



# Department of Justice

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**STATEMENT OF**

**BENJAMIN C. MIZER  
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL  
CIVIL DIVISION  
U.S. DEPARTMENT OF JUSTICE**

**BEFORE THE**

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

**FOR A HEARING CONCERNING**

**OVERSIGHT OF THE CIVIL DIVISION**

**PRESENTED**

**SEPTEMBER 29, 2016**

**Statement of Benjamin C. Mizer**  
**Principal Deputy Assistant Attorney General**  
**Civil Division**  
**U.S. Department of Justice**  
**Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law**  
**Committee on the Judiciary**  
**U.S. House of Representatives**  
**September 29, 2016**

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

Thank you very much for inviting me here to testify on the work of the Civil Division (the Division) of the Department of Justice (the Department). I have led the Division since March 2015, and I appreciate the opportunity to discuss the work of the Division and its budget and resource needs for Fiscal Year (FY) 2017.

The Division represents the United States, its agencies, Members of Congress, Cabinet officers, and other Federal employees. Approximately 88 percent of its cases involve defending claims filed against the government. This litigation reflects the diversity of government activities, involving, for example, challenges to Acts of Congress and actions of the Executive; national security issues; benefit programs; energy policies; commercial issues such as contract disputes, banking, insurance, and patents; all manner of accident and liability claims; and enforcement of immigration laws. In FY 2015, well over \$9 trillion was at issue in defensive suits alone.

The Division also brings affirmative cases involving, for example, fraud, debt collection, and civil and criminal violations of consumer protection laws. This work plays a critical role in achieving the Attorney General's priority of combating waste, fraud, and abuse. Since 2009, the Division, working with United States Attorneys across the country, has obtained more than \$45 billion in civil and criminal judgments and resolutions in affirmative cases. During that same period, the Division, often in concert with the United States Attorneys, has used the False Claims Act to recover more taxpayer dollars lost to fraud – more than \$30 billion – than in any other comparable period. At the end of FY 2016, the government will have recovered more than \$3 billion in False Claims Act recoveries for the seventh straight year. Similarly, the government's health care fraud recoveries since January 2009 are at an all-time high for any comparable period, with recoveries in each of the last six fiscal years exceeding \$2 billion. In addition, in FY 2016, the government has already recovered \$1.5 billion from banks and other financial institutions involved in making false claims.

The Division is made up of more than 1,350 permanent employees, including over 1,000 attorneys. Each year, Division attorneys handle tens of thousands of cases that collectively involve tens of billions of dollars in claims and recoveries. The Division confronts significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various federal programs and actions. The priorities of the Division include strengthening the security of our nation, protecting the health and safety of consumers, and pursuing fraud against the government and in the financial sector.

## NATIONAL SECURITY

Defending the nation remains the highest priority of the Department. Although other parts of the Department have a more visible role in this effort, the actions of the Division are no less vital to its success. Whether those actions entail the defense of national security laws and regulations, litigating and defending of the U.S. Government's immigration actions, defending restrictions placed on assets and activities within the United States of individuals or entities tied to foreign terrorist organizations, or the litigation of habeas petitions brought by known or suspected terrorists, Division attorneys are dedicated to the protection of the American people.

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

- Supporting efforts to counter the continuing threat of terrorism, the Division has, among other things, successfully defended the validity of a cause of action against state sponsors of terror and also defended against *Bivens* lawsuits against law enforcement officers and high-level government officials arising out of efforts to protect national security.
- The Division's Office of Immigration Litigation has successfully prevented known or suspected terrorists from becoming naturalized citizens, defended against habeas corpus petitions seeking the release of known or suspected terrorists, and sought to revoke the naturalizations of terrorists.
- The Division has defended against immigration-related appeals involving aliens who have engaged in or committed terrorist activities, espionage, and atrocities, and helped train over 3,000 agents assigned to the Federal Bureau of Investigation's (FBI) Joint Terrorism Task Forces.
- The Division has litigated cases relating to the security of our borders and our airports, defending against constitutional challenges to the restriction on photography at border points of entry, screening procedures for individuals entering the United States, and the maintenance of the No Fly List.
- Similarly, the Division has also defended litigation filed against government agencies charged with ensuring the safety and security of the U.S. financial system, as well as the integrity of the U.S. economic sanctions program.
- The Division has continued to defend the actions of the military and law enforcement in numerous lawsuits and habeas petitions arising out of the detention of individuals at Guantanamo Bay.
- The Division has responded to lawsuits relating to the government's bulk collection of telephony metadata, which permitted National Security Agency analysts, acting under strict controls imposed by the Foreign Intelligence Surveillance Court, to detect communications between foreign terrorists and their contacts located in the United

States. Although the program ended in November 2015, certain claims remain pending in litigation.

- The Division represents the agencies of the U.S. Intelligence Community in the protection of national security information in different settings, including claims raised under Freedom of Information Act (FOIA) and discovery requests made in civil litigation.

## **HEALTH AND SAFETY**

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

Fighting fraud against federal health care programs is a pivotal element of the Division's work to protect consumer health and safety. On May 20, 2009, the Attorney General and the Secretary of the Department of Health and Human Services (HHS) announced the creation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement among agencies. Through enforcement actions under the False Claims Act, and aided by the efforts of HEAT, the conclusion of FY 2015 marked the sixth straight year the Department has obtained more than \$2 billion in health care fraud recoveries and FY 2016 is on track to continue the streak. All told, the Department has recovered more than \$18.5 billion in federal health care dollars since January 2009.

A significant component of the Department's health care fraud case load has historically consisted of cases alleging misconduct by manufacturers of pharmaceuticals and medical devices, as well as hospitals and home health care providers. The pharmaceutical industry continues to account for a substantial part of the Division's health care fraud recoveries.

For example, in April 2016, the Department announced a \$784.6 million settlement with Wyeth and Pfizer to resolve allegations that Wyeth underpaid rebates owed to state Medicaid programs for two proton pump inhibitor drugs by failing to disclose the "best prices" it offered to thousands of hospitals on those drugs. Another example from the pharmaceutical industry is the \$390 million settlement with Novartis Pharmaceuticals Corp., which the Department announced in November 2015. In that case, Novartis allegedly gave kickbacks to specialty pharmacies in return for recommending two of its drugs. The Novartis settlement was actually the third settlement in that lawsuit – in January 2014 and April 2015, two specialty pharmacies agreed to pay a total of \$75 million to resolve similar allegations.

The Division has also had large recoveries in other sectors of the healthcare industry. For example, in October 2015, Millennium Health agreed to pay \$256 million to resolve allegations

that it billed federal health care programs for medically unnecessary urine drug and genetic testing and provided kickbacks to physicians who agreed to refer expensive laboratory testing business to Millennium. In another case announced in January 2016, Kindred Healthcare – the nation’s largest provider of nursing home rehabilitation services – agreed to pay \$125 million to resolve allegations that it caused skilled nursing facilities to submit false claims to Medicare for rehabilitation therapy services that were not reasonable, necessary, or skilled, and in some cases, that were never provided at all.

The Division also spearheads the Elder Justice Initiative, which coordinates and supports law enforcement efforts to combat elder abuse, neglect, and financial exploitation by maintaining an information bank of Elder Justice related materials, funding medical reviewers to assist Department attorneys in pursuing nursing home cases, and coordinating nationwide investigations of skilled nursing facilities.

The Division’s efforts to protect consumer health have also prompted a focus on the unlawful sale of certain dietary supplements. In November 2015, the Department and its federal partners announced that they had pursued civil and criminal cases against more than 100 makers and marketers of dietary supplements. Those actions, including federal cases in 18 states, resulted from a year-long effort to focus enforcement resources in an area of the dietary supplement market that has been causing increasing concern among health officials nationwide. In each of the cases, the Department or one of its federal partners has alleged the sale of supplements that contain ingredients other than those listed on the product label or the sale of products that make health or disease treatment claims that are unsupported by adequate scientific evidence.

## **FINANCIAL FRAUD**

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

That commitment has been demonstrated by the Division’s efforts to target multiple aspects of fraud that contributed to the 2008 financial crisis. One facet of that fraud involved actions by financial institutions to knowingly approve mortgages that did not meet federal requirements, putting people into homes that they could not afford. When these mortgages failed, the Federal Government was required to cover the losses – a practice that led to the depletion of the crucial FHA insurance fund. In the last year, the Division, as part of a collective enforcement effort by President Obama’s Financial Fraud Enforcement Task Force, and in combination with our partners in the U.S. Attorney’s Offices, has recovered more than \$1.8 billion under the False Claims Act from six financial institutions. As part of the settlement agreements, the financial institutions admitted the conduct that gave rise to the government’s investigations.

The Department and the Task Force's Working Group has continued its pursuit of claims under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) arising out of the packaging, marketing, sale and issuance of residential mortgage-backed securities, or RMBS. In April 2016, Goldman Sachs agreed to settle federal and state civil claims for \$5.06 billion, which included a \$2.365 billion penalty. In February 2016, Morgan Stanley agreed to settle federal claims by paying a penalty of \$2.6 billion. Both banks also executed statements acknowledging their conduct. In prior years, the Department reached resolutions with JPMorgan (\$13 billion), Bank of America (\$16.65 billion), and Citibank (\$7 billion), each of which featured substantial penalties, relief for consumers, and also included statements as to their conduct.

The Division remains committed to aggressive investigation and prosecution of corporate wrongdoing, and Deputy Attorney General Yates emphasized the Department's commitment to doing so when she announced the Department's policy on individual accountability in September 2015. The policy recognizes that the most effective way to deter corporate wrongdoing is by holding to account the individuals responsible for the corporate malfeasance. We continue to vigorously investigate and pursue fraud committed by both individuals and corporations.

The Division also continues to prioritize cases where it can prevent ongoing harm. In June 2016, for example, as part of an ongoing effort to dismantle international mass-mailing fraud schemes, the Department and Dutch authorities announced simultaneous enforcement actions against companies and individuals targeting the elderly. The Department filed a civil action and obtained a restraining order that stopped two Dutch companies and their owner from continuing to operate businesses that facilitated fraud schemes. The schemes involved direct mail solicitations that falsely claimed that the individual recipient won, or would soon win, cash or valuable prizes, or would otherwise come into great fortune. American consumers, victims of these schemes, sent an estimated \$18 million annually to these companies for processing.

## **OTHER FRAUD RECOVERIES**

Although healthcare and financial fraud recoveries have remained predominant during this period, the Division has continued to aggressively pursue fraud involving Federal Government contracts, grants, and other federal programs.

Examples of the breadth of the Division's recoveries include its settlements with Education Management Corp. (EDMC), L-3 Communications EoTech, Inc. (EoTech), and University Furnishings LP. In November 2015, the Division spearheaded a global federal and state settlement with EDMC – the second-largest for-profit education company in the country – under which the school agreed to pay \$95.5 million to resolve allegations that it falsely certified compliance with Title IV of the Higher Education Act despite unlawfully paying admissions personnel based solely on the number of students they recruited. Also in November 2015, EoTech and its president agreed to pay a total of \$25.6 million to resolve allegations that the company sold defective holographic weapon sights to the United States. The defendants allegedly knew that the sights failed to perform as represented in cold temperatures and humid environments, but delayed disclosure of these defects to the government. In December 2015, as part of its pursuit of customs fraud cases, the Division settled for \$15 million allegations that

University Furnishings LP avoided paying duties on wooden bedroom furniture imported from China by misclassifying the furniture.

In addition to these and other recoveries, the Division represents the government in a number of lawsuits alleging fraud that were either initiated or continued in FY 2016. For example, the Division continues to litigate claims against Kellogg, Brown & Root (KBR) and foreign subcontractors in connection with KBR's contract with the U.S. Army to provide wartime logistical support. The government has alleged that KBR employees took kickbacks in return for awarding subcontracts at inflated prices for services and equipment that were often deficient or not provided at all, as well as other false and inflated claims. The Division is currently litigating claims against DynCorp International Inc., alleging that the contractor knowingly submitted inflated claims in connection with a State Department contract to train Iraqi police, and against BAE Systems Tactical Vehicle Systems LP (BAE) for knowingly overcharging the Army for materials under a military truck contract by concealing cost and pricing data on parts and materials during contract negotiations. In addition, the Department joined a *qui tam* lawsuit which alleges that Inchcape Shipping Services Holdings Limited and certain of its subsidiaries knowingly overbilled the U.S. Navy to supply goods and services to ships at ports throughout the world. The Division is also continuing to pursue claims against IT contractors Symantec and CA, Inc. for overcharging government agencies for information technology.

## **DEFENDING FEDERAL STATUTES AND PROGRAMS**

The Division is primarily responsible for defending the legality of statutes passed by Congress. Accordingly, the Division has led the Department's response to a number of recent challenges on issues of national significance. The Division defended the constitutionality of the Affordable Care Act, which was ultimately upheld in major part by the Supreme Court in 2012. Following that decision, the Division has handled many additional lawsuits relating to individual provisions of the Act. The Division is also currently defending against constitutional and statutory challenges to Sections 215 and 702 of the Foreign Intelligence Surveillance Act. Under the authority of this statute, and with strict controls imposed by the Foreign Intelligence Surveillance Court, the government operated a telephony metadata bulk collection program as part of its efforts to fight terrorism. The Division has also led the defense of constitutional challenges to the Adam Walsh Act, which imposes registration requirements on sex offenders; the Protection of Lawful Commerce in Arms Act, which immunizes firearms manufacturers or sellers from qualified civil liability actions; the Professional and Amateur Sports Protection Act, which prohibits states from authorizing private gambling on sporting events; the Emergency Medical Treatment and Active Labor Act, which requires certain hospitals to provide emergency medical treatment without regard to a patient's ability to pay; the nondisclosure provisions of the National Security Letter statutes; and many other statutes. The Division also successfully defended against a challenge to the constitutionality of the federal debt ceiling.

The Division also defends the interpretations of statutes and the policies and actions of the Executive Branch. In that role, the Division has handled numerous high-profile lawsuits, including the availability of tax credits under the Affordable Care Act through insurance exchanges set up by the Federal Government on behalf of a State. As another example, the Division is currently defending a challenge to a decision by the Financial Stability Oversight

Council to designate MetLife as a nonbank financial company subject to Federal Reserve supervision and enhanced prudential standards under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Division is also currently defending a challenge to the President's constitutional authority to deny a cross-border permit for the TransCanada Keystone oil pipeline to transport crude oil from Canada into the United States. The Department also routinely defends decisions by the Food and Drug Administration concerning the approval of generic drugs, ensuring that there are incentives for developing new products and that there can be price competition for safe and effective medicines.

### **PROTECTING THE FEDERAL FISC**

The Division represents the United States, including its officers and agents, in suits for money damages. In 2015 and 2016, the Division's work has helped the government to avoid billions of dollars in damages sought by obtaining favorable judgments or negotiating settlements for less than the full amount of a plaintiff's claim.

Currently, for example, the Division is defending against claims relating to the government's actions in 2008 and 2009 to address the economic crisis. In one case, the Division is defending a class action on behalf of shareholders of the American International Group (AIG), who are seeking tens of billions of dollars based on allegations relating to the government's 2008 rescue of AIG. After the trial court concluded that the shareholders were not entitled to compensation, appeals and cross appeals were taken; those appeals are still pending. Similarly, the Division is representing the government in multiple lawsuits brought by shareholders of Fannie Mae and Freddie Mac challenging the government's actions in connection with conservatorships of those entities. Finally, the Division is defending a series of claims brought by auto dealers whose dealership agreements were terminated when General Motors and Chrysler declared bankruptcy.

### **DEFENDING IMMIGRATION ACTIONS**

The Division defends and prosecutes civil immigration matters in federal court. The Division's Office of Immigration Litigation represents the government in cases in the federal courts of appeals challenging determinations that an individual is subject to removal from the United States or is not eligible for some form of relief that would allow him or her to remain in the United States. These cases represent approximately 11 percent of all cases filed in federal appellate courts, with the Division handling more than 5,500 new filings in FY 2015 and more than 4,500 to date in FY 2016.

The Office of Immigration Litigation also handles immigration cases at the district court level in all of the 94 federal district courts nationwide on behalf of several agencies. These include the Department of Homeland Security and HHS in cases involving a wide range of complex immigration matters, the Department of State in cases involving passports and visas, the Department of Labor in employment-related visa matters, and the FBI on immigration-related national security matters, including denaturalization and other actions involving individuals with established terrorism ties. The Office of Immigration Litigation has also defended numerous cases brought by known or suspected terrorists and convicted criminals attempting to acquire immigration benefits, thwart removal, or avoid mandatory detention pending removal.



The Office of Immigration Litigation also handles class action cases challenging critical policies and programs relating to the Federal Government's interpretation, administration and enforcement of immigration law.

### **PRESIDENT'S BUDGET REQUEST**

The President's FY 2017 request for the Division seeks 1,334 positions (960 attorneys) and \$309,591,000, including increases for litigating and defending the U.S. Government's immigration actions, for elder justice, and for improvements to our E-Records systems as well as an increase in the reimbursement levels from the Vaccine Injury Trust Fund for the Division's handling of vaccine cases. This request consists of the resources required to maintain the superior legal representation services that have yielded such tremendous success. We hope the House and Senate will fully fund the Division's FY 2017 request.

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