



Department of Justice

STATEMENT

OF

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BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

"ONGOING OVERSIGHT: MONITORING THE ACTIVITIES OF THE JUSTICE
DEPARTMENT'S CIVIL, TAX AND ENVIRONMENT AND NATURAL RESOURCES DIVISIONS
AND THE U.S. TRUSTEE PROGRAM "

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Statement of Stuart F. Delery
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Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
United States House of Representatives

Concerning the Civil Division of the United States Department of Justice

September 19, 2014

Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee:

Thank you so much for inviting me here to testify on the work of the Civil Division of the Department of Justice. Earlier this week, I moved from serving as Assistant Attorney General for the Civil Division to serving as Acting Associate Attorney General. I had led the Civil Division for the prior two and a half years, since March 2012, and I appreciate being here today to discuss the work of the Civil Division and its budget and resource needs for Fiscal Year 2015.

The Civil Division represents the United States, its agencies, Members of Congress, Cabinet officers and other Federal employees. Approximately 86 percent of its cases involve defending claims filed against the government. This litigation reflects the diversity of government activities, involving, for example, challenges to Acts of Congress and actions of the Executive; national security issues; benefit programs; energy policies; commercial issues such as contract disputes, banking, insurance, and patents; all manner of accident and liability claims; and enforcement of immigration laws.

The Division also brings affirmative cases involving, for example, fraud, debt collection, and civil and criminal violations of consumer protection laws. This work plays a critical role in achieving the Attorney General's priority of combating waste, fraud, and abuse. Since 2009, the Civil Division, working with United States Attorneys across the country, has obtained more than

\$30 billion in civil and criminal judgments and resolutions in cases combating fraud. During that same period, the Civil Division, often in concert with the United States Attorneys, has used the False Claims Act to recover more taxpayer dollars lost to fraud – more than \$22.4 billion – than in any other comparable period. In 2012, the government set a record for the most single-year recoveries in False Claims Act cases involving health care fraud, and a similar record was set last year for procurement fraud cases.

The Division is made up of approximately 1,300 permanent employees, almost 950 of whom are attorneys. Each year, Division attorneys handle tens of thousands of cases that collectively involve tens of billions of dollars in claims and recoveries. The Division confronts significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various federal programs and actions. The priorities of the Division include strengthening the security of our nation, protecting the health and safety of consumers, and pursuing fraud against the government.

NATIONAL SECURITY

Defending the nation remains the highest priority of the Department of Justice. Although other parts of the Department have a more visible role in this effort, the actions of the Civil Division are no less vital to its success. Whether those actions entail the defense of national security laws and regulations, the enforcement of the nation's immigration laws, or the litigation of habeas petitions brought by known or suspected terrorists, Civil Division attorneys are dedicated to the protection of the American people.

The Division's efforts in recent years to defend national security have taken a number of different forms, including:

- Supporting efforts to counter the continuing threat of terrorism, the Civil Division has, among other things, successfully defended the validity of a cause of action against state sponsors of terror and *Bivens* lawsuits against law enforcement officers and high-level government officials arising out of efforts to protect national security.
- The Division's Office of Immigration Litigation has successfully prevented known or suspected terrorists from becoming naturalized citizens, defended against habeas corpus petitions seeking the release of known or suspected terrorists, and has sought to revoke the naturalizations of terrorists.
- The Civil Division has litigated cases relating to the security of our borders and our airports, defending against constitutional challenges to the restriction on photography at border points of entry, screening procedures for individuals entering the United States, and the maintenance of the No Fly List.
- The Division has continued to defend the actions of the military and law enforcement in numerous lawsuits and habeas petitions arising out of the detention of individuals at Guantanamo Bay and Bagram Air Force Base.
- The Division has responded to recent lawsuits relating to the government's bulk collection of telephony metadata, the collection of which permits National Security Agency (NSA) analysts, acting under strict controls imposed by the Foreign Intelligence Surveillance Court, to detect communications between foreign terrorists

and their contacts located in the United States. The legality of the program continues to be litigated in district courts, with one court having ruled the program unconstitutional and others upholding it. The Division also is currently handling appeals from those decisions.

HEALTH AND SAFETY

The Civil Division has placed a special emphasis on pursuing conduct that threatens the health and safety of American consumers, including the misbranding or adulteration of drugs, the distribution of tainted food, and the sale of unsafe goods. The Division also prioritizes pursuing false claims that target federal health care programs. Although the most visible efforts of the Division in this area are those lawsuits that result in large monetary judgments or settlements, the impact of the Division's work cannot be measured solely in dollars and cents. It must also take into account the ability of the Division to prevent and deter the actions of those who seek to harm consumers and the healthcare system upon which they rely.

Fighting fraud against federal health care programs is a pivotal element of the Division's work to protect consumer health and safety. On May 20, 2009, the Attorney General and the Secretary of the Department of Health and Human Services (HHS) announced the creation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement among agencies. Through enforcement actions under the False Claims Act, and aided by the efforts of HEAT, the conclusion of fiscal year 2013 marked the fourth straight year the Department has obtained more than \$2 billion in health care fraud cases, amounting to \$14.1 billion in federal health care dollars that have been recovered since 2009.

A significant component of the Department's health care fraud case load consists of cases alleging misconduct by manufacturers of pharmaceuticals and medical devices. Indeed, of the \$2.6 billion in federal health care fraud judgments and settlements in fiscal year 2013, \$1.8 billion were from alleged false claims for drugs and medical devices under federally insured health programs, including Medicare, Medicaid, TRICARE (which provides benefits for military personnel and their families), veterans' health care programs and the Federal Employees Health Benefits Program. The Department recovered an additional \$443 million for state Medicaid programs.

For example, in November 2013, the Department announced a \$2.2 billion civil and criminal settlement with Johnson & Johnson to resolve allegations by the government that a Johnson & Johnson subsidiary distributed a drug to the nation's most vulnerable patients – including elderly nursing home residents, children, and individuals with mental disabilities – for uses that the FDA had never approved. Additionally, the Civil Division pursued allegations that a subsidiary of generic pharmaceutical manufacturer Ranbaxy Laboratories was manufacturing and distributing certain adulterated drugs from a plant in India. The result was a \$500 million civil and criminal settlement – the largest drug safety resolution to date with a generic drug manufacturer.

As noted, the Department's success in combatting fraud against federal health care programs is not simply a matter of the money recovered; it extends to preventing future harm to the American people. In resolving alleged violations, the Civil Division has placed a renewed emphasis on the inclusion of non-monetary measures to prevent misconduct from recurring. For example, the resolutions reached with GlaxoSmithKline and Abbott Laboratories in 2012

included compliance commitments and required certifications by the companies' officers and directors.

The Division has also prioritized cases in which we are able to stop ongoing harm from continuing. For example, in 2013 the Department secured permanent injunctions in separate lawsuits against two companies that were allegedly unable to create and follow appropriate procedures to prevent the contamination of supposedly sterile drugs. Each company entered into a consent decree to ensure that appropriate procedures were in place to protect consumers before the company would be permitted to resume operations. And in June and July of this year the Department secured several permanent injunctions to prevent manufacturers from producing and distributing adulterated dietary supplements, including the recall of potentially adulterated products from the marketplace.

The Division's efforts to protect consumer health have also prompted a focus on the safety of food products. The Division has undertaken a number of important efforts over the past two years to hold food processors accountable for the safety of consumers. In 2013, the Division charged five former officials associated with the Peanut Corporation of America with numerous offenses relating to the sale and distribution of salmonella-tainted peanuts and peanut products. According to the charging documents, these individuals misled their customers about the presence of pathogens, most notably salmonella, in their food. Two of the officials entered guilty pleas; the trial of the other three officials began in August 2014 and is ongoing. And in 2014 the Division has continued its focus on food safety, working with the United States Attorneys on criminal and civil cases to prevent the distribution of tainted foods, ranging from eggs to cantaloupe to cheese.

FINANCIAL FRAUD

The Civil Division's efforts to combat financial fraud are most directly focused on enforcement against those bad actors that either take advantage of vulnerable consumers – such as struggling homeowners – or wrongly deplete the federal fisc. However, as we saw from the financial crisis that began in 2008, the harm caused by such fraud often extends beyond the specific victim – whether a consumer, an investor, or the federal government. On a broader scale, such fraud jeopardizes investors, markets, and the economy as a whole. The Civil Division is dedicated to holding accountable those actors that threaten the integrity of our financial system.

That commitment has been demonstrated by the Civil Division's efforts to target all aspects of fraud that contributed to the 2008 financial crisis. One facet of that fraud involved actions by financial institutions to knowingly approve mortgages that did not meet federal requirements, putting people into homes that they could not afford. Worse still, when these mortgages failed, the banks looked to the federal government to cover the losses – a practice that led to the depletion of the crucial FHA insurance fund. In 2014, the Civil Division, as part of a collective enforcement effort by President Obama's Financial Fraud Enforcement Task Force, and in combination with our partners in the U.S. Attorney Offices, reached agreements with U.S. Bank, J.P. Morgan Chase, and SunTrust that resulted in payments of over \$1.7 billion. As part of these agreements, the financial institutions admitted the conduct that gave rise to the investigations, including failing to carry out a quality control program that was effective in identifying non-compliant loans.

Another important type of financial fraud that contributed to the financial crisis was the fraudulent sale of mortgage-backed securities to investors. This conduct has been the focus of

the work of the Task Force's Residential Mortgage-Backed Security Working Group; I am a co-chair of that Working Group. In November 2013, as a result of the Working Group's efforts, the efforts of the Civil Division, and the work of our enforcement partners in the U.S. Attorney Offices and elsewhere, JPMorgan agreed to what was, at the time, the largest settlement against a single entity in American history – \$13 billion – to resolve federal and state civil claims arising out of the packaging, marketing, sale and issuance of residential mortgage-backed securities. The settlement also required JPMorgan to provide significant relief to consumers in the housing market, including homeowners who were struggling to afford their mortgages. As a result of the efforts of the Working Group and the Department, the Department has more recently entered into settlement agreements with Citibank (for \$7 billion) and Bank of America (for \$16.65 billion), each of which featured record-setting civil penalties, relief for consumers, and acknowledgments by the banks as to their conduct.

The fraudulent conduct relating to the sale of financial instruments also included the knowing issuance of inflated ratings that misrepresented their true risks. In 2013, the Civil Division filed suit against the credit rating agency Standard & Poor's Ratings Services (S&P) alleging that S&P engaged in a scheme to defraud investors in structured financial products. The lawsuit alleges that investors, many of them federally-insured financial institutions, lost billions of dollars on securities for which S&P issued inflated ratings that were falsely represented to be objective, independent, and uninfluenced by S&P's relationships with investment banks.

PROCUREMENT FRAUD

The Civil Division plays a leading role in recovering money lost to fraud involving federal government contracts and grant programs. In fiscal year 2013, the Department of Justice

achieved record success in this area, securing more than \$887 million in settlements and judgments based on allegations of false claims and corruption involving government contracts. Prominent among these successes was the Department's \$664 million judgment against Connecticut-based defense contractor United Technologies Corporation (UTC). A federal court found UTC liable for making false statements to the Air Force in negotiating the price of a contract for fighter jet engines. The \$664 million judgment is the largest judgment in the history of the False Claims Act and, if upheld on appeal, would be the largest procurement recovery in history.

The Department also settled allegations of false claims with two companies in connection with their contracts with the General Services Administration (GSA) to market their products through the Multiple Award Schedule (MAS) program. To be awarded a MAS contract, and thereby gain access to the broad government marketplace, contractors must provide GSA with complete, accurate and current information about their commercial sales practices, including discounts afforded to their commercial customers. The government alleged that several companies failed to disclose discounts given to their commercial customers, which resulted in government customers paying higher prices. Ultimately, the Department recovered approximately \$131 million in taxpayer funds.

DEFENDING FEDERAL STATUTES AND PROGRAMS

The Civil Division is primarily responsible for defending the legality of statutes passed by Congress. Accordingly, the Civil Division has led the Department's response to a number of recent challenges on issues of national significance. The Civil Division defended the constitutionality of the Affordable Care Act, which was ultimately upheld by the Supreme Court

in 2012. Subsequent to that decision, the Division has handled numerous additional lawsuits relating to individual provisions of the Act, including those relating to contraceptive coverage for women and tax credits for individuals. The Civil Division has also led the defense of constitutional challenges to the Adam Walsh Act, which imposes registration requirements on sex offenders; the Professional and Amateur Sports Protection Act, which prohibits states from authorizing private gambling on sporting events; the Emergency Medical Treatment and Active Labor Act, which requires certain hospitals to provide emergency medical treatment without regard to a patient's ability to pay; and many other statutes. The Division is currently defending against a challenge to the constitutionality of the federal debt ceiling.

The Civil Division also defends the interpretations of statutes and the policies and actions of the Executive Branch. In that role, the Division has handled numerous high-profile lawsuits, including the availability of tax credits under the Affordable Care Act through insurance exchanges set up by the federal government. In addition, the lapse in appropriations for federal agencies in October 2013 produced unique challenges for the Division, including numerous furloughs of Division attorneys. During the lapse, several lawsuits were brought by individuals, businesses that operate on federal land, and states challenging decisions made by agencies in the implementation of an orderly government shutdown. Certain Division attorneys, who were authorized to work during the lapse, successfully defended against these challenges in district court. The Division is also defending against related lawsuits filed by government contractors in the Court of Federal Claims.

PROTECTING THE FEDERAL FISC

The Civil Division represents the United States, including its officers and agents, in suits for money damages. In 2013 alone, the Division's work has helped the government to avoid billions of dollars in damages sought by obtaining favorable judgments or negotiating settlements for less than the full amount of a plaintiff's claim.

Currently, for example, the Civil Division is defending against claims relating to the government's actions in 2008 and 2009 to address the economic crisis. In one case, the Civil Division is defending a class action on behalf of shareholders of the American International Group (AIG), who are seeking tens of billions of dollars based on allegations relating to the government's 2008 rescue of AIG. Similarly, the Civil Division is representing the government in dozens of lawsuits brought by shareholders of Fannie Mae and Freddie Mac challenging the government's actions in connection with conservatorships of those entities.

DEFENDING IMMIGRATION ACTIONS

The Civil Division defends and prosecutes civil immigration matters in federal court. The Division's Office of Immigration Litigation represents the government in cases in the federal courts of appeals challenging determinations that an alien is subject to removal from the United States or is not eligible for some form of benefit, relief, or protection that would allow him or her to remain in the United States. These cases represent approximately 12 percent of all cases filed in federal appellate courts, with the Division handling over 7,200 new filings in fiscal year 2013 alone. For example, the Division has successfully defended the application of the statutory terrorism-related bars against relief from removal.

The Office of Immigration Litigation also litigates significant challenges to the lawfulness of the government's practices in enforcing the immigration laws. For example, the

Office coordinates all litigation defending the expedited removal statute, 8 U.S.C. § 1225, which permits immigration officials to remove expeditiously certain arriving aliens or recent unlawful entrants apprehended near the border.

IMPLEMENTING THE SUPREME COURT'S *WINDSOR* DECISION

Section 3 of the Defense of Marriage Act (DOMA) limited the definition of the terms “marriage” and “spouse” under federal law to opposite-sex couples. Accordingly, federal agencies were prohibited from recognizing the marriages of same-sex married couples. In June 2013, the Supreme Court in *United States v. Windsor* held section 3 of DOMA unconstitutional. The ruling required agencies to revisit the rules, policies, and practices implementing over 1,000 federal statutes to determine what changes must be made to implement the decision.

The President directed the Attorney General to oversee the government-wide implementation process and emphasized that it be carried out as efficiently as possible. The Attorney General then tasked me to lead this effort. Partnering with our agency colleagues, the Department of Justice attorneys assisted agencies in identifying legal issues and evaluating whether the agencies’ proposed courses of action reflected a reasonable interpretation of the governing statutes, regulations, and the *Windsor* decision itself. Through this process, agencies across the federal government have revised their rules, policies, and practices to account for the *Windsor* decision and to recognize same-sex married couples when permitted by law.

PRESIDENT’S BUDGET REQUEST

The President’s FY 2015 request for the Civil Division seeks 1,425 positions (1,025 attorneys), 1,347 FTE and \$298,394,000. Included in the request are the resources required to

maintain the superior legal representation services that have yielded such tremendous success. Unfortunately, the House bill approved on June 20, 2014 provided \$289,000,000, or \$9,394,000 less than the President's request. This shortfall would leave the Civil Division without sufficient resources to cover most of the pay increase and increased rent and other inflationary expenses. We urge the House to reconsider the President's request at Conference.

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