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Financial Fraud

In This Issue

The Financial Fraud Enforcement Task Force

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At the beginning of the last decade, the United States faced a cascade of falling bankruptcy dominoes at Enron, Worldcom, and other companies. But the crisis we face at the beginning of this decade is broader and deeper than those that have come before. So, too, is the fraud surrounding it. We face not only the fraud and deception in the finance and housing markets that fueled the crisis but also the potential for fraudulent schemes that aim to misuse the public's unprecedented investment in economic recovery. It is clear that responding to the fraud born of the current financial crisis demands an altogether different approach. We cannot simply prosecute our way out of the current crisis; it is too broad. Instead, we must match it with an equally broad and comprehensive enforcement response. This is the mission of the Financial Fraud Enforcement Task Force.

In November 2009, President Obama created the Financial Fraud Enforcement Task Force (Task Force) by Executive Order. Exec. Order No. 13519, 74 Fed. Reg. 60,123 (Nov. 17, 2009). Composed of more than 25 federal agencies, regulators, and Inspectors General, as well as state and local partners, it is the largest coalition ever brought to bear in confronting fraud. As the Executive Order directs, the Task Force is not limited in its scope to any one type of fraud. Subsuming the Corporate Fraud Task Force and similar initiatives, the Task Force is charged with addressing an exceptionally wide array of fraudulent activities including "bank, mortgage, and lending fraud; securities and commodities fraud; retirement plan fraud; mail and wire fraud; tax crimes; money laundering; False Claims Act violations; unfair competition; discrimination; and other financial crimes and violations." *Id.* Even this far-reaching list, however, only begins to capture the unprecedented breadth and depth of this massive interagency effort.

As the President set forth in his Executive Order, the Task Force has a clear mandate: to use the full criminal and civil enforcement resources of the executive branch, along with state and local partners, to pursue a 5-part mission:

- To investigate and prosecute financial crimes and other violations relating to the current financial crisis and economic recovery efforts
- To recover the proceeds from such crimes and violations
- To address discrimination in the lending and financial markets
- To enhance coordination and cooperation among federal, state, and local authorities responsible for the investigation and prosecution of financial crimes and violations
- To conduct outreach to the public, victims, financial institutions, nonprofit organizations, state and local governments and agencies, and other interested partners to enhance detection and prevention of financial fraud schemes in order to reduce the chance of another financial crisis

This is admittedly a tall task, but one that is already being accomplished through sound prioritization and simple organization. The Department has made the Task Force among its highest priorities - the Attorney

General serves as Chair of the Task Force and the Deputy Attorney General serves as Chair of the Steering Committee. The Task Force is designed to prioritize the types of financial fraud that affect Americans most during this time of economic recovery: mortgage fraud, securities and commodities fraud, financial discrimination, and potential frauds preying upon the response to the economic crisis, such as the more than one trillion dollars in funds disbursed through the American Recovery and Reinvestment Act and the Troubled Asset Relief Program. The fraud enforcement areas prioritized by the President are reflected in the organization of the Task Force into five working groups:

- **The Securities and Commodities Fraud Working Group**, co-chaired by Preet Bharara, U.S. Attorney for the Southern District of New York, Lanny Breuer, Assistant Attorney General for the Criminal Division, Robert Khuzami, Director of Enforcement for the Securities and Exchange Commission, and Stephen Obie, Director of Enforcement for the Commodity Futures Trading Commission
- **The Mortgage Fraud Working Group**, co-chaired by Ben Wagner, U.S. Attorney for the Eastern District of California, Tony West, Assistant Attorney General for the Civil Division, Ken Donohue, Inspector General for Housing and Urban Development, as well as representatives of the Federal Bureau of Investigation and National Association of Attorneys General.
- **The Recovery Act Fraud Working Group**, co-chaired by Christine Varney, Assistant Attorney General for the Antitrust Division, Lanny Breuer, Assistant Attorney General for the Criminal Division, and Earl Devaney, Chairman of the Recovery Accountability and Transparency Board.
- **The Rescue Fraud Working Group**, co-chaired by Neil Barofsky, Special Inspector General for the Troubled Asset Relief Program, Timothy Massad, Chief Counsel of the Office of Financial Stability at the Treasury Department, and Lanny Breuer, Assistant Attorney General for the Criminal Division.
- **The Non-Discrimination Working Group**, co-chaired by Tom Perez, Assistant Attorney General for the Civil Rights Division, as well as representatives from Housing and Urban Development and the Federal Reserve Board.

(See Task Force Organization Chart at Figure 1 below). At the heart of these working groups is a simple idea: to bring together powerful subject-matter experts from agencies at an operational level to make a significant, coordinated and, above all, focused push of enforcement in these critical areas. Whether it is case referrals, information sharing, case coordination or public outreach, we are far more effective and efficient when we combine our efforts.

The size and scope of the Task Force presents both a challenge and a strength. The challenge is obvious: how can a task force with such a broad mandate and membership make an appreciable, positive impact on enforcement efforts at the line level? The strength of the Task Force, however, comes also from its breadth. Through the Task Force, we are putting in place a structure that combines the collective wisdom and expertise of the member agencies that is still nimble enough to adapt to emerging schemes, capture lessons learned from one context and apply them to others, and share information and training. The nation's United States Attorneys' offices are the keystone of this structure.

This edition of the *United States Attorneys' Bulletin* and a second volume to follow are intended to provide you with an overview of some of the areas prioritized by the Task Force, from investment fraud to Recovery Act fraud, and what those initiatives mean to each of you. You will find articles describing the structure and recent successes of the Task Force's working groups and committees, a description of new fraud

trends, and articles discussing the importance of civil enforcement, of the nation's Inspectors General, and of an informed and vigilant public to the new war on financial fraud.

Above all, you will find that this Task Force is not just words on paper, but an effort underway on the ground, with many successes already achieved and many more soon to come with your help. During one week in June alone, the Task Force announced the indictment of the orchestrator of a multi-billion dollar complex fraud scheme that decimated one of the nation's largest banks, as well as the largest mortgage fraud sweep in history, with more than 1,500 criminal mortgage fraud defendants, nearly 400 civil fraud defendants, and an estimated aggregate loss figure exceeding $3 billion. Both of these recent enforcement actions resulted from improved interagency cooperation. For example, the mortgage fraud sweep was not only different from prior efforts in terms of its size by orders of magnitude but also because it included a broad array of enforcement, important participation by state attorneys general and district attorneys, and the use of civil, bankruptcy, and other enforcement means to confront fraud. These efforts reinforce the strength of the Task Force's strategy of bringing broad coalitions to bear and using all the enforcement tools available, and we expect this approach to continue to be effective.

Meanwhile, every U.S. Attorney's office has established a Financial Fraud Coordinator to ensure that aggressive fraud enforcement at the line level is pursued in all corners of the country. U.S. Attorneys' offices are participating in a growing number of collaborative anti-fraud efforts at the regional level, as seen through the 90 regional mortgage fraud working groups and task forces around the country and the recently-announced interagency financial fraud task force in the Eastern District of Virginia, for example. Going forward, we expect the formation and use of regional operational groups combining federal, state, and local law enforcement and regulators to continue to grow.

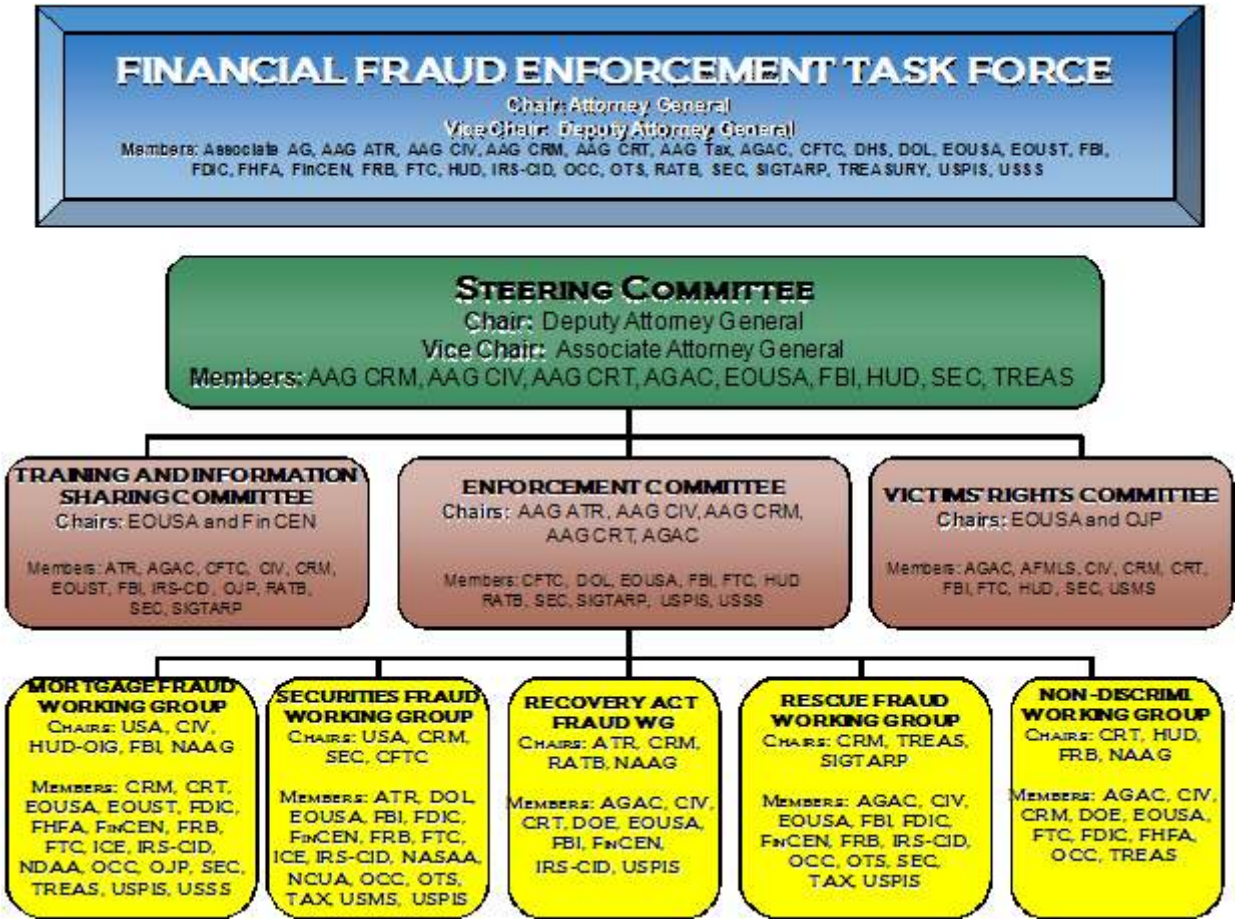
The first months of the Task Force have seen impressive results, but more is needed. Protecting the nation's markets, businesses, and consumers from financial fraud is critical to a full economic recovery and thus is one of the highest priorities of the Attorney General and all of us at the Department of Justice. We have been called upon by the President to send a strong message to those who would engage in fraud that there is a reinvigorated collaboration between agencies at every level in place to provide coordinated, nationwide enforcement. The United States Attorneys' offices are the centerpiece of that strategy. As I find myself saying to U.S. Attorneys' offices that we have visited around the country, *you* are the task force. Having served as an Assistant United States Attorney for almost my entire legal career, I know the vital role that U.S. Attorneys' offices must play in forming meaningful initiatives and strategies that will translate to better enforcement at the line level. I look forward to the national conference in mid-October for all of the Financial Fraud Coordinators, where we will discuss future strategy and how to assist line prosecutors and our partners in more effective fraud enforcement.

Thank you, as always, for your support of this historic effort. For more information about your Task Force, the fraud enforcement efforts around the country, and information on how the public can protect themselves from and report fraud, please visit http://www.StopFraud.gov.❖

ABOUT THE AUTHOR

❑**Robb Adkins** was selected by the Deputy Attorney General to serve as the Executive Director of the Financial Fraud Enforcement Task Force in February 2010. Prior to serving as Executive Director, Mr. Adkins was an Assistant United States Attorney for more than 8 years in the Central District of California, focusing on white collar fraud prosecutions, and served as the Chief of the U.S. Attorney's Office in Orange County, California for 3 years. From 2005 to 2007, Mr. Adkins was a member of the Enron Task Force, serving as a trial attorney in the landmark criminal trial against Kenneth Lay and Jeffrey Skilling. Mr. Adkins is a recipient of the Attorney General's Award for Exceptional Service, the highest commendation in the Department of Justice. Prior to joining the Department, Mr. Adkins was in private practice at a large law firm in San Francisco and was a consultant at a major accounting firm.✠

Figure 1: Task Force Organizational Chart



Mortgage Fraud Working Group

Hon. Benjamin B. Wagner
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In the financial crisis that has afflicted this country, there is perhaps no greater example of its damage to the lives of everyday Americans than the scores of recently shuttered and abandoned homes appearing across the United States. There is a wide range of explanations for the housing bust, but there can be little doubt that an important factor is the proliferation of mortgage fraud. Whether through loan origination fraud or advance-fee foreclosure rescue schemes, mortgage fraud crimes steadily kept pace with the rapid housing boom throughout the past decade and have continued to plague homeowners during the recent housing contraction.

For the past several years, U.S. Attorneys' offices, Main Justice, and their federal and state law enforcement partners have led significant efforts to combat the scourge of mortgage fraud. Several important inter-agency enforcement initiatives - for example, Operations Continued Action (2004), Quick Flip (2005), Malicious Mortgage (2008) - had positive impacts in hard-hit areas of the country, but the rapid rise in fraud demonstrated that a bolder, broader approach was needed.

The President's creation of the Financial Fraud Enforcement Task Force (FFETF) in 2009 put in place a critical enforcement and prevention framework to tackle all varieties of financial frauds, a chief one of which is mortgage fraud. The Task Force's Mortgage Fraud Working Group (the Working Group) was given the primary mandate to increase enforcement in the area of mortgage fraud through training, enhanced coordination among law enforcement agencies, and development and sharing of enforcement strategies. The Working Group works to increase both criminal and civil enforcement actions by federal agencies and to provide increased training, coordination, and other resources to federal, state, and local enforcement agencies.

I. Organization and structure of the Mortgage Fraud Working Group

The Working Group is led by five co-chairs: the Civil Division of the Department of Justice, represented by Assistant Attorney General for the Civil Division, Tony West; the Attorney General's Advisory Committee, represented by U.S. Attorney Benjamin Wagner, Eastern District of California; the FBI, represented by Sharon Ormsby, Chief of the Financial Crimes Section; HUD-OIG, represented by John McCarty, Assistant Inspector General; and the National Association of Attorneys General, represented by Attorneys General from four states.

The Working Group consists of numerous federal components and agencies, including the Criminal and Civil Rights Divisions of the Department of Justice, the Executive Office for United States Attorneys (EOUSA), the Financial Crimes Enforcement Network (FinCEN), IRS-CID, FDIC, the Federal Trade Commission, the Federal Housing Finance Administration (FHFA), the Office of the Comptroller of Currency, the United States Postal Inspection Service, the United States Secret Service, the National Credit Union Administration, and the Securities and Exchange Commission. The Working Group also maintains three subcommittees to expand its primary purposes: criminal and civil enforcement, outreach, and policy.

Since its inception, the Group has worked to expand and invigorate the 90 multi-agency mortgage fraud task forces and working groups located in U.S. Attorneys' offices around the country.

The Working Group held its first formal meeting in Washington, D.C., on December 16, 2009, and met again on February 3 and June 16, 2010. During each of these meetings, the Working Group discussed the role of its member agencies in addressing the mortgage fraud problem and heard presentations from several groups including FBI, HUD-OIG, civil and criminal Assistant United States Attorneys (AUSAs), FHFA, FTC, and others. At the first meeting, the Group agreed on its organizational structure, which included the creation of an agency contact information database, and set forth proposed strategies to increase law enforcement in the area of mortgage fraud. The proposal included the following plans:

- To hold regional mortgage fraud summits in cities around the country where the mortgage fraud problem is acute;
- To organize a nationwide enforcement sweep and regional sweeps, to include both criminal and civil enforcement efforts brought by federal and state authorities; and
- To organize training on mortgage fraud enforcement.

In order to be more informed and to provide guidance to its members and others, the Working Group seeks to obtain the views and opinions of the affected industry representatives. At each of its full meetings, the Working Group heard from various representatives, including the American Bankers Association, Mortgage Bankers, BITS, the Appraisal Institute, Conference of State Bank Supervisors, and Real Estate Valuation Advocacy Association. The presenters discussed the increased enforcement efforts within the real estate and mortgage finance industries, industry reactions to the housing crisis, and the effect of the enactment of the S.A.F.E. Act on industry practices. The group also heard from the non-profit entity, NeighborWorks, regarding the national Loan Modification Scam Prevention Network. The feedback that the Working Group has received from these representatives has recently developed into a course involving mortgage fraud, now being taught at the National Advocacy Center (NAC) in Columbia, South Carolina. The course also includes more focused segments on recent issues concerning mortgage fraud investigations and prosecutions.

Between December 2009 and early February 2010, the Working Group co-chairs collected and analyzed data relating to mortgage fraud around the country, in order to identify cities for regional mortgage fraud summits. At the second full meeting of the Working Group on February 3, 2010, the Working Group agreed to conduct three regional mortgage fraud summits, one each in the East, the Midwest, and the West, in areas where the mortgage fraud problem is particularly severe. Each summit will have a public portion and a non-public portion involving a coordination meeting with regional federal, state, and local law enforcement. The regional summits have multiple purposes: 1) to highlight the nature of the mortgage fraud problem and raise the profile of the Financial Fraud Enforcement Task Force in combating the problem nationally; 2) to learn more about the nature of the mortgage fraud problem and the emerging trends in different parts of the country; and 3) to help coordinate and motivate law enforcement agencies to work together, particularly in advance of the national sweep.

The first regional summit was held at the U.S. Attorney's Office for the Southern District of Florida in Miami on February 24, 2010. All of the Working Group co-chairs attended, as did the Executive Director of the FFETF. The second event was held in Phoenix, Arizona, on March 25 and was attended by Attorney General Eric Holder. A third regional summit was held in Detroit, Michigan, on April 23, 2010. The fourth regional summit will be held in Fresno and Los Angeles, California, in September 2010 and will last 2 days. Each event to date has been well attended by representatives of affected industries including real estate professionals, law enforcement, and the public. The regional summits are divided into a morning session, which focuses primarily on the community impact of mortgage fraud, recent trends involving mortgage fraud for the specific area, and a discussion from industry experts. The afternoon sessions consist generally of a 2-

hour meeting with federal, state, and local law enforcement representatives, at which the group discusses best practices, the use of FinCEN and HUD-OIG data, coordination, and preparation for the national sweep. A press conference is then held between the public and non-public sessions at both summits in which the purposes and the efforts of the participants to combat mortgage fraud are highlighted.

In addition to the summits, the Working Group has developed "summit packages" which can be used by other United States Attorneys' offices that wish to hold summits in their regions. On June 2, 2010, the United States Attorneys' offices for both the Northern and Southern Districts of Ohio held a summit in Columbus, Ohio, utilizing this summit package. If you wish to hold your own regional summit and would like a summit package, please contact Stanley A. Boone, at Stanley.Boone@usdoj.gov.

II. National and regional sweeps

From early to mid 2010, the Working Group devoted considerable attention to launching a national mortgage fraud enforcement sweep. The sweep, called Operation Stolen Dreams, lasted from March 1, 2010, to June 18, 2010. During that period, the Working Group coordinated with federal investigative agencies, U.S. Attorneys' offices, and state attorneys general to maximize the filing of criminal mortgage fraud charges (federal, state, and local) and the filing of civil enforcement actions. In addition, the Group tracked pleas, sentencings, and civil resolutions. The last major mortgage fraud sweep, Operation Malicious Mortgage, occurred in 2008 and was an FBI-based operation primarily involving criminal cases from the United States Attorney community and the FBI. In contrast, Operation Stolen Dreams involved multi-agency participation, comprising both criminal and civil enforcement actions from federal, state, and local agencies. In an effort to avoid burdening United States Attorneys' offices with detailed reporting obligations, representatives of the Working Group met on several occasions with the FBI, HUD-OIG, and other agencies to develop case-tracking forms and procedures for collecting and reporting data on mortgage fraud enforcement actions that were part of the sweep.

On June 17, the sweep culminated with a televised press conference in Washington, D.C., with Attorney General Eric Holder, FBI Director Robert Mueller, HUD Inspector General Ken Donahue, and other law enforcement representatives announcing the results of the operation. The sweep surpassed the results of the 2008 Malicious Mortgage Operation – by order of magnitude – and resulted in the following numbers:

Criminal Cases:

Total Number of Defendants:	1,517
Total Number of Arrests:	525
Total Number of Info/Indictments:	863
Total Number of Complaints:	172
Total Number of Convictions:	391
Total Number of Sentencings:	245
Total Estimated Loss Amount:	$3.05 billion
Total Seized Dollar Amount:	$10.7 million

Civil Cases:

Approximate Number of Defendants:	395
Total Number Civil Enforcement Actions:	191

(including cease and desist actions)

Total Recovered: $196.7 million

(including judgments pending approval or suspended and bankruptcy cases)

In addition to the national press conference, a number of United States Attorneys' offices throughout the country held regional press conferences announcing their local results.

At their meeting on June 16, 2010, the Working Group discussed sponsoring regional sweeps for specific localities based upon particular problems found in various communities. Potential actions include doing reserve mortgage fraud sweeps in the Southeast and foreclosure rescue sweeps in the northern Midwest.

III. Training and education

One important aspect of the Working Group is the training and education initiatives intended to get information out to its members, including the United States Attorney community, on issues related to mortgage fraud. From March 2 to 4, 2010, the Working Group, with assistance from the Office of Legal Education and EOUSA, provided information and intelligence about combating mortgage fraud at a 3-day Mortgage Fraud Task Force course for both federal and state enforcement attorneys at the NAC. The first of its kind, the course brought together both criminal and civil AUSAs and state and local prosecutors from Attorney General and District Attorneys' offices around the country. The course covered the operation of mortgage fraud task forces; federal-state cooperation and coordination in combating mortgage fraud; civil tools; state tools; case studies; and discovery issues. The course included regional breakout sessions. Approximately 130 attorneys attended the course. A second, 2-and-a-half-day mortgage fraud course was presented at the NAC from May 25 to 27, 2010. This class provided information acquired from the task force through its members and affected industry representatives to give a more updated and current issue focus to the new state and federal prosecutors.

In late April 2010, through AAG Tony West, the Working Group distributed a memorandum to Civil Chiefs in U.S. Attorneys' offices nationally with guidance concerning the use of civil tools for mortgage fraud enforcement. Additionally, the May 2010 issue of the *United States Attorneys' Bulletin* magazine was devoted exclusively to mortgage fraud. The introduction was written by the Group co-chair, U.S. Attorney for the Eastern District of California, Benjamin Wagner. The issue, Volume 58, #3, contains articles addressing various aspects of mortgage fraud enforcement, both criminal and civil.

Through EOUSA, the Working Group has recommended additional training courses at the NAC, to be scheduled for the fiscal year 2011. The Working Group hopes to help shape other mortgage fraud courses at the NAC based upon presentations from industry experts and from the findings from the regional summits. The Working Group, in conjunction with the Training and Information Sharing Committee, will assist in developing a prosecutors' manual on mortgage fraud and other materials that can be disseminated to federal and state prosecutors and civil enforcement authorities to assist them in their efforts to combat mortgage fraud.

IV. Outreach efforts

Members of the Working Group understand that its success is not measured only by the criminal and civil enforcement efforts but also by the Working Group's efforts in the area of outreach. The outreach subcommittee has held a number of meetings focused on outreach efforts involving mortgage fraud. The subcommittee is focusing on three areas: 1) having service providers of foreclosure notices include in their notices to homeowners information relating to scammers who prey on those who are in foreclosure proceedings; 2) creating interview packets that contain information about victims' rights and various ways

they can protect themselves from being victimized again and providing them to agents/detectives who interview victims of mortgage fraud; and 3) supplying education and public awareness information links for USAOs to post on their district's Web sites.

In addition to outreach, at the last meeting on June 16th, the Working Group decided to form a policy subcommittee to make recommendations to the full TTETF about policy issues involving mortgage fraud. This subcommittee will include members of the Working Group who are dedicated to formulating policies on behalf of the group.

V. Conclusion

One thing that has become clear to the Working Group in the course of its work since November of 2009 is that the mortgage fraud problem is constantly evolving as market conditions change, new schemes emerge, and new perpetrators find opportunities to defraud innocent victims. Several years ago, at the height of the housing boom, loan origination schemes involving straw buyers and "flipped" properties were rampant. Corrupt real estate professionals and bankers played a prominent role in aiding such schemes. With the collapse of home values came new schemes such as foreclosure rescue scams, loan modification schemes, and short-sale frauds. While these new schemes sometimes overlap with earlier schemes, others involve new perpetrators. In addition, the nature and seriousness of the mortgage fraud problem varies among different regions of the country.

Because of the varied and evolving nature of the problem, developing a reliable and uniform baseline by which to measure the effectiveness of mortgage fraud enforcement is difficult. Due to the decline of home values, in most mortgage fraud cases there is little hope of significant recoveries in restitution, forfeiture, or civil settlements for victim banks or homeowners. Measuring financial recoveries, therefore, is not a very useful tool in the mortgage fraud context. There are, however, ways to measure progress in the fight against mortgage fraud. First, the sweep period for Operation Stolen Dreams is nearly identical to the sweep period for a somewhat similar national mortgage fraud sweep, Operation Malicious Mortgage, which was conducted 2 years ago. The much higher number of federal criminal cases filed as part of Stolen Dreams, and the addition of civil and state enforcement actions, is one indicator of substantial progress in enforcement. Second, the number of local mortgage task forces, and the number of federal, state, and local agencies represented on them has expanded significantly in the last 2 years, which is another indicator of the increased enforcement effort now underway. Third, using LIONS data, the number of newly-filed criminal and civil mortgage fraud enforcement cases can be approximated. This tool is imperfect since many different statutes are used in mortgage-fraud related cases, but some assessment of volume can be made using that data. Fourth, USA-5 data can be used to track the time that AUSAs have devoted to mortgage fraud enforcement, although this is also not a refined measure of mortgage fraud enforcement activity. This data should show increases in the near future, as many U.S. Attorneys' offices directed additional resources at this problem and newly authorized AUSA positions were filled in 2010. This issue of identifying appropriate metrics to assess progress in the future is one issue to be addressed by the full Working Group.

With the new allocation of AUSAs to mortgage fraud cases and the strengthening of cooperative efforts between federal, state, and local agencies, United States Attorneys' offices are continuing to combat mortgage fraud relentlessly. The Mortgage Fraud Working Group will continue to play a key role in supporting these efforts through coordination, training, and outreach.❖

ABOUT THE AUTHORS

❑**The Honorable Benjamin B. Wagner** was appointed United States Attorney in November 2009. Prior to that, he served as Assistant United States Attorney for the Eastern District of California for over 17 years, including 9 years as Chief of the Special Prosecutions Unit. He has prosecuted mortgage fraud, investment fraud, money laundering, tax evasion, public corruption, domestic terrorism, and other cases. The Eastern District of California currently has two active mortgage fraud task forces.

❑ **Stanley A. Boone** is Chief of the White Collar Crime Unit in the United States Attorney's Office for the Eastern District of California, Fresno Division. From June 2009 to June 2010, he was White Collar Crime Coordinator at the Executive Office for United States Attorneys in Washington, DC. Prior to that time, he was an Assistant United States Attorney prosecuting mortgage fraud, investment fraud, bankruptcy fraud, tax evasion, and terrorism cases in the Eastern District of California.✠

Securities and Commodities Fraud Working Group

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I. Introduction

The financial crisis that began in 2008 was the capstone of a period that saw remarkable corporate profits and stunning financial losses. What has become clear in the wake of that crisis is that the law is a necessary and vital tool to ensure that wrongdoing committed by those who unlawfully contributed to the financial collapse are held accountable. The President's Financial Fraud Enforcement Task Force (FFETF or Task Force) has taken the lead role in coordinating and augmenting the aggressive enforcement actions that Main Justice, the various U.S. Attorneys' offices, and the array of law enforcement partners have taken over the past 2 years.

From the beginning, the Task Force has viewed securities and commodities fraud prosecutions as a central component of its enforcement and coordination strategy. As a result, the Task Force organized a permanent body called the Securities and Commodities Fraud Working Group (SCFWG). To be sure, the SCFWG is not a "first-of-its-kind" inter-agency collaboration focused on this type of financial fraud. Indeed, securities and commodities fraud investigators and prosecutors – the U.S. Securities and Exchange Commission, the Department of Justice Criminal Division, the United States Attorneys' offices, and the U.S. Commodity Futures Trading Commission – have a long history of successful cooperation, stretching back to the 1960s when the Department of Justice established the first securities fraud working group in the Southern District of New York.

The SCFWG is nevertheless unique because the group – chaired by U.S. Attorney Preet Bharara, of the Southern District of New York; Assistant Attorney General Lanny Breuer, of the Criminal Division; Director Robert Khuzami, of the SEC's Division of Enforcement; and Acting Director Stephen Obie, of the

Commodity Futures Trading Commission – carries a clear mandate articulated in the Executive Order establishing the Task Force that the President signed in November 2009. By drawing upon the coordination already underway in the field (e.g., the 22-year-old securities fraud working group organized and maintained by the Criminal Division's Fraud Section at Main Justice), the SCFWG intends to bring a new emphasis on inter-agency collaboration in the criminal, civil, and administrative enforcement of securities and commodities matters.

II. Overview of the Securities and Commodities Fraud Working Group

The SCFWG's enforcement initiatives are focused on: (i) facilitating the development and successful disposition of national priority cases; (ii) establishing principles guiding coordination among members of the SCFWG with an emphasis on enhanced communications; and (iii) maximizing deterrence by sending a strong public message that there is a united and coordinated law enforcement effort focused on securities and commodities fraud.

The scope of frauds that falls within the SCFWG's focus is broad – broader perhaps than the working group title suggests – and includes not just fraud related to publicly traded securities and commodities but also to the full range of investment and market manipulation frauds, such as Ponzi schemes, money laundering, and insider trading. At base, the SCFWG's mission is the successful investigation and prosecution of all of these types of fraud. To further this mission, the SCFWG has identified two key focus areas: (i) improving coordinated or parallel investigations to facilitate swift and successful resolution; and (ii) resolving coordinated investigations in a manner that serves both FFETF and individual agency priorities.

III. SCFWG initiatives involving U.S. Attorneys' offices

The SCFWG held its first meeting on December 11, 2009, hosted by the U.S. Attorney for the Southern District of New York, and has since launched several initiatives designed to accomplish its mission of improved coordination, swift resolution, and serving agency priorities. These efforts are underway, and many involve the United States Attorneys' offices.

The SCFWG is organizing a series of law enforcement summits in districts across the country. These summits, hosted by United States Attorneys' offices and coordinated by the Financial Fraud Coordinators in each office, bring together the regional investigators, regulators, and prosecutors at the federal, state, and local levels to establish and improve fraud enforcement. Many districts have existing regional groups or relationships with partners in fraud enforcement. The SCFWG summits are efforts to create such groups where they do not already exist, to share best practices by drawing from the experience of the many regional efforts across the country, and to introduce resources that have proved useful in some regional groups but are perhaps underutilized in others, such as state corporate regulators or the Special Inspector General of the Troubled Asset Relief Program. The SCFWG believes that encouraging individual relationships with the regional stakeholders in fraud enforcement is a vital way to facilitate efficient and appropriate parallel efforts. If you have an interest in participating in one of these summits, please contact the Financial Fraud Coordinator for your district.

Another focus of the SCFWG is increasing cooperation and coordination, where appropriate, among criminal and civil enforcement members. In response to the economic crisis, there has been a significant change in the way the government fights white collar crime. The broad focus on fighting fraud stemming from the financial crisis has resulted in increased civil enforcement by the Security and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and other members of the SCFWG. Effective parallel enforcement is essential to the fight against financial fraud, whether it is in connection with securities and commodities fraud or other white collar schemes.

In April 2010, the SCFWG convened a conference at the SEC Headquarters in Washington, D.C., to address topics including: (i) the impact of the SEC's new cooperation tools, such as cooperation agreements, deferred prosecution agreements, and non-prosecution agreements, on coordinated investigations; (ii) law enforcement opportunities in the area of structured products and derivatives; (iii) emerging trends and law enforcement opportunities in the area of municipal securities and pay-to-play/public corruption schemes; and (iv) law enforcement opportunities in investigating insider trading and market manipulation using sophisticated trading platforms and strategies. The SCFWG is continuing to facilitate more effective parallel proceedings and will be reinforcing those efforts at the regional summits discussed above. Input in that process is welcomed.

In addition to discussion as part of speaker panels at regular SCFWG meetings, the SCFWG provided member agencies with a contact list of experts who have agreed to consult with other agencies on various substantive areas. On a staff-level basis, the SCFWG provides opportunities for cross-agency training sessions sponsored by member agencies. For example, SEC and CFTC conducted joint staff training on Ponzi schemes in 2009. Members of the SCFWG will provide further training and sharing of ideas at a conference with the Financial Fraud Coordinators from all of the United States Attorneys' offices at the National Advocacy Center in mid-October 2010. Progress with these efforts is anticipated with the input of these important members of the Task Force.

IV. An example of the SCFWG approach in action: the prosecution of Hassan Nemazee

A number of successful prosecutions have been brought since the formation of the FFETF and the SCFWG. These prosecutions highlight the goals of broader coordination, parallel criminal and civil enforcement, swift resolution, and recovery of ill-gotten gains. The varied list of cases includes insider trading schemes, Ponzi schemes, securities fraud, investment adviser fraud, money laundering, bank fraud, and wire fraud.

One of the SCFWG's recent successes that demonstrates the group's goals in action is the prosecution of former political fund-raiser, Hassan Nemazee. Nemazee was sentenced in federal court on July 15, 2010, to 12 years in prison for defrauding Bank of America (BofA), Citibank (Citibank), and HSBC Bank USA (HSBC) of $292 million in loan proceeds. In addition to the prison sentence, the court ordered Nemazee to pay restitution of more than $292 million to the defrauded banks.

From 1998 to 2009, Nemazee obtained hundreds of millions of dollars in loans from BofA, Citibank, and HSBC. To obtain the loans, Nemazee misrepresented to the banks that he owned hundreds of millions of dollars in collateral in the form of securities and other assets. In fact, Nemazee used fake documents, including bogus account statements, to show his supposed ownership of the collateral. The documents also contained forged signatures of persons associated with Westminster Securities Corporation (Westminster), the brokerage firm at which Nemazee claimed to hold these assets, as well as Westminster's clearing firm, Pershing LLC (Pershing).

The fake account statements and other documents that Nemazee provided contained telephone numbers, supposedly for Westminster and Pershing, which were in fact assigned to either "virtual offices" that Nemazee himself had established or to a cell phone that Nemazee himself had obtained. Nemazee created at least two "virtual offices" in Manhattan that held themselves out, at his direction, as being associated with Westminster and Pershing.

One of the loans from BofA, a $100 million line of credit, was guaranteed by Nemazee's longtime friend and business associate, who pledged a multimillion-dollar home in Colorado as collateral on the loan,

not knowing that the collateral that Nemazee was pledging did not exist. As of August 2009, Nemazee owed approximately $142 million to BofA and $74.9 million to Citibank.

In August 2009, when Citibank began to ask questions in order to verify the existence of the purported collateral that Nemazee had pledged for their loan and after Special Agents of the FBI had interviewed Nemazee about the Citibank loan, Nemazee drew down on a line of credit that he had fraudulently obtained from HSBC earlier in 2009 and used those funds to pay Citibank the $74.9 million that he owed.

Nemazee was able to continue the fraud for more than a decade, primarily by making partial repayments on his borrowings from BofA with proceeds from his fraud of Citibank and vice versa. Nemazee used the proceeds of his fraudulent schemes to, among other things, purchase an apartment and land in Italy; make monthly maintenance payments on a Park Avenue apartment; pay for the upkeep of a 12-acre property in Katonah, New York; purchase partial interests in a private plane and a luxury yacht; make personal donations to the election campaigns of federal, state, and local candidates, political action committees, and charities; and make various other investments.

Nemazee also used his political donations to enhance his reputation and standing in various political circles. In 2009, Nemazee unsuccessfully attempted to capitalize on that standing by seeking nomination to a Cabinet-level position, all the while engaged in the fraud for which he was recently sentenced. Nemazee had previously been nominated to the position of United States Ambassador to Argentina in 1999, but his nomination was withdrawn.

From the end of 1997 until August 2009, Nemazee gave more than $845,000 to political candidates and political parties and donated over $1.1 million to a host of charities. After Nemazee's guilty plea, the government sent letters to approximately 115 recipients of political and charitable donations from Nemazee, his wife, and his immediate family members. In the letters, the government requested that the recipients of the donations return the funds to the government. As a result of the these letters, hundreds of thousands of dollars were returned to the government by the date of Nemazee's sentencing, and the government has received commitments from others to return additional funds.

As part of the sentence, the court ordered Nemazee to forfeit various real properties, corporate entities, hedge funds, securities accounts, and bank accounts. He was also ordered to forfeit his interests in an apartment in Rome, Italy; property in Puglia, Italy; the luxury yacht and private plane; various Manhattan apartments, including the one located on Park Avenue; the Katonah, New York estate; and various interests in privately- and publicly-held companies.

The effort in the Nemazee case to recover ill-gotten gains and return them to his victims through restitution, forfeiture, and letter-writing campaigns, demonstrates the type of innovative and aggressive pursuit of asset recovery for victims that is a hallmark of the FFETF and, in particular, the SCFWG.

V. Other examples of recent successful prosecutions

Of course, the Nemazee case is just one of the many cases the SCFWG has prosecuted to date. Many districts are actively charging and pursuing cases. Outlined below is a snapshot of indictments and guilty pleas filed within the past month, up to date as of the time this article was written. As briefly described below, these prosecutions brought together enforcement from numerous member agencies and further underscore the importance of parallel proceedings, swift resolution, just punishment, restitution for victims, and pursuing asset forfeiture.

A. Colonial Bank/Lee Farkas

In a case that received international attention, Lee Bentley Farkas, the former chairman of a private mortgage lending company, Taylor, Bean & Whitaker, was charged in a 16-count indictment in the Eastern District of Virginia for his alleged role in a more than $1.9 billion fraud scheme that contributed to the failures of Colonial Bank, one of the 50 largest banks in the United States, and TBW, one of the largest privately held mortgage lending companies in the United States in 2009. The charges were announced by a broad coalition of FFETF members composed of the Criminal Division, the U.S. Attorney's Office for the Eastern District of Virginia, the FBI, the Special Inspector General for TARP, HUD OIG, FDIC OIG, and IRS Criminal Investigation. The SEC also brought a related civil complaint.

B. Integrity Bank/Douglas Ballard

In a case prosecuted by the U.S. Attorney's Office for the Northern District of Georgia, Douglas Ballard and Joseph Todd Foster pleaded guilty to various conspiracy and securities fraud charges. Ballard and Foster, both of Atlanta, were senior Vice Presidents of Integrity Bank, a $1 billion financial institution that failed and was taken over by the FDIC in August 2008. Ballard, Integrity Bank's former Executive Vice President in charge of lending, admitted that he conspired to receive bribes and to assist a co-conspirator in receiving millions of dollars in loan draws under false pretenses. During this same time, Ballard caused Integrity Bank to distribute nearly $20 million in loan proceeds to the co-conspirator's personal account, much of which was allegedly used for personal consumption, including the purchase of a private island in the Bahamas. Foster, Integrity's former Vice President in charge of risk management, pleaded guilty to charges that he committed securities fraud through insider trading. Specifically, he dumped his shares of Integrity stock based on his knowledge that the bank was facing an increasingly substantial but undisclosed risk that its major customer would default on over $80 million in outstanding loans. This case was investigated by Special Agents of the FBI, FDIC-OIG, and the IRS.

C. CRW Management/Ray White

Ray M. White pleaded guilty in federal court in Dallas to one count of commodities fraud. White admitted that in July 2008 he contracted with an investor to sell $50,000 in commodities through CRW Management LP (CRW), which White operated in Mansfield, Texas. According to March 2009 emergency civil enforcement actions filed in the Northern District of Texas by the CFTC and the SEC, White solicited at least $10.9 million from late 2006 to March 2009 from more than 250 investors to trade in the foreign currency market. The complaint filed by the SEC states that White used the funds to finance his son's car-racing career, to purchase a company called Hurricane Motorsports, LLC in Arlington, Texas, and to purchase a home and other real property. The case is being prosecuted by the Criminal Division's Fraud Section and the Northern District of Texas. The case was investigated by the CFTC, the SEC, the FBI, and the U.S. Postal Inspection Service.

D. Capitol Investments/Nevin Shapiro

Nevin Shapiro, former owner and CEO of Capitol Investments, was indicted for allegedly overseeing an $880 million Ponzi scheme linked to his purported wholesale grocery distribution business. This case is being prosecuted by the U.S. Attorney's Office in the District of New Jersey with the assistance of the IRS and FBI. The Miami Regional Office of the SEC is also involved in this matter.

VI. Conclusion

The work of the SCFWG is steeped in a tradition of agencies working in parallel to bring charges in historic cases. The SCFWG anticipates future initiatives including coordinated take-downs that will maximize deterrence and send a strong public message that there is a united law enforcement effort focused on securities and commodities fraud.❖

ABOUT THE AUTHOR

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What's Next: Total Accountability For Recovery Act Fraud

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Combating fraud in the wake of the current financial crisis is no longer solely about cracking down on the Wall Street schemes responsible for weakening the nation's financial markets and eroding the public's confidence in the accountability of corporate executives. It is now about protecting Main Street by ensuring that the significant amount of federal funds being pumped into the economy in connection with the American Recovery and Reinvestment Act (Recovery Act) is spent as intended and reaches those in need. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

The Recovery Act represents an unprecedented effort to support the American economy. Over the span of roughly 2 years, the Government is investing $787 billion in American workers and businesses in the hopes of reviving the struggling economy. This substantial investment is divided roughly equally among three types of relief: tax benefits ($288 billion); contracts, grants, and loans ($275 billion); and entitlements ($224 billion). By the end of September 2010, nearly three quarters of this relief should hit Main Street America, with the vast majority of the money constituting tax and entitlement relief.

To match the ambitious goals of the Recovery Act, Congress created an important watchdog organization tasked solely with the responsibility of ensuring that Recovery Act monies are used for their intended purpose. Headed by Chairman Earl Devaney, the Recovery Accountability and Transparency Board (Recovery Board) is an equally unprecedented effort to prevent fraud from affecting Recovery Act funds in the first place. Through its efforts, the Recovery Board has closely monitored the roll-out of the Recovery Act and coordinated with the various Inspectors General (IGs) of the federal agencies that will distribute the funds.

Despite the remarkable level of prevention efforts and coordination currently underway, there is little doubt that criminals will find a way to defraud the system of Recovery Act funds. As a result, strong and robust enforcement – which includes criminal, civil, and administrative remedies – is vital. The good news is that there is nothing novel about prosecution of "Recovery Act" fraud, no new Title 18 criminal statutes, and no unique legal hurdles. Recovery Act fraud is just a general term to describe a variety of typical fraudulent conduct involving, at least in part, Recovery Act funds. Given the means by which Recovery Act monies are being distributed – standard vehicles like tax credits, unemployment benefits, and contracts – the schemes and tricks would-be fraudsters may employ to get their hands on Recovery Act dollars are already well known to fraud investigators and prosecutors. Indeed, procurement and grant fraud schemes and tax and benefits frauds have long been a steady diet for fraud investigators and prosecutors. The difference for the law enforcement community when Recovery Act funds are involved is that Congress, the President, and the American public at large, have all upped the ante on the value of federal, state, and local law enforcements' pursuit of these types of Main Street frauds. The importance of deterring fraudsters from following the money and misappropriating these massive stimulus funds, the interest in protecting the public fisc, and the goal of maximizing the economic recovery to which these funds were intended, compel a clear message: any fraud, waste, and abuse of these stimulus funds simply will not be tolerated.

When the President created the Financial Fraud Enforcement Task Force (the Task Force) in November 2009, a permanent working group was specifically created to address Recovery Act fraud. Exec. Order No. 13519, 74 Fed. Reg. 60, 123 (Nov. 17, 2009). The Task Force's Recovery Act Fraud Working Group (RAFWG) is responsible for coordinating a national strategy to draw on all the resources and expertise of the Department of Justice, as well as other partner agencies, regulatory authorities, and IGs throughout the Executive Branch, to ensure that taxpayer funds are safeguarded from fraud and abuse and that the Recovery Act effort is conducted in an open, competitive, and non-discriminatory manner. The RAFWG is led by three co-chairs – Assistant Attorney General of the Criminal Division, Lanny Breuer; Assistant Attorney General of the Antitrust Division, Christine Varney; and Chairman of the Recovery Accountability and Transparency Board (the Recovery Board), Earl Devaney – and consists of a broad array of members from federal, state, and local law enforcement agencies. Importantly, the foundation for the work of the RAFWG is the well-developed enforcement framework already established by the National Procurement Fraud Task Force, which has only been further enhanced by increased coordination in the community of federal and state IGs under the leadership of the Recovery Board.

Given that the funds have yet to be fully disbursed, we can focus now on how to anticipate and prepare for the problem and send a strong deterrent message with the goal of dissuading those who would commit fraud related to Recovery Act funds. To best prepare, the RAFWG has focused its early efforts on laying a solid foundation for a coordinated enforcement response as allegations of Recovery Act fraud surface and, equally important, on executing a vigilant fraud prevention and detection effort aimed at stopping frauds before they occur. The RAFWG has taken significant strides toward these ends.

Perhaps the most visible and influential work done by the RAFWG to date is the Group's massive fraud prevention and detection effort. These efforts, which draw significantly from the massive efforts undertaken by the Recovery Board, have targeted two key constituencies: (i) professionals at the federal and state levels responsible for detecting, reporting and/or preventing Recovery Act fraud, such as the procurement and grant officials who are awarding and overseeing Recovery Act funds; and (ii) individuals responsible for investigating and prosecuting Recovery Act fraud, including federal and state agents and civil and criminal prosecutors. To date, more than 50,000 professionals responsible for awarding and overseeing Recovery Act funds, as well as more than 4,000 agents and auditors responsible for investigating Recovery Act fraud, have been trained as part of this effort, and these numbers are continuing to grow. This targeted fraud prevention and detection effort is the largest such effort ever in the history of the Department.

At this point, you may be asking yourself, "Okay, but what does this have to do with me?" The answer: a great deal, as you may already be working on an investigation involving Recovery Act funds, and we expect to see more of them in the future. One of the most ambitious steps taken by the RAFWG thus far is its development of a database to track prosecution efforts across the country. Working closely with the Recovery Board, IG community, and Executive Office for United States Attorneys, the RAFWG is tracking information on criminal prosecution and civil enforcement matters opened and pending in prosecutors' offices that involve Recovery Act funds. The tracking effort is enabling the RAFWG to: (i) track existing matters and spot emerging fraud trends; (ii) stay attuned to progress in bringing these fraud cases to prosecution; (iii) identify cases that may require additional resources; and (iv) develop new ideas about strategies for addressing particular frauds and potential legislative fixes.

Hand-in-hand with monitoring fraud trends and existing enforcement efforts, the RAFWG has also been proactive in identifying and fostering targeted, multi-agency initiatives designed to address particularized Recovery Act fraud schemes. As noted earlier, the fraud schemes emerging in the Recovery Act area are not new but rather typical of the procurement and grant fraud and tax and benefits frauds that white-collar prosecutors have pursued for many years. In response to the importance placed on protecting Recovery Act funds, the RAFWG has put an emphasis on building strong coalitions among agencies to commit the time and resources necessary to vigorously pursue these crimes and developing cases when any Recovery Act dollars are at issue. Ensuring strong communication and coordination with Civil Division AUSAs, the IG community, and state and local authorities, is essential in combating Recovery Act fraud.

The reasons for this are practical as well as strategic. Using the full array of enforcement alternatives is the best way to support a "total accountability" policy for Recovery Act fraud. For example, if a Recovery Act matter cannot be brought federally for either criminal and/or civil enforcement, the matter should be, if practicable, brought to the attention of state or local authorities for potential enforcement. State attorneys general, some of whom are members of the Task Force, have successfully brought enforcement actions in Recovery Act fraud matters, and many local authorities have been involved as well. In addition to criminal and civil enforcement, federal agencies are uniquely positioned to take administrative action against companies and individuals who take unlawful advantage of Recovery Act funds. Agencies can initiate suspension and debarment proceedings against wrongdoers in certain circumstances and take action based upon proved conduct that may not rise to the level of criminal or civil liability. The combined strength of all of these enforcement weapons is the best way to hold all Recovery Act fraudsters accountable, no matter the type of scheme employed or the nature of the harm ultimately inflicted by the fraud. Thus, each AUSA or DOJ trial attorney with a fraud matter involving Recovery Act funds should reach out to these entities to ensure that all of these enforcement tools are brought to bear.

Because the Recovery Act is such a critical element in the efforts to restore the health of the nation's economy, with hundreds of billions of taxpayers' dollars at risk, the Department will continue to call on its AUSAs and component trial attorneys to commit extra time and attention to those matters involving Recovery Act dollars. The reason for this is simple: we cannot afford to ignore this problem.

The Task Force and the RAFWG will continue their outreach to federal, state, and local law enforcement in districts with large outlays of Recovery Act funds, and we will continue to do so as the funds are disbursed in districts across the country. The RAFWG also welcomes interested Financial Fraud Coordinators, other AUSAs, or component trial attorneys to reach out to the Group's co-chairs to learn more about fraud trends emerging in particular states and judicial districts or information on upcoming training and other resources, as well to contribute new ideas for expanding or improving the Department's Recovery Act effort.

Thank you for being part of the Department's effort to uphold the American public's expectation that our nation's investment in economic recovery will not fall victim to fraud, waste, and abuse.❖

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The Front Line in the Coming War on Recovery Act Fraud—The Nation's Inspectors General

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The first war on crime, in the 1930s, saw the demand for a national investigative force. The Federal Bureau of Investigation (FBI) met this demand when it moved from obscurity into the role that has defined it for decades. As the war on drugs evolved, several agencies moved to the forefront. Fast forward to 2010. With the nation committing billions of dollars to aid in the economic recovery, Congress and the President have pledged that the programs, projects, and contracts funded by the American Recovery and Reinvestment Act (ARRA) will not fall victim to fraud, waste and abuse. The Offices of the Inspector General for the 29 federal agencies disbursing ARRA funds are tasked with this mission.

Given the importance of aggressively combating ARRA fraud, more AUSAs will likely be working with IGs. This article highlights for AUSAs: (i) the genesis and function of the IGs in federal law enforcement; (ii) the particularly prominent role the IGs will play in relation to matters involving ARRA funds; and (iii) why AUSAs are lucky to be partnered with the IGs to develop and prosecute ARRA cases.

I. A history of the Office of Inspector General

The Federal Inspectors General (IGs) were created under the Inspector General Act of 1978 (IGA), which sought to create an independent watchdog that would be accountable to both the agency within which they worked and to Congress. Pub. L. No. 95-452, § 1, 92 Stat. 1101 (1978). As stated in the Act, the mission of the Inspectors General is "to detect and prevent fraud, waste, abuse and violations of law and to promote economy, efficiency and effectiveness in the operations of the [f]ederal [g]overnment." Currently there are 69 Inspectors General operating under the guidelines of the IGA.

In most cases, the IG of each agency is a presidential appointee (in some cases they are appointed by the agency head) and is confirmed by the Senate. The IGs serve at the pleasure of the President, and they

have duel reporting responsibilities to both Congress and the head of their respective agency. They are mandated to conduct their investigations and audits independently. Additionally, the IGs are often summoned to testify before Congress on matters related to their respective departments, and they are called to conduct Congressional inquiries. IGs also have the duty to investigate and report violations of federal criminal law to the United States Attorney General.

The IGA has been amended and clarified over time to expand the number and law enforcement powers of IGs. Most recently, as a result of the terrorist attacks on September 11, 2001, Congress passed the Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002), which extended law enforcement authority to several IGs who did not previously have such authority. The statutory authority given to IG special agents now includes carrying a firearm; making arrests; seeking and executing search and arrest warrants; and seizing evidence. Pub. L. No. 95-452, § 1, 92 Stat. 1001 (1978). IG agents also have the ability to issue administrative subpoenas known as IG Subpoenas. An IG Subpoena can be a valuable tool because it is not subject to the rules of grand jury secrecy and may thus be used to gather evidence in criminal, civil, and administrative actions.

The Department also has provided those IGs possessing law enforcement authority with guidelines relating to the execution of that authority. *See* Memorandum from Attorney General John Ashcroft on Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority (Dec. 8, 2003) (on file with author).

As part of those guidelines, the Department made clear that the IGs "have primary responsibility for the prevention and detection of waste and abuse and concurrent responsibility for the prevention and detection of fraud and other criminal activity within their agencies and their agencies programs." *Id*. The AG said that "crimes against government programs result in some of the most complicated and sensitive of criminal investigations and prosecutions." *Id*. The Department also emphasized a combined effort between the IG community and the FBI, as well as prosecutors, "to root out corruption." *Id*. Recognizing that there will be overlap in fraud investigations, the AG's guidance requires mutual, written notification between the IGs and the FBI.

Ultimately, the Department reserves the right to revoke the statutory law enforcement authority of any IG, and thus a peer review is conducted at least once every 3 years to ensure that each IG has adequate internal safeguards and management procedures in place to ensure that their law enforcement powers are being properly exercised.

Aside from the Department's peer reviews, the IG community is largely self-policing. A board, known as the Council of Inspectors General on Integrity and Efficiency (CIGIE), seeks to develop and maintain a "corps of well-trained and highly skilled Office of Inspector General personnel." The CIGIE is comprised of all of the Presidentially-appointed IGs and those who are appointed by agency heads. Other members include the FBI, the Office of Special Counsel, the Government Accountability Office, and many others.

II. The American Recovery and Reinvestment Act

The ARRA, Pub. L. No. 111-5, § 1553, 123 Stat. 115 (2009), was signed into law in February 2009. In an effort to help the nation recover from a severe economic downturn, the ARRA pledged $787 billion dollars in tax benefits, entitlements, contracts, grants, and loans. The money available under ARRA reaches virtually every sector of society and is required to be infused into the economy quickly. From money provided to underwrite the process of digitizing health records to money provided directly to local school districts and for the construction of roads, bridges, and other infrastructure projects, ARRA money is being distributed to local governments and contractors at unprecedented levels.

ARRA appropriates money to numerous agencies and sectors of the economy under various titles within the Act. For example, Title XII of the Act specifically relates to the Federal Highway Administration and Highway Infrastructure Investment, and mandates that "funds made available under this heading shall be apportioned not later than 21 days after the date of enactment of this Act." Pub. L. No. 111-5, § 2, 123 Stat. 306 (2009). Emphasis is placed on projects that will be completed in a 3-year time frame. Similar requirements are in each of the other titles.

Title XII also obligates states to certify, within 30 days of the enactment of ARRA, that they will maintain the level of funding required under the United States Code and the Code of Federal Regulations. States that do not allocate the money appropriated to them under the Act face the risk of losing their funding and having the money redistributed to other states.

The Act also contains additional reporting requirements to measure its effectiveness. For example, ARRA requires fund recipients to submit to agencies monthly recipient status reports and monthly employment summary reports. American Recovery and Reinvestment Act of 2009, Title XII at 92. In addition to special reporting requirements unique to ARRA, all the normal contracting and project management rules must be adhered to in the distribution of ARRA funds, such as Title 23 Code of Federal Regulations (Highways) and specifically, prevailing wage, minority/disadvantaged business requirements, buy America provisions, National Environmental Policy Act, The Brooks Act, and others.

In short, ARRA contains numerous provisions and requirements specifically meant to encourage transparency and accountability for the significant investment of the nation in reviving the health of the economy.

III. The critical role of the IGs in protecting ARRA funds

In drafting ARRA, Congress recognized that the extraordinary funding provided for by the Act may create new opportunities for fraudulent activity. In addressing this concern, Congress placed the weight of protecting ARRA funds from fraud squarely on the shoulders of the IG community.

Congress created, as part of ARRA, the Recovery Accountability and Transparency Board (Recovery Board). The Recovery Board was created to accomplish two primary goals: (1) to provide transparency in relation to the use of Recovery-related funds; and (2) to encourage accountability through prevention and detection of fraud, waste, and mismanagement. Earl E. Devaney was appointed by the President to serve as chairman of the Recovery Board, and the remainder of the Board consists of Inspectors General from twelve major cabinet agencies, such as the Departments of Transportation, Justice, Treasury, and Commerce. The Board, with the support of the IGs for the 29 federal agencies distributing ARRA funds, operates as the watchdog of ARRA spending.

In furtherance of its goal to foster greater transparency regarding the use of ARRA funds, a primary function of the Recovery Board is maintenance of the Web site, www.recovery.gov. Recovery.gov is a public Web site, which contains information such as: details about ARRA contracts awarded; findings from audits, IGs, and the Government Accountability Office; methods for the public to provide feedback on contract performance; and plans from each federal agency using stimulus funds as to how the money will be distributed.

In furtherance of its goal to require accountability regarding the use of ARRA funds, the Recovery Board has oversight authority over the 29 IGs for the federal agencies distributing ARRA funds. The Recovery Board has the authority to ask "that an inspector general conduct or refrain from conducting an audit or investigation." The IGs are also answerable to the Recovery Board relating to their agency-specific Recovery Act work plans. Under ARRA, each IG was responsible to prepare a work plan for the Recovery Board addressing the agency's outreach goals, the results of the agency's risk assessment of programs

distributing ARRA funds, and the planned ARRA oversight actions of the agency. The Recovery Board is responsible for ensuring that the IGs meet these plans.

In addition to being a central component of the Recovery Board, the prominence of the IG community in protecting ARRA funds has also put them at the front lines of the Recovery Act effort of the President's Financial Fraud Enforcement Task Force (FFETF). President Obama created the FFETF on November 17, 2009, by Executive Order. The FFETF, which is chaired by the Attorney General and led by Executive Director Robb Adkins, is leading an aggressive, coordinated, and proactive effort to investigate and prosecute financial crimes. One of the central pillars of the FFETF's effort is the Recovery Act Working Group, which is responsible for developing a national strategy to draw upon the resources and expertise of the Department and its law enforcement partners, particularly the IG community, to ensure that ARRA funds are safeguarded from fraud and abuse and that the Recovery Act effort is conducted in an open, competitive, and non-discriminatory manner.

The IG community has welcomed the demands of Congress and the President in regard to ARRA. Two Web sites, www.Recovery.gov and www.IGnet.gov, provide links to a complete listing of the various IG Web sites that contain descriptions of cases and initiatives the various agencies are involved in to safeguard and proactively monitor fraud in ARRA programs. Some examples of recent efforts in the IG community relating to ARRA funds include:

- The Department of Education IG (ED OIG), conducted an initial Recovery Act audit and made the results available to state and local auditors. The purpose of the audit was to ensure that Recovery Act money was reaching its intended recipients. The ED OIG has developed and conducted training for Department employees and external "stakeholders" to improve accountability and promote fraud awareness within Department programs. The purpose of these training programs is to discourage intentional fraud, to reduce or eliminate accidental fraud, and to encourage witnesses to acts of fraud, waste, and abuse to contact the appropriate officials so that the matter can be investigated.
- The Department of Energy IG (DOE OIG) is conducting outreach to federal employees, contractors, and recipients of federal stimulus money. One program under scrutiny is the Energy Efficiency and Conservation Block Grant, which provides money for energy-related improvements to homes and for educating residents about energy conservation. According to a recent Recovery Act Strategy Overview posted by DOE OIG on its Web site, it is anticipating 200 criminal cases and 500 hot line complaints related to ARRA funds in the coming months.
- The Department of Health and Human Services and the Department of Labor are conducting reviews of "high-risk programs." Both are conducting outreach and coordination with state and local agencies.
- The Department of Transportation (DOT OIG) is conducting outreach briefings for stakeholders in each of the Operating Administrations (Federal Highways, Federal Aviation, Federal Transit, etc.) that oversees the distribution of federal funds. To date, we have trained more than 15,500 of our transportation partners. DOT OIG agents and investigators are also conducting site visits and are interviewing construction contractors to ensure compliance with federal contracting regulations. As of June 2010, DOT OIG has received more than 200 complaints involving federal ARRA funds.

IV. Why prosecutors are lucky to have the IGs in their corner in ARRA cases

Given the critical role the IG community is being asked to play in protecting ARRA funds by the Recovery Board, the FFETF, and the Act itself, when, or if, ARRA funds should fall victim to fraud, you can expect that the IG responsible for the program providing those funds will be prepared and eager to move that case to resolution. The undivided attention and enthusiasm exhibited by IGs in ARRA cases is a good thing. It is good for the American public, who, through Congress and the President, have high expectations that ARRA funds will not be squandered on fraud. Equally important, it is good for prosecutors, who need to rely on the skill and expertise of IG agents in fraud cases as they are called upon to bring would-be fraudsters of ARRA funds to justice.

The inclusion of IG agents early in an investigation can help build a successful prosecution in most fraud cases because they are uniquely positioned and qualified to investigate cases involving fraud. Prosecution of contract fraud, grant fraud, and other cases with a heavy regulatory component requires knowledge of the programs and agencies affected and IG agents have that expertise. They understand how to work up frauds involving certified payrolls, buy America provisions, disadvantaged business enterprises, health care, social security scams, and the like. IG agents also have the advantage of being intimately familiar with the specific regulations of the agencies within their statutory jurisdiction, which often proves critical to deriving a prosecutable case from a fraud investigation. Finally, IG agents have the same law enforcement authority as other federal agents and are adept at all aspects of criminal investigative techniques.

The types of investigations that will be necessary to protect the huge investment that is the ARRA will require knowledge of the programs and regulations not only of ARRA, but also of the agencies and administrations that are responsible for distributing the money. The agencies required by ARRA, and best positioned in terms of skill and expertise to investigate these types of crimes, are the Offices of the Inspector General.

V. Conclusion

The Recovery Act has put billions of dollars to work across the country in an effort to help the United States recover from one of the worst financial down-turns in the nation's history. Along with the money came a mandate of "transparency and accountability" that falls to federal prosecutors, auditors, and agents to meet. The IGs of the agencies tasked with distributing and monitoring ARRA funds are working proactively to ensure fund recipients and program managers are complying with federal rules, regulations, and statutes. The IGs are actively investigating allegations of fraud, waste, and abuse, and will be looking to federal prosecutors to bring those cases to resolution.

The complex nature of fraud investigations and the reliance on contracting rules and regulations requires an agent/investigator with knowledge of the program and agency affected by the fraud. Utilizing the resources of the IGs in fraud investigations provides prosecutors with a degree of experience and knowledge that may not be available with other agencies. By successfully partnering with the associated IG and other federal agencies, prosecutors can assemble effective teams to combat the coming war on fraud.

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The views and opinions expressed in this article are solely those of the author and not necessarily those of the Department of Transportation or of the United States.

Combating the Financial Crisis Through Collaborative Enforcement: Understanding the Department's Lending Discrimination Enforcement

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Civil Rights Division

I. Introduction

Risky and irresponsible lending practices allowed too many Americans to obtain unsustainable or unaffordable home loans in recent years. These practices played a large part in fueling the nationwide housing crisis, a significant factor contributing to the nation's economic unrest. As a result, many Americans who worked hard to achieve the American dream of home ownership have found themselves on the brink of disaster, facing the loss of their most important asset. Addressing this crisis in the housing and mortgage markets requires expanded collaboration among governmental agencies charged with ensuring fair and responsible lending at all levels – federal, state, and local.

While this crisis has overwhelmed families and communities of all kinds, it is clear that minority communities have been hit particularly hard. For example, a study of foreclosures in the New York region found that 85 percent of neighborhoods with mortgage default rates of at least twice the regional average have a majority of African-American or Latino homeowners. Studies taking into account creditworthiness and other relevant factors have found that African-American and Latino borrowers were far more likely to be locked into sub-prime loans than were similar white borrowers. Another series of foreclosure studies has found that as a community's percentage of African-American and Latino residents increases, so too does the community's overall share of foreclosed properties.

For these reasons, the Non-Discrimination Working Group of the President's Financial Fraud Enforcement Task Force (FFETF) plays an integral part in addressing the crisis. The FFETF, led by Attorney General Holder, facilitates information sharing and coordinates enforcement among a wide range of agencies. Thomas Perez, Assistant Attorney General for the Civil Rights Division of the Department of Justice, is co-chair of the FFETF Non-Discrimination Working Group and a member of the Mortgage Fraud Working Group.

Fair lending is a top priority within the Civil Rights Division, and mortgage fraud is a high priority for both the Criminal and Civil Divisions. Cases may involve both fraudulent practices and discriminatory practices, including those where African-American or Latino homeowners are targeted for predatory lending schemes. The Civil Rights Division is committed to working collaboratively with U.S. Attorneys' offices (USAOs) throughout the country on fair lending and mortgage fraud issues to provide more effective enforcement of federal law that prohibits such discrimination.

II. Civil Rights Division fair lending enforcement

The Civil Rights Division plays a key role in the enforcement of federal statutes that prohibit lending discrimination. *See* Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2009); Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2010) (ECOA). Both statutes prohibit discrimination in lending based on race, color, national origin, sex, and religion. ECOA also prohibits discrimination based on age, marital status, source of income, or having exercised rights protected under the Consumer Credit Protection Act. The Fair Housing Act also prohibits discrimination based on disability and familial status. The Fair Housing Act covers mortgage and other residential loans, while the ECOA covers automobile and consumer loans and small business lending, as well as residential lending

The Civil Rights Division opens many investigations based on referrals from banking regulatory agencies. These agencies must refer cases to the Department when the agency believes a pattern or practice of discrimination may exist at a bank or other regulated financial institution. The Division also opens investigations of possible fair lending violations identified by complaints from local community organizations, academic studies, media reports, or other sources that it receives directly or through USAOs.

Most fair lending cases start with allegations that the creditor defendants have engaged in a pattern or practice of discrimination on one of the prohibited bases listed above. The discrimination may involve several different aspects of the lending process:

- The underwriting process (e.g., denying loans to certain groups of borrowers)
- The loan pricing process (e.g., charging certain groups higher interest rates or fees)
- The loan product determination (e.g., placing certain groups in loans that have less favorable terms such as balloon payments or prepayment penalties)
- The loan servicing process (e.g., treating certain groups less favorably when they seek a loan modification)

These cases can proceed under a disparate impact theory, a disparate treatment theory, or both. Statistical evidence of discrimination is relevant to both theories. Courts generally apply the legal standards developed in employment discrimination cases brought under Title VII to cases under both the Fair Housing Act and ECOA.

The Obama Administration is making a concerted effort to take a more proactive approach to fair lending enforcement. The Division has created a new Fair Lending Unit in the Housing and Civil Enforcement Section in order to devote more resources to this critical work. Both career attorneys and new hires staff the unit, together with a dedicated professional staff that will grow to include three economists and a statistician. The Division has hired a Special Counsel for Fair Lending, a senior career position in the Office of the Assistant Attorney General, to ensure that fair lending issues receive immediate attention and high priority.

III. Mortgage fraud and fair lending

The Civil Rights Division's Fair Lending Unit is focusing its efforts on the entire range of abuses seen in the market. These include the following areas that may involve mortgage fraud targeted at a protected class of borrowers:

- Reverse redlining - targeting minority neighborhoods with less favorable lending products, including affinity fraud

- Abusive reverse mortgages, also known as HECMs (Home Equity Conversion Mortgages), particularly those that are targeted at vulnerable senior citizens based on race, national origin, gender, or even age
- Lenders/brokers who describe loan terms in a language other than English then provide documents with different terms in English

In March 2010, the Division filed a complaint and simultaneous consent order with two subsidiaries of AIG, resolving allegations that the lenders engaged in a pattern or practice of discrimination against African-American borrowers. The Division's lawsuit alleged that African- American borrowers nationwide were charged higher fees on wholesale loans made by lenders through contracted brokers. The lenders granted brokers subjective discretion when setting the amount of the direct fees, and took no steps to review or monitor the fees for racially discriminatory disparities. The $6.1 million settlement marked the largest amount of damages for victims ever secured by the Department of Justice in a fair lending settlement.

This case, *United States v. AIG Federal Savings Bank*, 10-cv-178-JJF (D. Del. Mar. 19, 2010), marked the first time the Department has held a lender accountable for failing to monitor brokers' fees to ensure that the fees are not charged in a discriminatory manner. *See* http://www.justice.gov/crt/housing/documents/aigcomp.pdf. This type of case could also have mortgage fraud implications if, for example, the African-American borrowers were being charged higher fees than white borrowers because brokers initially promised them low fees and then raised those fees in the documents that were signed at the closing table.

The Civil Rights Division is also working with partners in other governmental agencies to identify potential fair lending violations where much of the mortgage lending is occurring today, including Federal Housing Administration lending, mortgage modifications, and the foreclosure prevention arena. Homeowners seeking modifications for unsustainable loans or facing possible foreclosures are in a particularly vulnerable position and collaborative enforcement efforts are needed to ensure that they are not subject to discrimination or fraud in this process. To this end, the Division is collaborating with other members of the Non-Discrimination Working Group of the Financial Fraud Enforcement Task Force on methods to analyze the data from the Home Affordable Modification Program, desegregated by race and ethnicity.

IV. Conclusion

The enormity of the housing crisis demands that all of our enforcement work be as efficient and effective as possible. The Civil Rights Division views collaboration with USAOs on cases and investigations involving both mortgage fraud and fair lending violations as critical. When we are working to identify potential violations in these areas, sharing information between a mortgage fraud and a fair lending investigation can provide very useful insights and context for both matters.

As in other fair lending cases, the Civil Rights Division welcomes the opportunity to work jointly with AUSAs or, if resources are stretched, the Division can take the lead with an AUSA serving as local counsel. In either situation, AUSAs bring invaluable local knowledge and information to a fair lending case and the Division's attorneys and economists can provide substantial expertise on the lending industry and data analysis. Working together, we can do an even better job of vindicating the rights of the borrowers who have suffered discrimination or fraud.

If AUSAs would like to discuss fair lending issues with attorneys in the Civil Rights Division, please contact Housing and Civil Enforcement Section Deputy Chiefs Donna M. Murphy at 202-514-1775, donna.murphy@usdoj.gov, or Jon M. Seward at 202-305-0009, jon.seward@usdoj.gov.❖

ABOUT THE AUTHOR

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A Confluence of Events: Increased Task Force Civil Enforcement Meets FERA and *Allison Engine*

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I. Introduction

As discussed in Executive Director Robb Adkins' introduction to this issue of the *Bulletin*, a critical goal of the Financial Fraud Enforcement Task Force is to increase civil enforcement in response to financial crimes. The civil enforcement goal of the Task Force is made possible not just by the hard work of its members, but also by increased statutory authority. Six months prior to the formation of the Task Force, on May 20, 2009, President Obama signed the Fraud Enforcement and Recovery Act of 2009 (FERA) into law. Pub. L. No. 111-21, § (4)(f)(1), 123 Stat. 1617 (May 20, 2009). Section 4 of FERA revised certain provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729-33 (2008), which is the government's primary civil tool for redressing fraud against the American taxpayers, and therefore a critical weapon to the Task Force's civil enforcement efforts.

The FCA was enacted in 1863 in response to "the fraudulent use of government funds during the Civil War." *United States v. Neifert White Co.*, 390 U.S. 228, 232 (1968). The Act imposes treble damages and civil penalties between $5,500 and $11,000 per violation on any person who knowingly engages in a variety of false or fraudulent acts. 31 U.S.C. § 3729(a)(1) (2009). The FCA defines "knowingly" to include not only "actual knowledge" but also "deliberate ignorance" or "reckless disregard," and provides that "no proof of specific intent to defraud is required." *Id.* at § 3729(b)(1). Actions under the FCA may be brought either by the Attorney General or by a private citizen who files the action (called a "*qui tam"* action) in the name of the United States and shares in any recovery. 31 U.S.C. §§ 3730 (a)(b), 3730(d) (2009).

The FERA amendments represent Congress' third major revision to the FCA. Unlike the earlier revision in 1986, which effectuated a general overhaul of the statute, FERA's changes to the FCA were designed primarily to overrule or affirm specific judicial decisions. Foremost among the decisions that Congress sought to overrule was the Supreme Court's decision in *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), which read an implicit intent requirement into two of the FCA's substantive liability provisions. This article will briefly examine the impact of *Allison Engine* on current FCA enforcement efforts and Congress' efforts to supercede that decision.

II. The *Allison Engine* decision

At issue in *Allison Engine* was whether the FCA provisions imposing liability in connection with the submission of a false claim required proof that the claims were presented to an officer or employee of the United States. Before the enactment of FERA, the FCA imposed liability on any person who "knowingly presents, or causes to be presented to an officer or employee of the United States government, causes to be made or used, a false record or statement to get a false or fraudulent claim paid." 31 U.S.C. § 3729(a)(2) (2009). In addition, the pre-FERA version of the FCA prohibited any person from "conspir[ing] to defraud the government by getting a false or fraudulent claim allowed or paid." *Id.* at § 3729(a)(3).

Prior to *Allison Engine*, the D.C. Circuit held that sections 3729(a)(1) and (a)(2) required proof that false claims were actually presented to the United States for payment. *See United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). In *Totten*, a relator alleged that a contractor submitted false claims to Amtrak that were paid from an account that included federal funds. The district court dismissed these allegations due to the relator's failure to allege that any false claims were presented to the United States. The D.C. Circuit affirmed the dismissal on appeal, ruling that proof that false claims were presented to the government was an integral element of liability under both sections 3729(a)(1) and (a)(2) of the FCA, and that it was not sufficient to show that false claims were paid with federal funds. *Id.* at 491.

The *Totten* decision was a primary focus of the litigation in *Allison Engine*. The defendant, Allison Engine, was a Navy subcontractor hired to provide generator sets (Gen-Sets) for use on guided missile destroyers. The relator alleged that Allison Engine billed the prime contractor for Gen-Sets that did not meet contract specifications, and thereby violated all of the FCA's false claim provisions. It was undisputed at trial that the funds used to pay Allison Engine came from the federal government. At the close of the relator's case, however, the defendant argued that the relator failed to prove that any false claims were presented to the United States and, therefore, that it was entitled to judgment as a matter of law based on *Totten*. The district court granted the motion and the relator appealed.

The Sixth Circuit disagreed with *Totten* and reversed in part. The appeals court held that "while § 3729(a)(1) turns on whether a claim has been presented to the government, subsections (a)(2) and (a)(3) do not require such a showing. Rather, a relator under these two subsections must show that government money was used to pay the false or fraudulent claim." *United States ex rel. Sanders v. Allison Engine Co., Inc.*, 471 F.3d 610, 622 (6th Cir. 2006).

The Supreme Court granted certiorari on the question of whether sections 3729(a)(2) and (a)(3) of the FCA required that a false claim be presented to a federal officer or employee as an element of liability. The Court concluded that they did not. *Allison Engine*, 128 S. Ct. at 2129-30. The Court relied heavily on the fact that section 3729(a)(1) expressly references "presentment," but that no such reference is contained in sections 3729(a)(2) or (a)(3). *Id.*

Although it concluded that sections 3729(a)(2) and (a)(3) do not contain a presentment requirement, the Court held that they require proof that the defendant intended for its conduct to affect the government's payment of a claim. Specifically, the Court held that

> a plaintiff asserting a § 3729(a)(2) claim must prove that the defendant intended that the false record or statement be material to the [g]overnment's decision to pay or approve the false claim. Similarly, a plaintiff asserting a claim under § 3729(a)(3) must show that the conspirators agreed to make use of the false record or statement to achieve this end.

Id. at 2126. As the Court explained, "eliminating this element of intent . . . would expand the FCA well beyond its intended role of combating 'fraud against the *Government*.' " *Id*. at 2128 (emphasis in original).

The Court further distinguished between payment by the government and payment of federal funds. As the Court explained, getting a false or fraudulent claim "paid . . . by the [g]overnment" is not the same as getting a false or fraudulent claim paid using "[g]overnment funds . . . under § 3729(a)(2), [where] a defendant must intend that the [g]overnment itself pay the claim." *Id*. The Court acknowledged that the intent requirement could be satisfied even if the defendant did not present a claim directly to the United States. *See id*. at 2129 ("[A] request or demand may constitute a 'claim' even if the request is not made directly to the [g]overnment, but under § 3729(a)(2) it is still necessary for the defendant to intend that a claim be 'paid . . . by the Government' and not by another entity.")

Finally, the Supreme Court clarified that it was not altering the proof required to establish the defendant's scienter as to the falsity of its statement or claim:

> The [FCA's] statutory definition of [the terms "knowing" and "knowingly"] is easily reconcilable with our holding in this case for two reasons. First, the intent requirement we discern in § 3729(a)(2) derives not from the term "knowingly," but rather from the infinitive phrase "to get." Second, § 3729(b) refers to specific intent with regard to the truth or falsity of the "information," while our holding refers to a defendant's purpose in making or using a false record or statement.

Id. at 2130 n.2.

III. FERA's response to *Allison Engine*

FERA was enacted less than a year after *Allison Engine* was decided. Congress identified *Allison Engine* as one of the chief reasons that it elected to include amendments to the FCA in FERA. *See* S. Rep. No. 111-10, at 10-11 (2009). As the Senate Report accompanying the legislation explained:

> The *Allison Engine* decision created a significant question about the scope and applicability of the FCA to certain false claims, effectively limiting FCA coverage for some Government programs and funds. As a result, defendants across the country have cited *Allison Engine* in seeking dismissal of certain FCA cases claiming that the FCA no longer applies to Government programs traditionally covered.

Id. at 11-12.

To correct the *Allison Engine* decision, FERA made three primary changes to the FCA's liability provisions. First, in section 3729(a)(2), FERA replaced the words "to get," which the Supreme Court relied on to find an intent requirement, with the words "material to." Further, the language "paid or approved by the [g]overnment" was removed from this section. The revised section (which FERA recodified as section 3729(a)(1)(B)) thus imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3730 (b) (2009).

Second, FERA defined the term "material" to mean "having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property." *Id.* at § 3730(b)(4). FERA borrowed this definition from those courts that had already read an implicit materiality requirement into the FCA. *See United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008); *United States v. Rogan*, 517 F.3d 449, 452

(7th Cir. 2008); *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1204 (10th Cir. 2006); *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 446 (6th Cir. 2005); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913, 916–17 (4th Cir. 2003).

Finally, FERA removed from section 3729(a)(3) the words that the Supreme Court identified as giving rise to an intent requirement. The revised version of this section (which FERA recodified as section 3729(a)(1)(A)) thus prohibits any person from "conspir[ing] to commit a violation of [any other liability provision]." 31 U.S.C. § 3730 (2009).

FERA included an effective date provision providing that its changes to the FCA would generally apply only to conduct occurring on or after the date of enactment. *See* Pub. L. No. 111-21, § (4)(f)(1), 123 Stat. 1617 (May 20, 2009). However, FERA expressly provided that the changes to former section 3729(a)(2) "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), which was 2 days before the *Allison Engine* decision was issued.

IV. The retroactivity of FERA's changes to former section 3729(a)(2)

To date, the most heavily litigated issue involving FERA's amendments to the FCA has been the extent to which the changes to former section 3729(a)(2), which were designed to overrule *Allison Engine*, apply to pending cases. The crux of the debate has centered on whether the phrase "claims under the False Claims Act" in section 4(f)(1) of FERA's effective date provision refers to claims for payment or legal claims alleging a violation of the FCA.

The majority of courts that have addressed this issue have construed the phrase in question to refer to claims for payment and have therefore held that FERA's changes to former section 3729(a)(2) apply only to cases where the defendant's claims for payment were pending on or after June 7, 2008. *See, e.g.,United States ex rel. Sanders v. Allison Engine*, 667 F. Supp.2d 747, 752-57 (S.D. Ohio 2009); *United States v. Science Applications Int'l Corp*., 653 F. Supp.2d 87 (D.D.C. 2009); *see also United States ex rel. Hopper v. Solvay Pharm., Inc*., 588 F.3d 1318 (11th Cir. 2009); *United States ex rel. Pilecki-Simko v. The Chubb Inst.*, 2010 U.S. Dist. LEXIS 27187 at *14 n.10 (D.N.J. May 17, 2010); *United States ex rel. Bender v. North American Telecomm., Inc.*, 686 F. Supp.2d 46, 48 n.4 (D.D.C. 2010); *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 2010 WL 1753378 (D.D.C. May 4, 2010); *United States ex rel. Burroughs v. Central Arkansas Dev. Council*, 2010 WL 1542532 at *2-3 (E.D. Ark. Apr. 19, 2010); *United States ex rel. Gonzalez v. Fresenius Med. Care North America*, 2010 WL 1645971 at *8-9 (W.D. Tex. Mar. 31, 2010); *United States ex rel. Baker v. Community Health Sys., Inc.*, 2010 WL 1740624 at *16-17 (D.N.M. Mar. 19, 2010); *United States ex rel. Compton v. Circle B Enters.*, 2010 U.S. Dist. LEXIS 22749 at *8 n.5 (M.D. Ga. Mar. 11, 2010); *United States ex rel. Putnam v. Eastern Idaho Reg'l Med. Ctr*., 2010 U.S. Dist. LEXIS 22129 at *10-15 (D. Id. Mar. 10, 2010); *Mason v. Medline Indus., Inc.*, 2010 WL 653542 at *3 (N.D. Ill. Feb. 18, 2010).

In addition, two 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 Baker*, 2010 WL 1740624 at *17-20; *Allison Engine*, 667 F.Supp.2d at 752-57.

By contrast, in *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94 (2d Cir. 2010), the Second Circuit held that the language "claims under the False Claims Act" in FERA's section 4(f)(1) refers to civil actions for FCA violations. Accordingly, the Second Circuit concluded that FERA's substantive revision of the standard for liability under former section 3729(a)(2) applied in that case because a civil action under the FCA was pending on the relevant date. *See also United States ex rel. Walner v. Northshore Univ. Healthsystem*, 660 F. Supp. 2d 891,(N.D. Ill. 2009); *United States ex rel. Stephens v.Tissue Science Labs., Inc*., 664 F. Supp.2d 1310, 1316 (N.D. Ga. 2009); *United States ex rel. Carter v. Halliburton Co.*, 2009 WL 2240331, at *15, n.3 (E.D. Va. July 23, 2009).

The next significant development on this issue may come, fittingly enough, in the *Allison Engine* case itself. On remand, the district court joined the majority of courts in holding that the former section 3729(a)(2) continues to govern cases where the defendant's claims for payment were submitted before June 7, 2008, and, in the alternative, concluded that any retroactive application of the statute would be unconstitutional. *Allison Engine,* 667 F.Supp.2d at 752-57. The United States intervened in that case and filed a petition with the 6th Circuit arguing that the district court's ruling was in error and sought permission to file an interlocutory appeal. On July 2, 2010, the appellate court granted that petition and ordered full briefing of the issues.

V. The courts' interpretation and application of *Allison Engine*

Because the courts disagree over the retroactivity of FERA's changes to former section 3729(a)(2), and the changes to former section 3729(a)(3) apply only to conduct occurring after FERA's date of enactment, the question of how *Allison Engine's* intent requirement applies to these provisions remains an important one for Government attorneys pursuing FCA cases.

As noted, *Allison Engine* did not alter the showing required to establish the defendant's scienter as to the falsity of the information that it provides to the government. *Allison Engine,* 128 S. Ct. at 2130 n. 2. Rather, its holding refers only to "a defendant's purpose in making or using a false record or statement." *Id.* Thus, to satisfy *Allison Engine's* intent requirement, an FCA plaintiff need only show that a defendant intended that its statement or claim would affect the government's payment decision, not that the statement or claim would be deceptive. *See United States ex rel. Wall v. Circle Constr.*, LLC, 2010 WL 1170468 at *9 (M.D. Tenn. Mar. 15, 2010) ("Th[e] "intent" requirement refers to the defendant's awareness that its statements would potentially be relied upon by the government, not to the defendant's awareness of the truth or falsity of its statement.")

The courts have had little difficulty applying this standard where the defendant submitted claims directly to the United States, and have consistently found the intent requirement to be satisfied in such cases. *See, e.g., Circle Constr.*, 2010 WL 1170468 at *9; *Science Applications*, 653 F.Supp.2d at 104-05; *United States ex rel. Roberts v. Aging Care Home Health, Inc.*, 2008 WL 2945946 at *10 (W.D La. July 25, 2008). The courts have disagreed, however, on how *Allison Engine* applies in circumstances where the defendant did not submit any claims to the government but instead caused others to submit such claims.

A few decisions have focused on whether the defendant's own false statements or claims were submitted to the government. *See United States v. Hawley*, 566 F.Supp.2d 918 (N.D. Iowa, 2007), *appeal pending* No. 08-2992 (8th Cir.); *Eastern Idaho*, 2010 WL 910751 at *14. Other courts, by contrast, have held that liability may exist under *Allison Engine* even if the defendant does not submit any claims to the United States if "the natural and reasonable consequence" of the defendant's conduct would be to affect the government's payment decision. *Mason v. Medline Indus.*, 2010 WL 653542 at *9 (N.D. Ill. Mar. 10, 2010), or "if the federal government is somehow involved in the grantee's disbursement of federal money," *United States Dept. of Transp. ex rel. Arnold v. CMC Eng'g*, 564 F.3d 673 (3d Cir. 2009).

The *Hawley* case, which was one of the first cases decided in the wake of *Allison Engine*, highlights the debate over *Allison Engine's* applicability to defendants that do not have a direct payment relationship with the United States. In *Hawley*, the government alleged that a crop insurance agent and his company made false statements to a private insurance company to obtain federal crop insurance. When the private insurance company eventually paid out under those policies, the United States was required to reimburse the company. Three weeks after *Allison Engine* was issued, the district court, sua sponte, granted summary judgment on the government's claims under former sections 3729(a)(2) and (a)(3), because the defendant's "allegedly false crop insurance claims were never forwarded to or approved by the government." 556 F.Supp.2d at 927. The court acknowledged that the Government was required to reimburse the insurance company for paying the defendant's false claims but concluded that this was insufficient to satisfy *Allison Engine*. *Id.*

On appeal, the United States contended that it was legally irrelevant whether the defendant's own claims were forwarded to the Government. Brief for Appellant (United States), at 30-35, No. 08-2992 (8th Cir.). Relying on former section 3729(a)(2)'s express application to defendants that "cause" the submission of false claims, the Government argued that if "the natural consequence of the defendant's conduct is that false claims would be presented to the United States, [then] the defendant may properly be found to have intended that result even if the claims were to be presented to the Government by a third party." *Id.* at 33. To support its position, the Government pointed to *Allison Engine*'s observation that under the False Claims Act "a defendant is not answerable for anything beyond the natural, ordinary, and reasonable consequences of his conduct." *Allison Engine*, 128 S. Ct. at 2130 (citation omitted).

The 8th Circuit heard arguments in *Hawley* last May, so a decision in that case should be forthcoming shortly.

VI. *Allison Engine's* applicability to reverse false claims

In addition to imposing liability in connection with false claims to the United States, the FCA also imposes liability for the failure to pay money or property owed to the United States. This provision of the FCA is known as the "reverse false claim" provision because the money or property at issue flows in the opposite or reverse direction than it does under the FCA's affirmative false claims provisions. The pre-FERA version of the reverse false claim provision imposed liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States." 31 U.S.C. § 3729(a)(7) (2009).

Allison Engine did not directly address the FCA's reverse false claim provision. Nevertheless, in a case currently pending before the 10th Circuit, the Government has taken the position that an *Allison Engine*-type intent requirement adheres to the pre-FERA version of that provision. *See* Brief of the United States as Amicus Curiae, *United States ex rel. Bahrani v. Conagra*, No. 09-1163, 09-1180 (10th Cir. 2010).

In that case, the government observed that both the structure and phrasing of former sections 3729(a)(7) and (a)(2) are similar and, in particular, that both provisions use language that connotes intent "to conceal, avoid, or decrease" in § 3729(a)(7) and "to get" in § 3729(a)(2). *Id*. at 8-13. Accordingly, the Government argued that the logic of *Allison Engine* properly extends to the reverse false claim provision and a defendant therefore violates former section 3729(a)(7) "only if he employs a false statement for the purpose of diminishing the amount he pays to the government." *Id.* at 6.

The Government nevertheless cautioned that this intent requirement refers to the defendant's purpose in using the statement in question, not to the defendant's knowledge of the statement's truth or falsity. *Id*. at 13-19. Thus, "a defendant can act with the requisite purpose by making or using a false statement for the purpose of paying less to the Government than he otherwise would have paid, even if he is uncertain about what, if anything, he actually owes." *Id.* at 14. The Government therefore argued that the intent requirement in the former reverse false claim provision is coextensive with the one governing former sections 3729(a)(2) and (a)(3) in the affirmative false claims context.

As part of the FERA amendments, Congress removed from the reverse false claim provision the phrase "to conceal, avoid, or decrease," thereby eliminating from this provision any requirement of intent. Because these changes are not retroactive, however, government attorneys should be prepared to establish the defendant's intent in reverse false claims cases governed by the pre-FERA version of the FCA.

VII. Conclusion

Although the primary purpose of the FERA amendments was to supercede the intent requirement imposed by *Allison Engine*, that decision may continue to impact a substantial number of the Government's

existing and future cases, including those alleging reverse false claims violations. The Government has argued that this intent requirement refers only to the defendant's awareness that its statement will affect what is claimed to be owed to or by the Government - not whether that statement is true or false - and can be satisfied by showing that such an effect was the natural and reasonable consequence of the defendant's conduct. The meaning and effect of the *Allison Engine* decision remains relatively unsettled, and along with the scope of FERA's changes to former section 3729(a)(2), will likely be one of the ongoing battlegrounds in FCA jurisprudence, especially in light of increased civil enforcement through the Financial Fraud Enforcement Task Force.❖

ABOUT THE AUTHOR

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I. Introduction

Advances in technology and telecommunication have exposed individuals to a whole new world of financial crime, including sophisticated financial schemes and new methods for perpetrating financial fraud. Victims of financial crime can face unique hurdles when trying to access justice, whether they are victimized through technological methods (phishing, spoofing, spam, etc.) or through more traditional schemes (advance fee loans, Ponzi schemes, lottery scams, etc.). Victims may not know what agency should investigate their allegations, and when they connect with the correct investigative agency, they may not have suffered a loss high enough to meet the threshold to qualify for federal prosecution. If victims are able to pursue a remedy through federal prosecution, the wheels of justice can turn slowly and victims may struggle financially while waiting for a chance to recover their losses. These cases are often complex and time consuming, causing the victim to feel lost in the process.

Victims of financial fraud not only feel the immediate impact of losing their income or savings but also may suffer the emotional consequences of being victimized. Fraud victims often suffer from self blame, shame, guilt, condemnation, and isolation because they have lost their financial security and are unable to recoup their losses. These victims often feel betrayed, particularly if they are victimized by someone they know or trusted with their finances. Some victims may be angry at state and federal agencies when told that resources to help with recovery are limited and may blame consumer protection agencies, the government, or the media for failing to warn them about the dangers of financial fraud.

Given the proliferation and expansion of financial crime and the significant impact on its victims, President Barack Obama signed an Executive Order creating the Financial Fraud Enforcement Task Force

(FFETF) in November of 2009. The Executive Order instructs the formation of subcommittees to address certain topics, including victims' rights. Exec. Order No. 13,159, 74 Fed. Reg. 60,123 (Nov. 17, 2009). As a result, the Crime Victims' Rights Committee (the Committee) was organized, and in December 2009, the Executive Office for United States Attorneys (EOUSA) and the Office of Justice Programs (OJP) were designated as chairs of the Committee. Membership in the Committee includes representatives from the following: the Attorney General's Advisory Committee, the Asset Forfeiture and Money Laundering Section, the Civil Division, the Criminal Division, the Civil Rights Division, EOUSA, the Federal Bureau of Investigation, the Federal Trade Commission, the U.S. Department of Housing and Urban Development, the Securities and Exchange Commission, and OJP. The fact that one of only three committees under the FFETF focuses exclusively on victims' rights is indicative of the high priority that the government places on the rights of victims in the criminal justice process.

The Committee examined various issues relating to victims' rights in financial fraud cases and ultimately decided to concentrate its efforts in three areas: public awareness and education through a public Web site, training on victims' rights and services, and restitution as a prosecution priority. This article will discuss the Committee's activities in these three areas and provide an overview of the statutory rights of fraud victims.

II. Public FFETF Web site

In order to address the first area of concern, public awareness and education, the Committee compiled resources for www.stopfraud.gov, the FFETF's public Web site. The Web site is designed to be a one-stop resource about financial fraud for both victims and the public at large. The consumer education sections of the Web site provide information about how to protect oneself from fraud and where to report various types of financial fraud. After collaborating with the Department's Office of Public Affairs, the Committee recommended that the Web site direct users to effective existing online resources. Consequently, the Web site is organized into categories of fraud and schemes and offers links to appropriate existing Web sites for each category. The Attorney General announced the launch of the Web site on April 16, 2010, at the Department's National Crime Victims' Rights Week Awards Ceremony.

The Committee is now working on developing an additional section of the Web site that will provide legal and financial assistance resources to victims of financial fraud.

III. Training

A. The Crime Victims' Rights Act

The landscape of victims' rights dramatically changed when President George W. Bush signed the Crime Victims' Rights Act (CVRA) into law on October 30, 2004. 18 U.S.C. § 3771 (2004). The CVRA establishes the rights of crime victims in federal criminal proceedings and provides mechanisms to enforce those rights. Although many of the rights listed in the CVRA are similar to the rights previously established by 42 U.S.C. § 10606, the CVRA gives victims a greater role in the criminal justice process and significantly affects the way Department of Justice employees interact with crime victims.

The CVRA provides crime victims with the following rights:

- The right to be reasonably protected from the accused
- The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused
- The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be

materially altered if the victim heard other testimony at that proceeding

- The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding
- The reasonable right to confer with the attorney for the government in the case
- The right to full and timely restitution as provided by law
- The right to proceedings free from unreasonable delay
- The right to be treated with fairness and with respect for the victim's dignity and privacy

18 U.S.C. § 3771(a) (2010).

Additionally, the CVRA allows either the victim or the government to assert the victim's rights in district court. 18 U.S.C. § 3771(d)(1) (2010). If the district court denies the right asserted, the movant may then petition the court of appeals for a writ of mandamus. 18 U.S.C. § 3771(d)(3) (2010). The court of appeals must rule on the petition within 72 hours of its filing, but the statute makes clear that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter." *Id*. Further, in any appeal in a criminal case, the government may assert as error the district court's denial of the victim's rights. 18 U.S.C. § 3771(d)(4) (2010). Any appeal by a United States Attorney's office must be pursued in conformance with Title 2 of the U.S. Attorneys' Manual.

The CVRA has had a tremendous impact on the Justice Department and in turn, on victims of federal crime. Since the CVRA's passage, United States Attorneys' offices have developed an increased awareness and a more energetic approach to according victims their rights. In the nearly 5 years since the CVRA went into effect, there has been a dramatic change in the role of victims in federal criminal cases. Victims are taking part in cases in greater numbers than ever before by attending proceedings, exercising their right to be heard, and receiving notifications of public court proceedings. The number of identified victims in federal cases has more than tripled since the CVRA passed, increasing from 554,654 victims in 2004 to 1,931,751 victims in 2009, a 248% increase. Victim notifications doubled to 5.7 million notices within 1 year of CRVA's passage in 2004 and totaled over 8.1 million in 2009.

The rights granted under CRVA do not act alone in protecting victims. Pursuant to *The Attorney General Guidelines for Victim and Witness Assistance* (the Guidelines) (May 2005), the victim service professionals in the various investigative agencies and litigating components in the Department of Justice provide necessary services to victims of federal crimes. These services begin at the investigative stage and continue through the prosecution stage, the post conviction proceedings, and imprisonment. The services include emergency assistance, counseling and social service referrals, assistance with creditors, providing information about victim impact statements, assistance with securing victim compensation, and restitution information.

B. The Committee's activities

Due to the many requirements placed on Department personnel by CVRA and the Guidelines, the Committee has identified a need for consistent and effective training for investigators, prosecutors, and victim assistance personnel concerning victims' rights, policy considerations, and other issues in financial fraud cases. The Committee has made an effort to ensure that relevant courses at the National Advocacy Center include a victims' rights presentation and since the Committee's formation, Committee members have presented such sessions at the following courses: Asset Forfeiture Chiefs and Experts Conference, Mortgage Fraud Task Force Seminar, Criminal Federal Practice Seminar, Asset Forfeiture for Support Staff Experts, and Survey of White Collar Crime.

In addition to live training at large conferences, the Committee recognizes that much of the critical training takes place at a local, district, or regional level, and that some training curricula may not allow for a full session on victims' rights. Therefore, the Committee is developing training modules that are suitable for insertion in any training presentation about financial fraud investigation and/or prosecution. These modules will focus on victims' rights and services and will be tailored to both investigators and prosecutors, addressing appropriate topics for each group. The format for these training modules is still being explored by the Committee, but the goal is to make the modules easy to use and easy to replicate for any presenter's purpose. The Committee will coordinate with the FFETF Training and Information Sharing Committee to distribute the modules to all FFETF member agencies to ensure that victims' rights issues are included as a segment of any course addressing financial fraud investigation or prosecution.

IV. Restitution

The return of lost money is of paramount importance to victims in financial fraud cases, many of whom have lost savings beyond the amount they are able to recover. Recognizing this concern, the President's Executive Order explained that one of the purposes of the Task Force is to strengthen efforts to recover the proceeds of financial fraud and ensure just punishment. Exec. Order No. 13,159, 74 Fed. Reg. 60,123 (Nov. 17, 2009). Therefore, the Committee is promoting various means of returning monies to victims of financial fraud. The CVRA provides that victims have the right to full and timely restitution, as provided in law. 18 U.S.C. § 3771(a)(6) (2010). The law that applies in the vast majority of financial fraud cases is the Mandatory Victim Restitution Act (MVRA), which requires that the defendant make restitution to the victim in all Title 18 property offenses. 18 U.S.C. § 3663A (2010). Further, once restitution is ordered, the Guidelines require that all federal components "work together as authorized by law to ensure that full and timely restitution is paid." Guidelines for Victim and Witness Assistance, Op. Att'y Gen. 37 (May 2005).

Successful recovery efforts begin with an active investigation that contemplates asset forfeiture and restitution, continues with forfeiture orders and a restitution order in the full amount of victims' losses, and ends with an aggressive effort to return monies to victims. This system of recovery requires close cooperation between investigators and prosecutors, as well as coordination among the criminal, asset forfeiture, victim witness, and financial litigation sections of the United States Attorneys' offices. To enhance such coordination, the Committee initiated a model monetary and asset recovery management plan that addresses promising practices at the investigative, prosecution, and collection stages of a criminal case. This plan will place a priority on the collection of restitution and will fully integrate asset forfeiture as a tool for returning monies to victims in financial fraud cases through the remission and restoration processes. In sum, if restitution is not considered until sentencing, significant opportunities for recovery are lost in the process. Thus, the goals of the plan will be to reinforce the importance of restitution at the earliest stages of investigations and to strengthen overall restitution collection efforts.

V. Conclusion

The FFETF Crime Victims' Rights Committee is dedicated to keeping the rights of victims at the forefront in all discussions of financial fraud crimes. Providing resources to help victims find the information they need to recover from financial fraud, ensuring that personnel in the criminal justice system have proper training and resources to serve victims, and securing restitution for victims will advance the Department's efforts in seeking justice for victims of financial fraud.❖

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