotiations with sophisticated entities and experienced legal counsel. To the extent that, after such negotiations, companies believe that the Department's legal theories are not valid, companies have the option of litigating with the Department rather than agreeing to a DPA or NPA.

30. **Has the Department of Justice attempted to study or evaluate the impact of FCPA enforcement on the competitiveness of American business overseas relative to that of other countries? In particular, has any such attempt taken place in the last five years, during the recent period of increased FCPA enforcement by the Department? If any such attempts have taken place, how did the Department perform its evaluation and what were the results?**

Response:

The Department has not attempted to study or evaluate the impact of FCPA enforcement on the competitiveness of American business overseas. The Department does not believe, however, that FCPA enforcement has harmed the competitiveness of American business. The Department

enforces the FCPA evenhandedly against both American companies and foreign companies within its jurisdiction. Based on anecdotal evidence, the Department understands that, in many cases, FCPA compliance enhances competitiveness. High levels of FCPA enforcement provide companies with a shield against bribe demands, which often allows them to operate without paying bribes in environments where other companies may pay them as a matter of course. According to "The Business Case Against Corruption," a joint publication of the International Chamber of Commerce, Transparency International, and the World Economic Forum, a robust corporate anti-corruption program reduces the cost of doing business in many environments, creates a competitive advantage over bribe-paying competitors, helps attract investment, helps attract and retain ethical employees, avoids exclusion from bidding processes and debarment, and the like. With enhanced enforcement of anti-corruption laws by other countries, such as the United Kingdom, Germany, and others, the international playing field is becoming increasingly more level. As China and Russia are engaged through the United Nations Convention Against Corruption and the OECD Working Group on Bribery, the original goal of the FCPA, of ensuring that markets operate on the basis of quality and price, not bribery, is closer to being achieved than ever before.

Questions for the Record
Assistant Attorney General Tony West
Civil Division
United States Department of Justice

Committee on the Judiciary
United States Senate

"Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud"
January 26, 2011

Questions Posed by Senator Patrick Leahy

1. **I am concerned about ongoing reports that prescription drug abuse is on the rise, and that the availability of counterfeit pharmaceuticals exacerbates this problem. We took steps in the last Congress to stop the problem of rogue online pharmacies, but we can do more. We can make further progress by ensuring that the Department of Justice has the tools to enforce the current laws, and that appropriate penalties exist to deter this behavior.**

   As I understand it, today the Department of Justice has the authority to investigate and prosecute offenses relating to trafficking in counterfeit pharmaceuticals under both the federal criminal counterfeiting laws (18 U.S.C. §2320), and the Federal Food, Drug and Cosmetic Act (21 U.S.C. §301 et seq.). The latter of these provides for relatively weaker penalties.

   How does the Department of Justice decide whether to use the criminal counterfeiting laws, the Federal Food, Drug and Cosmetic Act, or both, to prosecute trafficking in counterfeit pharmaceuticals?

Response:

The Department's policy is to charge the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. Depending on the facts of the case, charges may be brought under multiple statutes, including the Federal Food, Drug, and Cosmetic Act ("FDCA"), conspiracy, mail and wire fraud, and 18 U.S.C. §2320 (trafficking in counterfeit goods). Presently the FDCA does not contain direct forfeiture provisions, so adding charges under a statute such as 18 U.S.C. §2320 allows for civil and criminal forfeiture pursuant to 18 U.S.C. §2323. The Civil Division's Office of Consumer Protection Litigation often works cooperatively with U.S. Attorney's Offices on counterfeit pharmaceutical cases. Many cases involve sales and trafficking of both misbranded drugs, as well as counterfeit drugs. As an example of a recent case, Manuel Calvelo, a Belgian national

living in Costa Rica, pled guilty in January 2011 to charges involving violations of the FDCA and the Controlled Substances Act. Calvelo sold misbranded and counterfeit pharmaceutical drugs and controlled substances through various websites, including Depakote, Glucophage, Zoloft, Lipitor, Cialis, Viagra, Xanax, Ativan, and Klonopin.

2. **Mr. West, you testified about the Civil Division's role in bringing criminal cases under the Federal Food, Drug and Cosmetic Act (21 U.S.C. §301 et seq.). Currently, does the Civil Division also bring charges under the criminal counterfeiting laws for cases involving counterfeit pharmaceuticals? If not, why not?**

Response:

The Civil Division's Office of Consumer Protection Litigation brings criminal cases under the various statutes set forth above.

3. **Are the existing mechanisms for investigating and prosecuting trafficking in counterfeit pharmaceuticals, and the associated penalties under current law, sufficient to deter the problem? In what ways could current law in this area be improved?**

Response:

As the Senator noted, the maximum term of imprisonment for a felony conviction under the FDCA is three years, as opposed to ten years under 18 U.S.C. §2320. Mail and wire fraud statutes generally carry maximum terms of imprisonment of twenty years; the criminal counterfeit statute carries a maximum term of imprisonment of ten years. As discussed above, the FDCA does not provide for direct forfeiture, although it does provide for seizure and condemnation of counterfeit drugs, their containers, and items used to make counterfeit drugs under 21 U.S.C. § 334(a)(2).

Questions Posed by Senator Tom Coburn

4. **What further tools do you need to go after perpetrators of Medicare and Medicaid fraud and why? Please explain how your recommendations are different from the tools you already have.**

Response:

The Affordable Care Act provides the Department with several additional statutory tools that are enhancing federal law enforcement's ability to combat health care fraud. Among the changes in the new law, the Affordable Care Act:

- Directs the United States Sentencing Commission to amend the Sentencing Guidelines with respect to calculating loss in health care fraud cases and increase the guideline ranges for health care fraud schemes involving a loss of $1 million or more.
- Clarifies that the term "willfully" found in the health care fraud and anti-kickback statutes does not require proof that the defendant knew of the existence of, or intended to violate, those specific statutes.
- Amends the anti-kickback statute to provide that a claim that includes services or items resulting from a violation of the statute would constitute a false or fraudulent claim for purposes of the False Claims Act. The Act also adds the anti-kickback statute to the definition of "Federal health care offense" in 18 U.S.C. § 24.
- Clarifies the obstruction of justice statute, 18 U.S.C. § 1510(b), to make clear that it applies to health care fraud subpoenas issued pursuant to 18 U.S.C. § 3486.
- Confers new subpoena power on the Attorney General for the investigation of claims under the Civil Rights of Institutionalized Persons Act.
- Makes several significant changes to the law governing employee group health benefit plans subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and multiple employer welfare arrangements (MEWAs) regulated by ERISA by prohibiting false statements in the sale or marketing of employee health benefits by MEWAs and adding certain ERISA offenses concerning the sale and marketing of employee group health benefit plans to the definition of "Federal health care offense," 18 U.S.C. § 24.

There may well be other specific legislative changes that could enhance the Department's ability to fight fraud. We look forward to continuing to work with Congress and the Committee on effective strategies for prosecuting health care fraud in all its forms.

5. **Do they think states conduct sufficient program integrity oversight of Medicaid?**

Response:

The Department is not in the best position to opine whether or not the states conduct sufficient program integrity oversight of Medicaid, as DOJ does not have direct oversight responsibility for

Medicaid program administration or for the state Medicaid Fraud Control Units. As noted in the Health Care Fraud and Abuse Control (HCFAC) program report to Congress for FY 2010, however, we continue to work closely with our state counterparts to return money to the public fisc that is diverted as a result of health care fraud.

6. **You testified that you recovered nearly $5.4 billion in healthcare fraud under the False Claims Act and another $3 billion in fines, forfeitures, restitution, and disgorgement under the Food, Drug, and Cosmetic Act.**

   a. **What percentage is that of the total loss to the government due to healthcare fraud?**

Response:

A precise measure of actual fraud in public and/or private health care programs does not exist. We know, however, that the problem is significant and requires a multi-pronged approach that includes educating providers and consumers of health care to deter fraud at the outset, implementing payment systems that detect fraudulent claims before they are paid, and enhancing law enforcement efforts to redress fraud once it occurs. The Health Care Fraud Prevention and Enforcement Action Team (HEAT) implemented by the Attorney General and Secretary Sebelius in May of 2009 has made great strides toward those goals, and the record recoveries you cite are but one measure of that success.

7. **What percentage of healthcare fraud recoveries are a result of private litigants initiating *Qui Tam* lawsuits?**

Response:

Since 1986, when the False Claims Act was amended to strengthen its *qui tam* provisions, through Fiscal Year 2010, a total of $18.55 billion has been recovered in all False Claims Act matters alleging fraud or false claims submitted to government health care programs. Of that amount, $13.58 billion, or approximately 73%, was the result of *qui tam* actions.

8. **Are there any efforts at the Justice Department or elsewhere to stop fraud before it occurs?**

   a. **In other words, instead of prosecuting fraud after it happens, is there a system in place to identify fraudulent claims before they are paid?**

Response:

In his February 15, 2011 testimony before the Senate Appropriations Committee, Subcommittee on Labor, Health and Related Agencies, Deputy CMS Administrator Peter Budetti outlined several efforts now underway to implement the provisions of the Affordable Care Act that allow for increased detection for fraud before it occurs. These provisions include enhanced screening mechanisms of providers and suppliers wishing to enroll in the Medicare, Medicaid and CHIP programs, enhanced authority to stop payments to those suspected of fraud, increased use of

recovery audit contractors, and more effective use of CMS contractors charged with identifying fraud. Dr. Budetti's testimony provides greater detail and can be found at: http://appropriations.senate.gov/ht-labor.cfm?method=hearings.view&id=5113b16e-7adf-43c5-b207-56dcbee92373

b. Have you considered any private sector solutions to identifying this fraud before payment is made?

Response:

The Department coordinates regularly with private health insurers under the auspices of the National Health Care Anti-Fraud Association. We also have met with other representatives of the private sector to discuss these issues, and we will continue to do so in an effort to discern best practices applicable to our efforts.

9. What percentage of civil cases won by the government are appealed?

a. How often are those appeals successful?

Response:

The Department's data collection efforts do not focus on the type of information that would enable the Department to readily identify the portion of civil cases won by the Government that have been appealed. However, based on a review of the available data, since 1987 it appears that appeals were filed in roughly 50% of the cases where the Department obtained a money judgment in the district court (either on summary judgment or after trial), and that the Department prevailed, at least in part, in roughly 75% of those appeals where a decision was issued (some appeals were voluntarily dismissed and others remain pending).

b. What is the cost of defending an appellate action?

Response:

Every appeal is different, and the cost of defending an appeal depends on the issues involved, their complexity, the amount of evidence at the original hearing, and other characteristics unique to each appeal. The Civil Division has an appellate staff that handles the appellate matters associated with a wide range of cases, including fraud. Additionally, there are a significant number of other personnel that are involved in drafting, reviewing, and presenting arguments in court, in addition to the background work involved in an appellate action. Therefore, the Department could not easily quantify an estimated cost of defending an appellate action.

Questions Posed by Senator Chuck Grassley

10. False Claims Act Amendments Implementation:

In the last Congress, a number of changes were made to the False Claims Act. These changes were the most significant changes to the law since I authored the 1986 amendments to the Act. As the author of many of the changes, I want to know how the Department is implementing these changes.

Because the False Claims Act has a significant statute of limitations, many of the pending cases are based upon fraudulent acts that occurred years ago. As a result, many of the current cases are being litigated using the 1986 version of the FCA, with future cases based upon fraudulent conduct occurring after passage of the amendments operating under the amended version of the FCA.

a. The False Claims Act public disclosure bar was amended in the 111th Congress. Those amendments changed the public disclosure bar so that it is no longer a jurisdictional issue for the courts that can be raised by a defendant. Instead, the court shall dismiss claims under the new public disclosure provision, unless it is opposed by the Government.

This provision could have a significant impact on *qui tam* whistleblowers if it is not properly administered by the Department.

(1) At the hearing I asked you if the Department has developed guidelines concerning when it will and will not oppose such motions. You responded that you are "we are working...with the relators bar, and we work often very closely with them to make sure that these cases are being brought in a way that not only reflects meritorious investigations but are ones that ultimately can be successful." While I appreciate the Department's coordination with outside counsel, I want to know whether the Department has developed these guidelines. Has the Department developed guidelines concerning when it will oppose a court's dismissal of a case based upon a public disclosure? If so, please provide a copy. If not, will the Department be working on such guidelines in the future? If you anticipate working on guidelines, when do you anticipate completing them?

Response:

The Affordable Care Act made several amendments to section 3730(e)(4) of the False Claims Act (commonly known as the public disclosure bar), including authorizing the Government to "oppose" a defendant's motion to dismiss a *qui tam* action under this provision. The Supreme Court has held that these changes to the public disclosure bar are not retroactive, and thus the

Department has not yet had an occasion to exercise its authority to oppose a defendant's public disclosure motion.

Because the determination whether to oppose such a motion will necessitate an individualized inquiry as to the facts and circumstances of each case, at this juncture the Department does not believe issuing guidelines governing the use of this authority would be meaningful. The Department's practice, however, has been to hold periodic meetings with representatives of the relators' and defense bar to discuss the Department's enforcement of the False Claims Act, and once the new changes to the public disclosure bar are applicable, the Department will encourage feedback during these meetings on its implementation of these changes, including the Government's right to oppose a defendant's motions to dismiss. In light of any such feedback, and the Department's own experiences in implementing its new authority, the Department may revisit whether there are any recurring issues that might benefit from the issuance of guidelines.

(2) You also mentioned that "to the extent that there are any guidelines that we would be sharing with the relators bar or with anyone else, we would make those public, and we would share those with Congress." Your response indicates that you would only make these guidelines public, or share them with Congress, if the Department was to share them with the relators bar. Will you commit to sharing any guidelines with Congress irrespective of the Department making it public or sharing it with outside counsel? If not, why not?

Response:

Please see response to 10(a)(1) above.

b. Mr. West, another amendment made to the FCA authorized the Attorney General to delegate authority to issue Civil Investigative Demands (CIDs) to assist in FCA investigations.

(1) Has the Justice Department routinely utilized this new authority as part of FCA investigations?

Response:

As I noted in my testimony, one of the key changes to the False Claims Act that Congress made as part of FERA was to authorize the Attorney General to delegate his authority to issue civil investigative demands (CIDs). As a result of this change, the Department's use of CIDs to investigate health care and other fraud matters has increased markedly. From April 2010 through October 2010, the period for which Department-wide information on CID usage is currently available, approximately 640 CIDs were issued. During the same time period, according to the Department's records, Department attorneys were not required to file any motions to enforce a CID.

(2) How many times has the provision been utilized?

Response:

Please see response to 10(b)(1) above.

(3) In general, have FCA defendants been cooperative with CIDs issued or has the authority been challenged?

Response:

Please see response to 10(b)(1) above.

c. The Fraud Enforcement and Recovery Act (FERA) included a provision that applied one section retroactively to the date of the Supreme Court's decision in *Allison Engine*. A number of courts have held, based upon three different theories that this retroactive application should not apply in those cases.

(1) In your opinion, does the retroactive application contained in FERA apply to cases pending on or after June 7, 2008?

Response:

The Fraud Enforcement and Recovery Act of 2009 (FERA) included an effective date provision providing that its changes to the False Claims Act would generally apply only to conduct occurring on or after FERA's date of enactment. *See* Pub. L. No. 111-21, § (4)(f), 123 Stat. 1617 (May 20, 2009). However, FERA expressly provided that its changes to former section 3729(a)(2), which were designed to supercede the Supreme Court's decision in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123 (2008), "shall . . . apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after [June 7, 2008]." *Id.* at § 4(f)(1). This date is two days before the *Allison Engine* decision was issued.

The courts are currently split on the meaning of section 4(f)(1) of FERA. In particular, the courts have disagreed on whether the phrase "claims under the False Claims Act" refers to claims for payment or legal claims alleging a violation of the Act. *Compare, e.g., U.S. ex rel. Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009) *with U.S. ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), *cert. granted on other grounds*, 131 S. Ct. 63 (2010). In addition, several courts have concluded that any retroactive application of the changes to former section 3729(a)(2) would violate the ex post facto clause of the United States Constitution. *See, e.g., U.S. ex rel. Baker v. Community Health Sys., Inc.*, 2010 WL 1740624 at *16-17 (D.N.M. 2010); *but see U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc.*, 2010 WL 608 F.3d 871, 878-79 (D.C. Cir. 2010) (holding that retroactive application of FERA's new relation back provision would not violate the ex post facto clause because "[t]he FCA is not penal").

The Department has strongly opposed attempts by defendants to narrow or strike down section 4(f)(1). The Department has argued that Congress unambiguously expressed its intent in FERA that the changes to former section 3729(a)(2) should apply to all False Claims Act actions

pending as of June 7, 2008, and that Congress had the constitutional authority to do so. *See* Brief for Appellant The United States of America, filed Sept. 13, 2010, in *Sanders et al. v. Allison Engine Co., Inc. et al.*, Nos. 10-3818 & 10-3821 (Consolidated) (6th Cir).

(2) Does the Department support the retroactive application of FERA? Will it continue to appeal this issue?

Response:

Please see response to 10(c)(1) above.

(3) Do you believe Congress adequately explained the retroactivity necessary to satisfy the Supreme Court's two-step *Landgraf* analysis?

Response:

Please see response to 10(c)(1) above.

11. False Claims Act Settlements:

The amount of money recovered under the False Claims Act continues to increase. I was pleased to see the recent statistics that highlighted nearly $3 billion recovered under the FCA for FY2010, increasing the total to over $28 billion since the 1986 amendments were passed. I was particularly pleased to see that nearly $2.4 billion of that $3 billion was recovered from FCA cases brought by *qui tam* whistleblowers. These insiders come forward and stick their necks out to report fraud and save taxpayer money.

However, I remain concerned that settlements under the FCA are being viewed by defendants as merely the cost of doing business. Each year, I request FCA information and settlement data from the Department. Unfortunately, the Department isn't always forthcoming with this information and in other instances they don't keep records of certain metrics that would be helpful for us in Congress conducting oversight.

a. Mr. West, each year the Department issues a press release highlighting achievements under the FCA. Would the Department object to reporting False Claims Act settlement and caseload statistics annually to Congress?

Response:

The Department routinely discloses settlement and caseload statistics to the public and to Congress. Our fiscal year statistics are posted online at http://www.justice.gov/civil/frauds/Civil%20Fraud.htm and they disclose the number of new matters filed (both *qui tam* and non-*qui tam* matters), settlement and judgment amounts obtained in various categories of cases, relator share awards both in intervened matters and in matters in

which the United States has declined to intervene, and the number of cases in which the government has declined and has intervened, as well as the number of pending cases. In addition, the Department has routinely complied with the requests of individual members of Congress to provide more detailed information about particular settlements. In light of the information we make available, we are of the view that imposing an additional reporting requirement on the Department, particularly at a time when our resources are significantly strained, is not necessary.

b. The FCA's treble damages are a significant penalty to any entity that defrauded the Government. However, we continue to see some corporations and entities settling FCA cases for fraud. Does the Department hold repeat FCA offenders accountable when considering settlement agreements?

Response:

When attempting to resolve False Claims Act matters and achieve a maximum recovery on behalf of taxpayers, Department attorneys weigh a number of factors. These include the strength of the evidence supporting the government's case and the total harm inflicted on the government as a result of the defendant's schemes. Whether the defendant instituted corrective actions without prompting by the government and whether the defendant is a repeat FCA offender are additional factors and certainly influence the Department's view of what constitutes an appropriate resolution in any given matter.

c. How do we ensure the penalties under the FCA do not simply become the cost of doing business?

Response:

The treble damages and penalties provisions of the False Claims Act remain a substantial deterrent to entities and individuals who contemplate submitting false or fraudulent claims to the United States. In addition, we work closely with our agency partners in FCA matters to address appropriate administrative remedies that may include suspension, debarment or exclusion of the responsible parties from government contracts and programs. In appropriate circumstances, corporate monitoring or compliance plans also will be imposed, all at significant cost to the defendant. Finally, I would note that all False Claims Act matters are shared with the Criminal Division of the Department which may then open a parallel criminal investigation of those responsible, including individuals.

Questions Posed by Senator Jeff Sessions

12. **As you note in your testimony, the DOJ reports that amounts recovered under the False Claims Act since January 2009 are higher than any previous two-year period, totaling $6.8 billion. You explained that health care fraud recoveries under the False Claims Act accounted for $5.4 billion of that total. However, according to the Administrative Office of the U.S. Courts, government-related False Claims Act cases have dropped 16.5% since 2009, with the number of cases decreasing each year since 2006.**

    a. **How do you reconcile your increase in recoveries with the drop in overall False Claims Act cases?**

Response:

We are unfamiliar with the False Claims Act statistics attributed to the Administrative Office of United States Courts. Since Fiscal Year 2006, the total number of new matters (both *qui tam* and non-*qui tam*) alleging False Claims Act violations has increased by 56%. The totals are as follows:

Fiscal Year	Non-Qui Tam	Qui Tam	TOTAL
2006	71	384	455
2007	129	365	494
2008	161	379	540
2009	132	433	565
2010	138	574	712

While it is true that the Department devotes significant resources to the fight against health care fraud, it is not at the expense of other types of False Claims Act matters. It should be noted that the False Claims Act requires that the Attorney General diligently investigate all *qui tam* matters filed by whistleblowers, or "relators" as they are called under the False Claims Act. 31 U.S.C. § 3730. Since 1986, *qui tam* actions filed by relators that allege health care fraud have constituted approximately 55% of the total number of *qui tam actions* filed. In Fiscal Year 2010, relators filed 383 actions alleging false claims submitted to government health care programs compared to only 56 such actions alleging false claims implicating the Department of Defense, the second largest category of False Claims Act matters. Nevertheless, last year the Department recovered over $522 million in non-health care matters and since 1986 has recovered more than $8 billion in such matters.

    b. **Please explain the steady decline of these cases?**

Response:

Please see response to 12(a) above.

c. Has the Department's emphasis on health care fraud diverted disproportionate amounts of time and resources from other types of False Claims cases?

Response:

Please see response for a.

13. When Congress enacted FERA in May 2009, it authorized $266 million annually in 2010 and 2011 to hire hundreds of prosecutors, agents, and other federal officials to pursue financial fraud; however, the vast majority of successful civil recoveries were not recovered under FERA.

a. How has the Department used the resources provided by FERA, and why do we not see higher numbers of cases brought under the Act?

Response:

The FY 2009 Supplemental provided $10 million and 55 positions (including 45 attorneys) to the U.S. Attorneys (USA) for mortgage and financial fraud and market manipulation prosecutions, and $35 million and 81 agents to the FBI for mortgage fraud investigations. Further, the FY 2010 Appropriations Act provided program enhancements totaling $49.9 million for the following components to address mortgage fraud, financial fraud and other economic fraud law enforcement: FBI - $25.5 million and 50 agents; USA - $7.5 million and 87 attorneys; Civil Division - $10 million and 87 attorneys; Criminal Division - $1.8 million and 5 attorneys; Tax Division - $2.9 million and 5 attorneys; and the U.S. Trustees - $2.2 million and 15 attorneys. The new resources in the FY 2010 Appropriations Act were provided to address a wide range of economic fraud law enforcement, including affirmative civil enforcement and public corruption, as well as criminal mortgage and financial institution fraud cases.

Because FERA amended existing statutes instead of creating new sections under Title 18, it is difficult to precisely quantify the number of criminal cases brought as a direct result of FERA's enactment given that cases prior, and subsequent, to FERA's enactment continue to be charged under the same sections of the criminal code. However, a look at the Department's overall fraud caseload shows an increase in activity over the past several years. For example, the number of FBI investigations increased from 1,200 in 2007 to more than 3,000 in 2010. Further, the number of financial fraud cases brought by the USAs increased to 3,476 in 2010 from 3,069 in 2009 and, as a subset to financial fraud, the number of mortgage fraud cases brought by the USAs increased to 632 in 2010 from 248 in 2009. Finally, the number of defendants charged by the Criminal Division's Fraud Section increased to 302 in 2010 from 211 in 2009.

In addition to the increased number of criminal investigations and cases handled over the past few years, the FBI has implemented a number of innovative methods to detect and combat

mortgage fraud and other significant financial frauds. Foremost among those methods is the development of the Financial Intelligence Center (FIC). The FIC serves as a clearinghouse that provides tactical analysis of intelligence data to identify egregious offenders and emerging trends concerning mortgage fraud, predatory lending, market manipulation and other financial frauds.

With respect to civil fraud enforcement, the Department has continued its robust enforcement of the False Claims Act, which is the U.S. Government's primary tool for combating fraud against the Treasury. For example, during 2010, the Civil Division, working with the USAs, recovered more than $3 billion in civil settlements and judgments. This amount includes $2.5 billion in health care fraud cases – the largest annual recovery in DOJ history. Since January 2009, the Department's recoveries under the False Claims Act total nearly $7 billion

SUBMISSIONS FOR THE RECORD

Department of Justice

STATEMENT

OF

LANNY A. BREUER
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"PROTECTING AMERICAN TAXPAYERS:
SIGNIFICANT ACCOMPLISHMENTS AND ONGOING
CHALLENGES IN THE FIGHT AGAINST FRAUD"

PRESENTED ON

JANUARY 26, 2011

STATEMENT OF
LANNY A. BREUER
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I. INTRODUCTION

Good morning Mr. Chairman, Ranking Member Grassley, and distinguished Members of the Committee. Thank you for inviting me to speak with you today about the many ways in which the Department of Justice protects American taxpayer dollars by bringing criminal fraud prosecutions. I am honored to appear before you on behalf of the Department, and along with my colleague and friend, Assistant Attorney General Tony West.

Together with the United States Attorney's Offices and our many law enforcement partners, the Criminal Division, whose nearly 600 lawyers I am privileged to lead, is investigating and prosecuting fraud cases all across the country. We are holding fraudsters accountable for bilking the American people and seeking sentences designed to punish and deter. We are also aggressively working to recoup the money these defendants have stolen, whether it is money taken from individual investors in a Ponzi scheme, or funds pilfered from our taxpayer-funded public programs.

And we are coordinating across the U.S. government, working with our colleagues in the Civil and Antitrust Divisions, our important partners in the Inspectors General community, and

numerous task forces which join together the combined resources of multiple law enforcement and regulatory agencies.

As a result of those efforts over the past year, the Department has prosecuted thousands of defendants for fraud crimes and obtained judgments and settlements amounting to billions of dollars in fraud and corporate corruption proceeds. For example, in Fiscal Year 2010 alone, in criminal matters in which the Criminal Division participated, we obtained approximately $3.4 billion in judgments and settlements, with over $1 billion in restitution ordered, $570 million in fines, $914 million in forfeiture, and $828 million in other settlements.

II. CONGRESSIONAL SUPPORT FOR CRIMINAL FRAUD ENFORCEMENT

The Department is grateful for the many resources Congress has provided to support and enhance the Department's criminal fraud enforcement efforts. Beyond providing expanded statutory tools to fight various forms of fraud, Congress has authorized critical funds through various means, including in the Fraud Enforcement Recovery Act (FERA), which of course Chairman Leahy and Ranking Member Grassley sponsored. FERA, passed in 2009, authorized needed and targeted funds for the FBI, the Criminal Division, the U.S. Attorneys' Offices, and the Securities and Exchange Commission (SEC), giving us further resources to increase the scope of our collective enforcement response. In addition, last year, in the Affordable Care Act, Congress authorized additional, critical funding for use in health care fraud enforcement.

Congress's financial support of our criminal investigations and prosecutions is critical to protecting the American taxpayer's hard earned money. And the amount of taxpayer money restored to the United States Treasury through our criminal enforcement efforts far exceeds what we spend to recover that money. As a result of our criminal fraud prosecutions, the Department is transferring to the U.S. Treasury far more money than the amount budgeted by Congress to

support the Department's criminal fraud and corporate corruption investigations and prosecutions.

I have had the honor and privilege of appearing before this Committee on more than one occasion since I became Assistant Attorney General, including, most recently, in September 2010. During that testimony, I described to the Committee numerous significant prosecutions that we have brought against fraudsters, and some of our efforts to combat the various kinds of fraud we encounter regularly, including investment fraud, mortgage fraud, bank fraud, and fraud in disaster programs, such as the programs designed to aid survivors of Hurricane Katrina. Over the last several months since I testified, we have continued our aggressive push to investigate and prosecute fraud in all its guises. Focusing on the period since I last testified before this Committee I have set forth below some of the Department's recent fraud prosecutions.

A. Investment Fraud

We are continuing to investigate and prosecute defendants who are perpetrating myriad forms of investment fraud schemes. As this Committee knows well, investment fraud victimizes hundreds and even thousands of taxpayer investors, at times literally stealing these investors' entire life savings and causing devastating harm.

As reflected by the Department's announcement on December 6, 2010, together with our partners on the Financial Fraud Enforcement Task Force (FFETF), including the SEC, the U.S. Commodity Futures Trading Commission, and state Attorneys General, a tremendous number of investment fraud prosecutions are being pursued. On that date, looking back over many criminal fraud cases within a window of less than four months, the Department reported on fraud schemes involving hundreds of defendants, more than 120,000 victims around the United States, and billions of dollars in estimated losses. Beyond the data, a few of the specific examples of the

Department's recent activity in investment fraud cases illustrate how the Department is bringing defendants to justice who seek directly to defraud the American taxpayer.

On December 1, 2010, David Lewalski was indicted in the Southern District of Florida on mail fraud and wire fraud charges in connection with his alleged participation in a $30 million fraudulent investment scheme in which he falsely claimed he could earn investors up to 10% per month through trading in the foreign currency market.

On November 17, 2010, Philip Barry was convicted at trial in the Eastern District of New York on 34 counts of securities fraud and mail fraud in regard to his perpetration of a 30-year Ponzi scheme that victimized hundreds of investors and resulted in over $40 million in investor losses.

On October 21, 2010, Eric Kurz pleaded guilty in the Eastern District of Virginia to conspiring to commit wire fraud and money laundering in regard to a $100 million scheme to defraud hundreds of investors in numerous states and in Canada in regard to life insurance settlement investments.

The same day, Mark Alan Shapiro, the founder of the Cobalt Companies, was sentenced in the Southern District of New York to 85 years in prison on charges stemming from a fraud that raised more than $23 million from more than 250 investors in private placement real estate offerings.

On October 14, 2010, a superseding indictment unsealed in federal court in Brooklyn charged five defendants, in addition to a Chief Executive Officer and Chief Operating Officer already under indictment, with securities fraud and money laundering in regard to alleged false inflation of sales figures of Spongetech Delivery Systems, Inc. These defendants and others allegedly executed a fraudulent scheme to publicly report materially overstated Spongetech sales

figures to create artificial demand for, and increase the share price and trading volume of, Spongetech common stock.

I have the honor of co-chairing the FFETF's Commodities and Securities Fraud Working Group, and, together with our law enforcement partners, we will continue aggressively to pursue all forms of investor fraud.

B. Troubled Asset Relief Program Fraud

Taxpayer money has funded the Troubled Asset Relief Program (TARP), and the Department has been successful in detecting and prosecuting attempts to defraud that program. For example, in October 2010, Charles Antonucci, Sr., the former president and Chief Executive Officer of the Park Avenue Bank, pleaded guilty to federal securities fraud charges relating to Antonucci's attempt to fraudulently obtain more than $11 million of taxpayer rescue funds from TARP. The charges were brought by the United States Attorney's Office in Manhattan and Antonucci's guilty plea was the first criminal conviction for an attempt to defraud TARP. Other matters involving TARP fraud are ongoing, including the prosecution of former Taylor, Bean & Whitaker chairman Lee Bentley Farkas, which I described to this Committee last September.

Working in close coordination with the Special Inspector General for TARP and our other law enforcement partners, the Department is committed to keeping a vigilant watch on these taxpayer funds and, when fraud is detected, holding TARP fraudsters accountable.

C. Medicare Fraud

Over the past two years, we have also expanded our aggressive efforts to prosecute those who seek to defraud our taxpayer-funded health care system, especially Medicare. The Healthcare Fraud Prevention & Enforcement Action Team (HEAT)'s Medicare Strike Force, which now operates in seven U.S. cities, has led this effort. The Strike Force model's central goal is to investigate and prosecute defendants who steal taxpayer dollars through fraudulent

billing of Medicare. The Strike Force consists of dedicated agents from the FBI and the Department of Health and Human Services' Office of Inspector General; these agents work closely with Department prosecutors from the Criminal Division, the Civil Division, and U.S. Attorney's Offices in Strike Force cities.

The Strike Force has successfully indicted hundreds of defendants and obtained substantial prison terms. In Fiscal Year 2010 alone, the Medicare Strike Force filed 140 indictments involving charges against 284 defendants who collectively billed the Medicare program more than $590 million. In the same year, 217 guilty pleas were obtained, jury trials resulted in guilty verdicts against 23 other defendants, and 146 defendants were sentenced to prison terms, with an average sentence of more than 40 months of incarceration. The Strike Force also secured court orders of restitution totaling over $169 million. The Department steadfastly pursues enforcement of those restitution orders, searching for funds secreted away by defendants. When located, stolen taxpayer dollars are restored to the Medicare Trust Fund, where they belong.

The Medicare Strike Force has prosecuted defendants engaged in numerous forms of Medicare fraud, from fraudulent billing for durable medical equipment and HIV-infusion to home health care and mental health therapy. The Strike Force has prosecuted doctors, nurses, owners and operators of fraudulent providers and suppliers, and individuals who recruited beneficiaries to participate in fraud schemes. On October 21, 2010 in Miami, Florida, for example, Assistant Attorney General Tony West and I announced the unsealing of parallel criminal and civil enforcement actions against two Miami health care companies, American Therapeutic Corporation (ATC) and Medlink Professional Management Group, Inc., as well as ATC's owner and other senior executives. The ATC prosecution alleges a fraud scheme

involving approximately $200 million in Medicare billing for purported mental health services. At the same time that I announced criminal charges and criminal forfeiture counts against these defendants, Assistant Attorney General West announced the use of civil tools to freeze assets of the corporate and individual defendants. The ATC case is one of the largest Medicare Strike Force cases ever brought, it is the first time the Strike Force has indicted a corporation, and it reflects the important coordination occurring between the Department's Criminal and Civil Divisions to hold fraudsters accountable who are stealing taxpayer dollars.

The Department is grateful for the funding Congress has provided to pursue these cases, as well as the enhanced statutory tools Congress passed as part of the Affordable Care Act (ACA). Those tools are being put to use. The ATC indictment, for example, alleges a criminal count based on Congress's amendments to the Anti-Kickback Statute. In addition, the important whistleblower provisions of the False Claims Act spearheaded years ago by Ranking Member Grassley and others are resulting in both criminal and civil enforcement actions in health care fraud cases. On December 7, 2010, for example, Kos Pharmaceutical agreed to pay $41 million to resolve criminal and civil liability arising from, among other things, illegal kickbacks paid to doctors, other medical professionals, physician groups and managed care organizations to get them to prescribe or recommend certain drugs. As part of the resolution, Kos also entered into a deferred prosecution agreement and agreed to the filing of a criminal information in U.S. District Court for the Middle District of Louisiana charging the company with one count of conspiracy to violate the Anti-Kickback Statute.

D. Procurement Fraud

The Department is also vigorously prosecuting cases in another area where fraudsters are stealing taxpayer money: in government procurement programs. In a recent example of our aggressive prosecution of procurement fraud, on January 7, 2011, former U.S. Army staff

sergeant Stevan Ringo was sentenced to 90 months in prison in connection with a fuel theft scheme to solicit more than $400,000 in bribes from a government contractor in Afghanistan. In his guilty plea, Ringo admitted that, between December 2009 and February 2010, he accepted more than $400,000 in cash payments from a government contractor in exchange for submitting fraudulent paperwork that enabled the contractor to steal nearly $1.5 million worth of fuel.

E. Mortgage Fraud

I have previously described to the Committee the scope of Operation Stolen Dreams, the largest mortgage-fraud sweep in the Department's history, which Attorney General Holder announced last June. Since that time, we have prosecuted many additional mortgage fraud cases.

To give just three examples since I last testified before the Committee: On January 3, 2011, Matthew and Lance La Madrid pleaded guilty in the Southern District of California to mail fraud charges pertaining to a $30 million mortgage fraud and investment fraud scheme. As part of the scheme, the brothers used false borrower information to obtain millions of dollars in mortgages used to fund the defendants' real estate investment fraud scheme.

On December 13, 2010, Sergie Caro was sentenced in the Southern District of Florida to 37 months in prison in connection with a mortgage fraud scheme. To execute the scheme, Caro and others submitted loan applications to mortgage lenders that contained false information, including false bank statements, W-2 forms, pay stubs, verifications of deposit and verifications of employment.

And on October 15, 2010, Thomas Kontogiannis, a New York real estate developer who led a mortgage fraud conspiracy resulting in more than $90 million in losses, pleaded guilty in the Eastern District of New York to conspiracy to commit bank and wire fraud. Kontogiannis admitted defrauding Washington Mutual Bank and DLJ Mortgage Capital, Inc., a subsidiary of Credit Suisse, in connection with his development of tracts of land in Brooklyn and Queens.

Mortgage fraud remains a high priority for the Department, and the Department is committed to continuing to investigate and prosecute mortgage fraud cases aggressively in the months and years ahead.

F. Foreign Corrupt Practices

The Department is also steadfastly pursuing corporate corruption and bribery in violation of the Foreign Corrupt Practices Act ("FCPA"). This corruption and bribery works to the detriment of us all, stifling competition, imposing an insidious and illegal fee on business transactions, and undermining the transparency and honesty of corporate culture. Led by the Criminal Division's Fraud Section working in tandem with U.S. Attorney's Offices, the Department has a robust FCPA enforcement program. In 2010, we recovered over $1 billion through resolutions of FCPA investigations, more than in any other year in the history of our FCPA enforcement efforts.

G. Recovery Act Fraud

Before I conclude, I would like to say a brief word on the subject of Recovery Act fraud. As this Committee of course knows, President Obama signed the American Recovery and Reinvestment Act shortly after taking office, in February 2009. Among other things, the Act authorized $275 billion in taxpayer money for federal contracts, grants, and loans in order to spur economic activity and create long-term growth – funding roads, schools, police forces, and countless other projects across the country. So far, it has been encouraging not to see widespread fraud and abuse with respect to Recovery Act funds. However, given the opportunism and innovation of financial criminals, we must be prepared for them to work hard at devising fraudulent schemes aimed at stealing funds disbursed under the Act. To that end, the Criminal Division, the Antitrust Division, the Civil Division, and the U.S. Attorneys' Offices have established strong partnerships with Inspector Generals' Offices around the country that are

tasked with investigating Recovery Act fraud. I have the honor of serving as Co-Chair of the FFETF's Recovery Act Working Group, along with Earl Devaney, the Chairman of the Recovery Accountability and Transparency Board, and others. Last November, I had the privilege of speaking at a training conference for several hundred investigators, auditors, and inspectors general who are focused on Recovery Act fraud. I and others from the Department made it clear to them that we will not hesitate to prosecute fraud on Recovery Act funds when the facts and the law warrant, and that they have many strong partners at the Justice Department who stand ready to support them in carrying out our important collective mission to fight Recovery Act fraud.

III. CONCLUSION

Prosecuting fraud is a high priority for the Department of Justice. Every day, federal prosecutors and agents across the country are working hard to investigate and prosecute fraudsters who take directly, and indirectly, from American taxpayers or otherwise undermine the transparency and integrity of our markets. Our efforts have led to the incarceration of hundreds of defendants, and to billions of dollars in judgments and settlements. We are absolutely committed to continuing these efforts.

Thank you for the opportunity to provide the Committee with this brief overview of the Department's efforts to combat fraud. I look forward to working with the Committee further, and am happy to answer any questions.

Statement of

The Honorable Charles Grassley

United States Senator
Iowa
January 26, 2011

Prepared Statement of Ranking Member Chuck Grassley
U.S. Senate Committee on the Judiciary
Hearing on "Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud"
Wednesday, January 26, 2011

Mr. Chairman, thank you. This committee has a lot of work to do. And, our work could not come at a more critical time for our country. Every move we make must take a painstaking look at the fiscal realities of our time, the constitutional responsibilities we hold, and the will and desires of the American people we represent. I'll have more to say tomorrow at our first mark-up, but I look forward to working with you as we move this committee forward in a productive manner, consistent with our relationship over the years.

Today's hearing is a good way to start my time as Ranking Member of the Judiciary Committee. Fighting fraud is something we've worked on together over many years in the Senate. I'm glad to be in this chair as we begin the 112th Congress and focus on continued efforts to protect federal tax dollars from fraud. As the author of the 1986 amendments to the federal False Claims Act, which have recovered nearly $28 billion back to the taxpayer, I've spent a great deal of my time in the Senate working to combat fraud against taxpayers. I welcome the opportunity to begin this Congress on such an important issue.

Combating fraud is not a partisan issue. It is an American taxpayer issue and one every Senator and member of Congress should focus on. However, given the current fiscal condition of the federal government, combating fraud has become more important than ever. As Congress looks for ways to cut federal spending and reevaluates which federal programs are worthy of hard earned taxpayer funds, we need to be cognizant that every dollar lost to fraud is a dollar of funding siphoned away from legitimate programs. This is especially important given the significant government expenditures in the last few years including the President's trillion dollar stimulus funding, the AIG bailout, auto industry bailout, conservatorship of Fannie Mae and Freddy Mac, and the Troubled Asset Relief Program (TARP).

In an effort to better understand the vulnerabilities that exist and efforts to combat fraud, this Committee held a number of hearings focusing on various types of fraud. Those hearings were helpful in flushing out some of the problems that existed and highlighted where gaps in the law limited the government's ability to recoup taxpayer money and bring fraudsters to justice. These

hearings played an important part in helping Chairman Leahy and me craft the Fraud Enforcement and Recovery Act of 2009 which was signed into law with bi-partisan support of both the House and Senate. The Fraud Enforcement Recovery Act addressed a number of problems with the federal criminal code related to mortgage and securities fraud. It also overturned a number of court decisions that limited the scope and applicability of the False Claims Act. Additionally, the Fraud Enforcement and Recovery Act provided a temporary increase in funding to the Justice Department, the Federal Bureau of Investigation, the Securities and Exchange Commission, the U.S. Secret Service, and other agencies, to combat fraud. Today's hearing offers another opportunity to follow-up on the Justice Department's implementation of the Fraud Enforcement and Recovery Act and to ask questions to help us determine what is and isn't working.

First, I would like to talk about health care fraud and the False Claims Act. The federal False Claims Act remains one of the most important statutes for fraud recovery utilized by the federal government. Since 1986 when it was amended, the False Claims Act has recovered over $28 billion and it has prevented countless billions of fraud that others would have attempted. The False Claims Act's qui tam whistleblower provisions have been among the most successful elements of the Act. This year alone, the Department brought in $3 billion in recoveries under the False Claims Act, with $2.5 billion from health care fraud cases alone. Of the $3 billion in recoveries, nearly $2.4 billion was the result of cases filed by qui tam whistleblowers who courageously came forward and risked their livelihoods to bring fraudsters to justice. While this civil recovery is a great victory in the fight against fraud, it represents a small fraction of the actual estimated fraud in federal health care programs.

For example, in fiscal year 2009, the federal government spent $502 billion on Medicare and $379 billion on Medicaid. The general estimate for fraud in Medicare and Medicaid is between 5 and 8 percent. So, while recovering $2.5 billion is a significant win, it represents a mere fraction of the estimated $40-70 billion in health care fraud. To address the significant amount of fraud, I wrote to Attorney General Holder and Secretary Sebelius late last year raising my concerns with health care fraud enforcement and the falling number of criminal prosecutions. I received a response to my letter late Monday evening—which I'll note, came after the Department released the information publicly.

While it would have been nice to have an opportunity to review the information before a public release, the letter does answer a number of my questions. It appears that the new data for fiscal 2010 shows a marked improvement in efforts to fight fraud. Civil recoveries, criminal investigations, prosecutions and convictions are all increasing. However, I want to ask Mr. Breuer about why some of the information included in the response is not included in the annual Health Care Fraud and Abuse Control Account reports.

For example, the public data available does not include the number of defendants in closed cases or a final conviction rate for health care fraud defendants. I want to know why the Department of Justice has traditionally avoided making this information public and whether they will consider adding it in the future. I also want to ask about funding for the Department and whether the discretionary money Congress appropriated under the Health Care Fraud and Abuse Control program has been helpful to the Justice Department, as this accounts for most of the funding for

the Health Care Fraud Prevention & Enforcement Action Team strike forces. I am especially interested because nearly 75 percent of that discretionary money, $251 million out of $311 million, goes to the Centers for Medicare and Medicaid Services for vague initiatives labeled "oversight". I want to hear whether the Department of Justice thinks this money is going to good use or could be better spent elsewhere.

Additionally, the letter sought information from the Justice Department regarding settlements it reached under the False Claims Act. Year after year, the Department holds this information close to the vest, only releasing it reluctantly when asked. The information is helpful to Congress in conducting oversight to determine if the law is being faithfully executed and that taxpayers are getting the best deal possible. For years, I've been concerned that settlements under the False Claims Act are simply becoming the cost of doing business for these large corporate fraudsters. The only way we can tell if taxpayers are getting a good deal is to request these numbers annually and review them. However, because there is no statutory obligation to report the details, we often have to wait weeks, months, or sometimes years to get this information in response to questions for the record. That sort of delay is unacceptable. So, I'll be introducing legislation this Congress that will require the Attorney General to annually report details about False Claims Act settlements to Congress. This is a straightforward piece of legislation that simply builds upon the longstanding effort Chairman Leahy and I have undertaken to bring sunlight and transparency to the Department.

I also want to ask the witnesses about the role the Department of Justice plays in combating securities fraud and efforts to bring accountability and integrity to Wall Street. In the past couple of years, the American people have become the backstop for all sorts of wrongdoing and malfeasance on Wall Street. Whether it is the taxpayer funded bailout of AIG, the TARP bailouts of major banks, or the conservatorship of Fannie and Freddie, American taxpayers have become Wall Street's safety net. I want to ask the witnesses about some high profile settlements that the Securities and Exchange Commission has signed off on in the last year. Specifically, I want to know what the Justice Department knew about these settlements in advance and whether they signed off on them or otherwise agreed to them. For example, I want to know what level of involvement the Department played in the Securities and Exchange Commission's settlement with Citibank in response to allegations the bank misled investors about the bank's outstanding liability for mortgage backed securities. The Securities and Exchange Commission agreed to settle with the bank for $75 million and two executives agreed to pay $100,000 and $80,000. A U.S. District Court Judge questioned this settlement stating that the settlement did very little to assure that senior management who were responsible would feel any pain.

In another recent example, the Securities and Exchange Commission settled fraud allegations with investment firm Goldman Sachs for $550 million and a promise to remedy its offering process and create a new training program. This settlement seems very small considering a prominent law professor said the allegations were very severe and that it wasn't impossible criminal charges would follow. This settlement represented only 4 percent of Goldman Sachs yearly profits. I want to know what role the Justice Department had in this case and why it chose not to file criminal charges. It seems to me that these civil settlements are similar to health care settlements and that fraud by large entities may simply be the cost of doing business passed on to consumers.

I'd also like to learn more about why so many of these complex financial fraud cases seem to end in settlements where the shareholders are punished, and yet there are so few ending in criminal prosecutions where the senior executives are held accountable. How much coordination and communication is there between senior Justice Department officials and the Securities and Exchange Commission on the decision to settle these cases?

Time permitting, I'd like to ask about mortgage fraud and some questions about proposals to amend the Foreign Corrupt Practices Act. I have concerns about decisions by some U.S. Attorneys not to pursue complex mortgage fraud cases. Additionally, I have some questions about way the Financial Fraud Enforcement Task Force is operating and how mortgage fraud prosecutions and investigations are coordinated among various federal law enforcement partners. With regard to the Foreign Corrupt Practices Act, the Committee held a hearing on this topic in November and a number of proposed modifications to the statute were discussed. I want to hear from the Justice Department what it thinks of some of these proposals.

Finally, Mr. Chairman, I'd like to note that regardless of the substantive laws we pass, the investigative and law enforcement resources appropriated, and the prosecutions brought so far, criminal fraud will not be adequately deterred unless we revisit the Supreme Court's decision in United States v. Booker. In that case, the Supreme Court held that mandatory Sentencing Guidelines violated the Sixth Amendment. Now that the Guidelines have been held to be merely advisory, the disparity and unfairness in judicially imposed sentences that we sought to eliminate on a bipartisan basis are returning, especially in two areas: child pornography and fraud cases of the type we are discussing today. If potential fraudsters view the lenient sentences now being handed down as merely a cost of doing business, efforts to combat criminal fraud could be undermined.

Supporting this position is a Reuters analysis of 15 insider trading cases that were brought by the United States Attorney in New York in 2009 and 2010, which concluded that in 13 of them, or 87 percent, the sentences imposed were lighter than the terms prescribed by the Sentencing Guidelines, and seven, nearly half, contained no prison term. By contrast, in other cases, New York federal judges issued sentences below those called for in the guidelines 57 percent of the time, in itself a shocking change from the system that the Sentencing Reform Act of 1984 created until the Supreme Court's Booker decision. Nationwide, 42 percent of all federal sentences were below the guidelines. Federal judges often seem not to understand the seriousness of these crimes. At one sentencing proceeding in an insider trading case, Judge Alvin Hellerstein said, "[T]here are no victims in this crime, at least not in any real sense." Rather than imposing a sentence in keeping with the guidelines of 37 to 46 months, he noted that the defendant was an accomplished academic with an autistic son, and gave three years' probation. Most of the defendants who received lenient sentences did not cooperate with the government. As a result, defense lawyers are now arguing that to avoid disparity, their non-cooperating insider trading clients should also receive sentences below the guidelines.

I appreciate the opportunity to raise these important issues today with the witnesses and look forward to working with the Chairman, and all my colleagues on the Committee in the 112th Congress. Thank you.

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
January 26, 2011

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
"Protecting American Taxpayers: Significant Accomplishments And Ongoing Challenges In The Fight Against Fraud"
January 26, 2011

Today, in the Senate Judiciary Committee's first hearing of this new Congress, we consider a vital issue on which Senator Grassley and I have worked together with great success -- the fight against fraud. Last Congress, one of the first major bills the Senate Judiciary Committee considered, and one of the first bills the President signed into law, was the Leahy-Grassley Fraud Enforcement and Recovery Act. That bill gave fraud investigators and prosecutors needed tools and resources to better hold those who commit fraud accountable and to recover taxpayer money.

Working together, we also strengthened the False Claims Act, which empowers whistleblowers to find fraud and recover stolen tax dollars that would otherwise go undiscovered. We worked on key provisions to fight fraud in the Affordable Care Act and the Wall Street Reform Act. These new laws are already paying off, and I look forward to working with Senator Grassley, and with other Senators from both sides of the aisle, on further anti-fraud initiatives this year. In these trying economic times, cracking down on the fraud which has harmed so many hard-working Americans, and protecting hard-earned taxpayer dollars, is more important than ever.

At today's hearing, we will learn more about recent historic success in anti-fraud efforts. In the last fiscal year alone, the Department of Justice recovered well over $6 billion through fines, penalties, and recoveries from fraud cases. The sums are staggering. The government recovered $4 billion in taxpayer cases in health care fraud cases alone last year alone, the most of any year in history. In the last same period, the Criminal Division obtained $3.4 billion in judgments and settlements. Since January 2009, the Department has recovered $6.8 billion of taxpayer dollars in False Claims Act cases, far more than any other two-year period.

The recovery of these vast sums of taxpayer money demonstrates that investment in fraud enforcement pays for itself many times over. We must ensure that the Department of Justice continues to have the resources it needs to support anti-fraud efforts. Far from adding to deficits, investment in fraud enforcement returns money to taxpayers. If we can reinvest a small amount of these recoveries back into fraud enforcement, we will have an even better deal for Americans – greater recovery of taxpayer funds without any new spending of taxpayer money.

In addition to recovering billions of dollars in penalties and fines, the Department of Justice must continue to focus on holding individuals accountable for their fraud crimes. The Fraud Enforcement and Recovery Act and the other key anti-fraud provisions passed in the last Congress sought also to ensure that those who commit fraud go to prison. These provisions, and aggressive enforcement efforts by the Justice Department, are yielding results.

I was pleased to learn that the Financial Fraud Enforcement Task Force has secured charges against 343 criminal defendants and 189 civil defendants for fraud schemes that harmed more than 120,000 victims throughout the country in Operation Broken Trust. The Health Care Fraud Prevention and Enforcement Action Team (HEAT) Strike Forces created by the Justice Department and Department of Health and Human Services have had similar success. The HEAT Strike Forces have charged more than 500 defendants in 250 cases totaling approximately $1.1 billion in fraudulent billings to Medicare. More than 280 defendants have been convicted, and nearly 205 have been sentenced to prison. This prison time is critical as a deterrent. Fines and monetary penalties alone fall short in protecting the public. Too often, those who are willing to commit fraud view monetary penalties as just the cost of doing business. This focus on ensuring real prison sentences must continue.

We will also learn today about ongoing challenges that law enforcement officers face in investigating and prosecuting fraud. The FBI has recently more than doubled the number of agents investigating fraud and has created the National Mortgage Fraud Team, in part thanks to our legislation and increased appropriations. I am disturbed, though, by ongoing reports of fraud in the mortgage foreclosure process, where so many Americans are finding themselves in this challenging economy. I hope to learn today whether the Justice Department needs new tools and greater resources to root out those responsible for fraud crimes, including mortgage fraud.

President Obama and Attorney General Holder have enthusiastically supported legislative initiatives to bolster fraud enforcement, and have spearheaded important new efforts on mortgage fraud, health care fraud, and financial fraud. The administration's commitment to fraud enforcement is exemplified by our witnesses here today.

We welcome back to the committee Assistant Attorneys General Lanny Breuer and Tony West. As head of the Criminal Division, Mr. Breuer oversees nearly 600 attorneys who prosecute federal criminal cases across the country. The fraud section of the Criminal Division had a banner year, imposing the most criminal penalties in Foreign Corrupt Practices Act cases in any single 12 month period, over $1 billion, and I look forward to hearing more about this success.

As the head of the Civil Division, Mr. West has bolstered affirmative civil enforcement efforts in areas such as health care fraud and mortgage fraud to recover taxpayer money lost to fraud and abuse.

Major fraud cases take time to investigate and prosecute. The renewed push we have seen from this administration and from Congress will continue to yield significant results. But we must continue to give law enforcement agencies the tools and resources necessary to root out fraud so that they can continue to recoup the loss to taxpayers. Everyday, taxpaying Americans deserve to

know that their Government is doing all it can to hold responsible those who committed fraud, and to prevent future fraud, particularly with so much taxpayer money at risk.

Americans are worried about their budgets at home. We need to protect their investment in their government. Fighting fraud and protecting taxpayer dollars are issues Democrats and Republicans have worked together to address in the past, and in these difficult economic times, we need to continue in that spirit of bipartisanship. I look forward to working with Senator Grassley, the Administration and members of both political parties to bolster our nation's capacity to enforce effective anti-fraud laws.

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Department of Justice

STATEMENT

OF

TONY WEST
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"PROTECTING AMERICAN TAXPAYERS:
SIGNIFICANT ACCOMPLISHMENTS AND ONGOING
CHALLENGES IN THE FIGHT AGAINST FRAUD"

PRESENTED ON

JANUARY 26, 2011

STATEMENT OF
TONY WEST
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

"PROTECTING AMERICAN TAXPAYERS: SIGNIFICANT ACCOMPLISHMENT AND ONGOING CHALLENGES IN THE FIGHT AGAINST FRAUD"

JANUARY 26, 2011

Chairman Leahy, Senator Grassley, and Members of the Committee, thank you so much for inviting me here to testify on the work of the Civil Division. I appreciate the opportunity to discuss the work of the Civil Division of the Department of Justice regarding combating fraud and securing the recovery of monies on behalf of American taxpayers. I am honored to appear before you on behalf of the Department, and along with my colleague and friend, Assistant Attorney General Lanny Breuer.

The Civil Division represents the United States, its agencies, Members of Congress, Cabinet officers and other Federal employees. The Division is made up of approximately 1,400 permanent employees, more than 1,000 of whom are attorneys. Each year, Division attorneys handle thousands of cases that collectively involve billions of dollars in claims and recoveries. In my capacity as Assistant Attorney General, I oversee much of the federal government's civil litigation across the country, including many of the Department of Justice's efforts to protect consumers and recapture billions of taxpayer dollars lost to fraud, like health care fraud, procurement fraud, and mortgage fraud.

OVERVIEW OF COMBATING FRAUD AND SECURING RECOVERIES ON BEHALF OF AMERICAN TAXPAYERS

The Department takes seriously its obligation to guard the United States Treasury. Over the last year, the Department has made significant strides in protecting taxpayer dollars – as well as the integrity of government programs that depend on those dollars – through aggressive civil enforcement actions aimed at rooting out waste, fraud, and abuse. For fiscal year 2010, the Civil Division secured $3 billion in civil settlements and judgments in cases involving fraud against the government. This amount includes $2.5 billion in health care fraud recoveries – the largest in history – and represents the second largest annual recovery of civil fraud claims. Moreover, amounts recovered under the False Claims Act since January 2009 have eclipsed any previous two-year period with $6.8 billion in taxpayer dollars returned to federal programs and the Treasury. Recoveries since 1986, when Congress substantially strengthened the civil False Claims Act, now total more than $28.8 billion.

HEALTH CARE FRAUD RECOVERIES

Fighting health care fraud is a priority for the Division. The evils of health care fraud are many – it undermines the judgment of health care professionals, deprives people of the treatment that they need, and, in many cases, can put patients' health and safety at risk. Fighting fraud committed against public health care programs is a top priority for the Obama Administration. On May 20, 2009, Attorney General Eric Holder and Kathleen Sebelius, Secretary of the Department of Health and Human Services (HHS), announced the creation of a new interagency task force, the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement. These efforts not only protect the Medicare Trust Fund for seniors and the Medicaid program for the country's neediest citizens, they also help to maintain the integrity of services, and to prevent the costs of fraud from being

passed on to patients and taxpayers. The collaboration made possible by HEAT has led to extraordinary results. Since January 2009, the Civil Division, working with HHS, our partners in U.S. Attorneys' Offices around the country, and our state and federal colleagues, has opened more health care fraud cases, secured larger fines and judgments, and recovered more taxpayer dollars lost to health care fraud than in any other two-year period – more than $9.8 billion.

The record health care fraud civil recoveries of $2.5 billion in fiscal year 2010 made up 83 percent of the year's total civil fraud recoveries. HHS recovered the biggest amount, largely attributable to its Medicare and Medicaid programs. Recoveries were also made by the Office of Personnel Management, which administers the Federal Employees Health Benefits Program, the Department of Defense for its TRICARE insurance program and the Department of Veterans Affairs, among others.

From January 2009 through December 31, 2010, the Civil Division, together with the U.S. Attorneys' offices, set a two-year record for health care fraud enforcement efforts, recovering nearly $5.4 billion in taxpayer funds under the False Claims Act from health care providers and others in the industry, and securing $3 billion in fines, forfeitures, restitution, and disgorgement under the Food, Drug, and Cosmetic Act (FDCA).

In addition to the civil health care fraud recoveries, the Civil Division's Office of Consumer Protection Litigation (OCPL) brings civil and criminal actions for violations of the FDCA. Together with our partners in the U.S. Attorneys' Offices around the country, OCPL pursues such matters as the unlawful marketing of drugs and devices, fraud on the FDA, and the distribution of adulterated products. In fiscal year 2010, those efforts yielded more than $1.8 billion in criminal fines, forfeitures, restitution, and disgorgement, the largest health care-related amount under the FDCA in department history.

A significant component of the Department's health care fraud caseload consists of cases alleging misconduct by manufacturers of pharmaceutical and device products. For example, in December of last year, we announced settlements totaling more than $700 million with multiple pharmaceutical manufacturers resolving allegations that they had engaged in a scheme to report false and inflated prices for many of their pharmaceutical products, knowing that federal health care programs such as Medicare and Medicaid relied on those reported prices to set payment rates. In April of last year, we obtained a $520 million settlement with AstraZeneca LP and AstraZeneca Pharmaceuticals LP to resolve allegations that marketing of the anti-psychotic drug Seroquel for uses not approved as safe and effective by the FDA caused false claims to be submitted to federal health care programs. In 2009, the Department announced the largest health care fraud settlement in its history in a case that arose from Pfizer's illegal promotion of several pharmaceutical products. Pfizer paid $2.3 billion and pled guilty to misbranding the painkiller Bextra. In addition, a $108 million settlement with The Health Alliance of Greater Cincinnati and one of its former member hospitals, The Christ Hospital, was the largest settlement ever under the health care Anti-Kickback Statute for the conduct of a single hospital.

Health care fraud that affects the health, safety, and well-being of Medicare and Medicaid beneficiaries is of paramount concern to the Department. In January 2010, the Department negotiated a $24 million settlement to resolve allegations that a national chain of Small Smiles dental clinics was providing unnecessary dental services to children on Medicaid in order to maximize the company's Medicaid reimbursements. The services included unnecessary tooth extractions that resulted in healthy teeth being pulled and needless crowns and excessive root canalsfor baby teeth.

The Civil Division and the Criminal Division often work together in combating health care fraud. For instance, in October 2010, Assistant Attorney General Breuer and I jointly announced a crackdown on increasing fraud and abuse in the delivery of important mental health services provided under Medicare's Partial Hospitalization Program at Community Mental Health Centers in Florida.

The Department also leads an Elder Justice and Nursing Home Working Group, which focuses on health care fraud involving elderly patients, such as when a skilled nursing facility bills Medicare or Medicaid for deficient services. Such conduct not only wastes taxpayer dollars, but also threatens the health of some of our most vulnerable citizens. Last year, the Department announced criminal pleas and civil recoveries arising from our investigation of five nursing homes operated by Cathedral Rock, a Texas corporation, and its CEO. Our investigation found that these homes were staffed inadequately, that residents often did not receive their medications as prescribed, and that medical records were falsified to appear that the medications were given properly. The resolution of this case required that the homes institute a rigorous compliance program to ensure that this conduct is not repeated. Earlier this year, I personally launched the training that involved over 50 attorneys and investigators intended to hone their skills in this difficult enforcement area. This training is part of our emphasis in ensuring that our most vulnerable citizens receive the care for which Medicare and Medicaid pay.

STRONGER TOOLS FACILITATED THE CIVIL DIVISION'S RECORD RECOVERIES

Most of the cases resulting in recoveries were brought to the government by whistleblowers under the False Claims Act,. In 1986, Ranking Member Charles Grassley and Representative Howard Berman led successful efforts in Congress to amend the False Claims Act to revise the statute's *qui tam* (or whistleblower) provisions, which encourage

whistleblowers to come forward with allegations of fraud. The changes enacted in 1986 made the record-setting recoveries of last year possible. Chairman Leahy, your strong support, together with that of Ranking Member Grassley and Representative Berman also led to the enactment of the Fraud Enforcement and Recovery Act of 2009, which made additional improvements to the False Claims Act and other fraud statutes. Among other important changes, FERA authorized delegation of the Attorney General's authority to issue civil investigative demands (CIDs), which has substantially increased the use of this critical investigative tool in health care and other fraud matters. For example, during just the fourth quarter of 2010, Department attorneys requested authority to issue over 500 CIDs, which is more than six times the number of CIDs requested during the two preceding years combined.

Of the $3 billion in settlements and judgments obtained in fiscal year 2010, over $2.4 billion was recovered in lawsuits filed under the False Claims Act's *qui tam* provisions. Under these provisions, whistleblowers (known as "relators") – many of whom face considerable personal risk in coming forward with allegations of fraud – are entitled to recover between 15 and 30 percent of the proceeds of a successful suit. In fiscal year 2010, relators were awarded $386 million. Since 1986, when the *qui tam* provisions were strengthened by Congress, recoveries in *qui tam* cases have exceeded $28 billion, and relators have obtained more than $3.2 billion in awards.

The passage in March 2010 of the Affordable Care Act (ACA), which included additional provisions to aid the Government in redressing fraud on the nation's health care system and to promote incentives for whistleblowers to disclose fraud to the government, also provided the Civil Division with additional tools to combat fraud. Among many other changes, the ACA

amended the False Claims Act's public disclosure provision and strengthened the provisions of the federal health care Anti-Kickback Statute. *See, e.g.*, §§ 10104(j)(2) and 6402(f) of the ACA.

I would be remiss if I did not also note the important contributions of the Inspectors General, and their highly talented staffs, to the Civil Division's False Claims Act recoveries. These results are a direct testament to the close working relationship that exists between the Civil Division and the IG community. In pursuing cases brought by whistleblowers as well as the Government, the Civil Division has relied extensively on the outstanding assistance provided by IG agents, auditors, and attorneys. This successful partnership remains a key to the Department's ability to combat fraud across the broad spectrum of government agencies and programs.

FINANCIAL FRAUD/MORTGAGE FRAUD

As millions of Americans continue to cope with the fallout of the housing crisis, the Department has made protecting America's consumers against mortgage fraud a top priority. The Department is devoting increased resources to better detect, deter, prosecute, and punish mortgage fraud. In November 2009, the President created the Financial Fraud Enforcement Task Force to bring together a coalition of federal agencies and regulators, along with state and local partners, to provide a broad enforcement effort to combat financial fraud. The Civil Division, in conjunction with its partners on the Task Force, is aggressively pursuing all manner of financial fraud schemes, including mortgage fraud, non-war related procurement fraud, and fraud involving the Troubled Asset Relief Program, the American Recovery and Reinvestment Act, and other economic stimulus funds. False Claims Act recoveries in these cases accounted for 11 percent of fiscal year 2010 recoveries, with $327.2 million in settlements and judgments.

I co-chair the Task Force's Mortgage Fraud Working Group. In that capacity, the Civil Division coordinates with other state and federal officials to combat the mortgage fraud that has proliferated as a result of the current financial crisis and to help homeowners who have suffered from mortgage fraud. The increased enforcement efforts aimed at addressing fraud in the housing and mortgage industries have increased recoveries in this area from $15 million in 2008 to more than $53 million since January 2009.

On June 17, 2010, the Attorney General, along with other members of the Financial Fraud Enforcement Task Force, announced the results of a nationwide takedown, Operation Stolen Dreams, which targeted mortgage fraudsters throughout the country. Starting on March 1, 2010 and spanning three-and-a-half months, Operation Stolen Dreams involved 1,517 criminal defendants nationwide, including 525 arrests, representing an estimated loss of more than $3 billion. Additionally, the operation resulted in 191 civil enforcement actions and the recovery of more than $196 million.

One of the Mortgage Fraud Working Group's most important initiatives is to hold summits in those cities across the country that have been hit hard by mortgage fraud. Thus far, it has held summits in Miami, Florida; Phoenix, Arizona; Detroit, Michigan; Columbus, Ohio; Fresno, California; and Los Angeles, California. At these meetings, the Working Group highlights the issue of mortage fraud while working with our partners at the state and local levels to better understand the mortgage fraud crisis and become increasingly effective in combating the problem.

The Civil Division participated in this operation, prosecuting criminal cases aimed at business opportunity fraud schemes that fraudulently promise consumers profits from operating their own business, but leave its victims financially worse off. The Civil Division has been

focusing on this type of financial fraud prosecution during my time as Assistant Attorney General, participating in Federal Trade Commission-coordinated law enforcement sweeps called Operation Short Change in 2009 and Operation Bottom Dollar in 2010. Since January 2009, OCPL's efforts have yielded convictions of 39 defendants and courts have imposed criminal penalties exceeding $53.2 million for illegal activities in connection with such fraudulent schemes. During this same time period, 32 defendants were sentenced to some form of incarceration, receiving a total of more than 120 years.

PROCUREMENT FRAUD

Our commitment also extends to rooting out fraud in connection with the procurement of goods and services used by our military and civilian agencies, including fraud that affects our men and women fighting in Iraq and Afghanistan. Since January 2009, procurement fraud cases, including the non-war related procurement fraud recoveries I mentioned in connection with our financial fraud efforts, have accounted for over $1.01 billion in recoveries – more than the Department's recoveries in 2007 and 2008 combined. The Department's recoveries since 2009 include more than $718 million attributable to Department of Defense contracts.

Ensuring that our military and procurement systems are protected from fraud is vitally important. Using the False Claims Act, the Department is aggressively pursuing fraud in connection with the wars in Southwest Asia. During fiscal year 2010, the Civil Division recovered $10.6 million in these cases. To date, settlements and judgments in procurement fraud cases involving the wars in Southwest Asia total $152.2 million. Of this amount, $129.7 million has been recovered since January 2009.

The Department has intervened in a case against Public Warehousing Company, a multi-billion dollar defense contractor that is alleged to have engaged in war profiteering on three

prime vendor contracts (for which it was paid $9.8 billion) with the Defense Logistics Agency to supply food to U.S. troops in Kuwait, Jordan, and Iraq. At home, the Department is leading an investigation into companies, as well as individual executives, who manufacture and sell defective Zylon fabric used as the key ballistic material in bulletproof vests sold to the United States for use by federal, state, local, and tribal law enforcement agencies. Our investigation has revealed that these vests degraded quickly over time due to heat and humidity and were unfit for ballistic use. Thus far, the Department has obtained more than $59 million in this effort, and our investigation continues today.

In addition to investigating and initiating cases that target procurement fraud, the Division also aggressively pursues counterclaims when fraudulent conduct surfaces in defensive matters. The Division handles defensive procurement cases when they are filed in the United States Court of Federal Claims. The Division has had substantial success in recent years in obtaining judgments and settlements stemming from fraud in such cases, which often involve inflated contractor damages claims. For example, in *Daewoo Engineering v. United States*, we collected approximately $51 million in 2010 in settlement of fraud claims arising from a contract dispute concerning the construction of a road in Palau. The Division also recently settled for $9 million fraud claims in *Securitas v. United States*, a case concerning security guard contracts for services at United States military installations in Germany.

INTERNATIONAL TRADE

Consistent with its mission to enforce civil penalties for violations of United States customs laws, the Civil Division has also obtained judgments for millions of dollars for importation fraud. For example, in *United States v. Matthews*, the United States Court of Appeals for the Federal Circuit affirmed a $36.6 million judgment entered by the United States

Court of International Trade, including $23.8 million in penalties, based on an importer's fraudulent scheme to transship Chinese silicon metal through South Korea and falsely declare the merchandise to be of Korean origin to evade more than $12 million in special import duties on silicon metal from China. Similarly, the court of appeals affirmed another Court of International Trade judgment for over $8 million, including a $7.5 million penalty, against a California vegetable importer who used false invoices to understate the price of the vegetables to reduce import duties. We have also recovered millions of dollars through settlement, including a recovery of $3.9 million in lost duties from a surety of an importer of Vietnamese catfish who fraudulently declared the catfish as grouper to evade special duties on catfish from Vietnam.

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Committee may have.