Questions for the Record
U.S. Attorney B. Todd Jones and
Executive Director Robb Adkins
Financial Fraud Enforcement Task Force

Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
United States Senate

"Oversight of the Financial Fraud Enforcement Task Force"
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QUESTIONS POSED BY SENATOR COBURN

1. How much money is the Task Force spending per year?

a. How much of that money is spent on things other than investigations and prosecutions? For example, how much is spent on public outreach, regional summits, training events, public awareness, workshops, and courses at the National Advocacy Center – all of which were mentioned in your testimony?

Response:

The Task Force has a broad membership of federal, state, and local authorities. Member agencies with expertise in certain areas serve as co-chairs of various working groups and committees to further the goals listed in the Executive Order establishing the Task Force, including outreach, coordination, and training. However, each department, agency, office, inspector general, state attorney general's office, commission, and regulator has its own mandates, allocated budgets, policies, and procedures. The Task Force does not replace or supersede the mandates, budget decisions, policies or procedures of the many member agencies, but rather facilitates coordination, outreach, and training among these members. Each member agency that participates in Task Force initiatives uses its own existing funds. Indeed, many Task Force efforts are aimed at leveraging existing resources, such as: expanding the scope of an existing training session by a member agency to include other Task Force member agencies and thus providing broader outreach and reducing duplication; using existing conference space at agency facilities; expanding awareness of existing resources such as SIGTARP fraud inspectors and FinCEN data support services; and coordinating with existing regional efforts such as the 94 Mortgage Fraud Working Groups and Task Forces and with the Financial Fraud Coordinators throughout the country.

b. What amount of funds has been recovered by the Task Force in criminal fines and forfeiture?

Response:

As discussed in the preceding response, the Task Force is composed of criminal, civil, and regulatory agencies at the federal, state, and local level. While the Task Force members in various working groups and committees conduct coordination, training, and outreach, the Task Force does not replace or supersede the mandates or specific discretionary enforcement decisions of its criminal, civil, and regulatory members. With that understanding, however, improved asset forfeiture, restitution, civil judgments, and fines are a priority of the Task Force. During the first year of the Task Force, the U.S. Attorneys' Offices collected more than $690,000,000 in criminal restitution and fines in financial fraud cases.

2. **According to your First Year Report (Table 1 on page 4.7), less than 45% of the defendants you charged with fraud were actually found guilty in both 2009 and 2010.**

   a. **Is that percentage consistent with other crimes the Department of Justice charges?**

Response:

Table 1 on page 4.7 of the First Year Report does not indicate a 45% rate of conviction. The "Defendants Guilty" column does not represent convictions of the defendants that make up the totals in the "Defendants Charged" column of the chart. Instead, the "Defendants Guilty" column simply represents convictions obtained in mortgage fraud cases adjudicated during that fiscal year, whereas the "Defendants Charged" column represents the total number of defendants charged during the same fiscal year. In fact, the actual conviction rates for mortgage fraud prosecutions adjudicated in FY 2009 and in FY 2010 were greater than 92% in each of those periods. These rates compare favorably to conviction rates in all white collar crime prosecutions of 90% in FY 2009 and 91% in FY 2010 and are comparable to overall conviction rates of 92% in FY 2009 and 93% in FY 2010 reported by the Department for all criminal prosecutions. www.justice.gov/usao/reading_room/foiamanuals.html

   b. **Who makes the decision to bring charges?**

Response:

The Task Force coordinates efforts among its members but does not make the decisions for the criminal, civil, and regulatory member agencies at the federal, state, and local level; those powers are within the jurisdiction of the individual federal, state, and local authorities. At the Department of Justice, United States Attorneys within their respective districts have plenary authority, under the supervision and direction of the Attorney General and his/her delegates, regarding federal criminal and civil matters. 28 U.S.C. §§ 509. 519, 547.

      i. **What factors go into that decision?**

Response:

Department prosecutors are required to adhere to the Department's "Principles of Federal Prosecution" and "Principles of Federal Prosecution of Business Entities," which provide clear guidance to prosecutors on the exercise of discretion in making charging decisions. The guidance specifies various factors to be considered in making charging decisions including culpability of the individual or entity, the nature and seriousness of the offense and federal law enforcement priorities.

3. This week, *USA Today* reported that there has been a 20% decrease, according to DOJ statistics, in prosecutions of people accused of defrauding government benefits programs, such as Social Security and food stamps, and a shift to prosecuting fraud in mortgage lending, financial institutions, and Medicare. This has occurred even though the number of people collecting government benefits has increased significantly.

Have the efforts of the Task Force drawn resources away from benefits fraud during a time when we can least afford to be paying fraudulent benefits claims?

Response:

Task Force efforts have not diverted resources from benefits fraud enforcement. Aggressive enforcement targeting benefits fraud continues to be a priority of the Department and our law enforcement partners. In its recent Semiannual Report, the United States Department of Agriculture-Office of Inspector General (USDA-OIG) reports that, from October 1, 2010, through March 31, 2011, USDA-OIG investigations led to 199 indictments and to 249 convictions. Fines, recoveries/collections, restitutions, claims established, cost avoidance, asset forfeiture, and administrative penalties resulting from USDA-OIG investigations totaled approximately $47.8 million.

The Social Security Administration – Office of the Inspector General (SSA-OIG) reports in its recent Semiannual Reports that from October 1, 2010 through March 31, 2011, its agents closed 3,358 criminal investigations and from April 1, 2011 through September 30, 2011, its agents closed more than 3,809 criminal investigations for a total of 7,167 for the Fiscal Year. This has led to the following results:

- 488 indictments and informations from October 1, 2010 through March 31, 2011, and 637 indictments and informations from April 1, 2011 through September 30, 2011 for a total of 1,125 for the Fiscal Year;
- 262 arrests from October 1, 2010 through March 31, 2011 and 327 arrests from April 1, 2011 through September 30, 2011 for a total of 589 arrests for the Fiscal Year;
- 698 criminal convictions (including pretrial diversions) from October 1, 2010 through March 31, 2011 and 676 criminal convictions (including pretrial diversions) from April 1, 2011 through September 30, 2011 for a total of 1,374 for the Fiscal Year; and,
- 36 civil judgments/civil monetary penalty assessments from October 1, 2010 through March 31, 2011 and 66 civil judgments/civil monetary penalty assessments from April 1, 2011 through September 30, 2011 for a total of 102 civil judgments/civil monetary penalty assessments for the Fiscal Year.

For FY 2011, SSA-OIG reports over $419 million in investigative accomplishments, including over $81 million in SSA recoveries, restitution, fines, settlements, and judgments; and over $328 million in projected savings from investigations resulting in the suspension or termination of benefits.

4. The Justice Department, including U.S. Attorney Offices and the FBI, received $591 million for fighting fraud—excluding healthcare fraud—in 2010, $635.6 million in 2011, and the President has requested $683 million for 2012. That's an increase of about 8% per year.

i. Has fraud increased by 8% per year?

Response:

While fraud occurrence is difficult to measure for a number of reasons, including the many different types of fraud and the possibility of undetected or emerging fraud, the FBI has assessed significant increases in certain types of fraud such as mortgage and securities fraud schemes, which may be indicative of an increase in fraud. According to the FBI's 2010 Mortgage Fraud Report, mortgage fraud pending investigations totaled 3,129 in FY 2010, a 12 percent increase from FY 2009 and a 90 percent increase from FY 2008. The FBI also reports that securities and commodities fraud cases increased from 1139 open cases in FY 2005 to 1510 cases in FY 2009, an increase of about 32%. The Office of Investigations at HUD OIG has experienced a 12% increase in its number of FHA mortgage fraud related cases in the past year, which now account for 36% of its total number of ongoing investigations. A noticeable spike in the number of Suspicious Activity Reports (SARs) being reported also is indicative of an increase either in the occurrences of fraud or better detection of ongoing fraud schemes.

ii. Have resources been diverted from frauds that aren't being prosecuted as heavily, such as benefits fraud, to pay for the new attention to financial frauds?

Response:

Please see our response to question 3, above.

QUESTIONS POSED BY SENATOR SESSIONS

5. **I have serious concerns with the vagueness plaguing the "honest services" statute, which has been recognized by the Supreme Court. Criminal statutes must be clearly written to tell the court precisely what it is that a prosecutor must prove and to provide citizens with a clear understanding of what the law punishes. Despite the *Skilling* decision, federal judges are still struggling with this statute. In fact, a few months after the *Skilling* decision, one district court judge was quoted in oral arguments as saying, "nobody can articulate – including us – what someone has pled to in an honest services charge." (*U.S. v. Ring*, District Court of the District of Columbia, Sept. 2010).**

   a. **Is it the Task Force's view that its prosecutors must identify a *quid pro quo* agreement in establishing a scheme of bribery or kickbacks in order to rightfully charge an individual with honest services fraud?**

Response:

The Executive Order established the Task Force as a broad coalition of federal, state, and local authorities, including the Department of Justice, but it does not replace or supersede the mandate, policies or specific discretionary enforcement decisions of its individual members. The Justice Department's views regarding "honest services" fraud were expressed in testimony in September 2010 by Assistant Attorney General Lanny Breuer before the Senate Judiciary Committee:

> "For many decades, both before the *McNally* decision and under Section 1346, the two core forms of honest services fraud recognized by the courts remained the same: first, schemes involving bribery and kickbacks, and, second, schemes involving undisclosed self-dealing. In *Skilling*, the Supreme Court eliminated this entire second category of schemes from the reach of Section 1346, holding that the statute covers only bribery and kickback schemes, and not schemes involving undisclosed self-dealing."
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> "The impact of *Skilling* on pending investigations and our ability to bring criminal charges for certain types of corrupt conduct is significant. The Department's efforts in this area are robust. But by eliminating undisclosed self-dealing from the scope of the honest services fraud statute, the *Skilling* decision takes away one of the tools that the Department has heavily relied on to address corruption."
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> "A public official who conceals his financial interests and then takes official action to advance those interests engages in behavior every bit as corrupt as if he accepts a clear bribe from a third party."

   b. **Prior to *Skilling*, there was confusion within the circuits about the scope and source of the fiduciary duty that must be breached in order to prove honest services fraud. Many of the questions remain even after *Skilling*. Do Task Force prosecutors have a clear definition or understanding of what kind of fiduciary duty must exist under the honest services statute? If so, what is it?**

Response:

As noted above, the Executive Order established the Task Force as a broad coalition of federal, state, and local authorities, including the Department of Justice, but it does not replace or supersede the mandate, policies or specific discretionary enforcement decisions of its individual members. The Department's prosecution of "honest service" fraud was described in testimony in September 2010 by Assistant Attorney General Lanny Breuer before the Senate Judiciary Committee:

> "The Department of Justice is committed to using all available tools in our effort to combat fraud and corruption in the public and private sectors. Our enforcement efforts, which employ a number of different federal statutes, remain active and successful. However, one of the tools that we have relied upon for more than two decades was significantly eroded as a result of the Supreme Court's recent decision in *Skilling v. United States.* In *Skilling*, the Supreme Court held that the honest services fraud statute, 18 U.S.C. § 1346, applies only to bribery and kickback schemes, and not in situations involving undisclosed self-dealing by a public official or private employee. In short, the *Skilling* decision removed a category of deceptive, fraudulent, and corrupt conduct from the scope of the honest services fraud statute and placed that conduct beyond the reach of federal criminal law. The Department believes that the Court's decision has created a gap in our ability to address the full range of fraudulent and corrupt conduct by public officials and corporate executives, and we urge Congress to pass legislation to fill the void."
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> "Corrupt individuals can be very creative in their efforts to benefit themselves at the expense of those to whom they owe a duty of loyalty. While the Department of Justice's work in this area remains active and successful, the Department needs a full range of tools to address fraud and corruption in all forms. The Supreme Court's decision in *Skilling* removed undisclosed self-dealing from the scope of the federal criminal law, and we urge Congress to act quickly to restore our ability to address this significant category of fraudulent and corrupt conduct."

6. **For FY10, the Department of Justice received $591 million for fighting financial fraud, not including health care fraud. For FY2011, that number rose to $635.6 million. Again, for FY2012, the request rose by 8% to $683 million. Additionally, other agencies, like the Department of Health and Human Services, request and receive significant funding for combating fraud. You testified at the hearing that the Task Force has no formal budget, and a Justice Department representative has confirmed, that the Task Force has no "line item" for funding.**

   a. **Are the Justice Department's budget requests for financial fraud consistently increasing because of the need for additional funding of the Task Force's activities? Please explain your answer.**

Response:

The Financial Fraud Enforcement Task Force is not a Department of Justice task force, but rather a broad coalition of federal, state, and local criminal, civil, and regulatory authorities. It neither seeks nor receives funding.

In testimony in January 2011 before the Senate Judiciary Committee, Assistant Attorney General Lanny Breuer addressed increased funding for financial fraud enforcement:

> "The Department is grateful for the many resources Congress has provided to support and enhance the Department's criminal fraud enforcement efforts. Beyond providing expanded statutory tools to fight various forms of fraud, Congress has authorized critical funds through various means, including in the Fraud Enforcement Recovery Act (FERA), which of course Chairman Leahy and Ranking Member Grassley sponsored. FERA, passed in 2009, authorized needed and targeted funds for the FBI, the Criminal Division, the U.S. Attorneys' Offices, and the Securities and Exchange Commission (SEC), giving us further resources to increase the scope of our collective enforcement response. In addition, last year, in the Affordable Care Act, Congress authorized additional, critical funding for use in health care fraud enforcement."
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> "Congress's financial support of our criminal investigations and prosecutions is critical to protecting the American taxpayer's hard earned money. And the amount of taxpayer money restored to the United States Treasury through our criminal enforcement efforts far exceeds what we spend to recover that money. As a result of our criminal fraud prosecutions, the Department is transferring to the U.S. Treasury far more money than the amount budgeted by Congress to support the Department's criminal fraud and corporate corruption investigations and prosecutions."

b. **You testified that the Task Force holds various meetings and conferences across the country. From where does the Task Force obtain the funding to organize such conferences and for the travel costs associated with attendance of Task Force members, including yourself?**

c. **Without a formal budget, how does Task Force leadership determine when too much money is being spent on a particular Task Force operation?**

Response to 6(b) and (c):

The Task Force is composed of a broad membership of criminal, civil, and regulatory agencies at the federal, state, and local level. While the Task Force members in various working groups and committees conduct coordination, training, and outreach, the Task Force does not replace or supersede the mandate or specific discretionary enforcement decision by the criminal, civil, and regulatory members. Each department, agency, office, inspector general, state attorney general's office, commission, and regulator has its own mandates, allocated budgets, policies, and procedures. The Task Force facilitates coordination, outreach, and training among these members.

Each member agency that participates in Task Force initiatives uses its own existing funds. Indeed, many Task Force efforts are aimed at leveraging existing resources, such as: expanding the scope of an existing training session by a member agency to include other Task Force member agencies and thus have a broader outreach and to reduce duplication; using existing conference space at agency facilities; expanding awareness of existing resources such as SIGTARP fraud inspectors and FinCEN data support services; and coordinating with existing regional efforts such as the 94 Mortgage Fraud Working Groups and Task Forces and the Financial Fraud Coordinators throughout the country.

d. How is the Task Force accountable to the agencies who share in funding Task Force operations or activities?

Response:

The Task Force does not pool and distribute funds from its broad membership but rather each member makes its own decision whether to participate in a coordinated effort. Given the breadth of the Task Force, this is the most feasible means by which to operate. Moreover, it ensures that the Task Force focuses on those areas of mutual benefit for the membership that serves their mandates and needs.

e. Does the Task Force issue regular or annual reports to any of the agencies who fund the Task Force identifying how the money has been spent?

Response:

The Task Force does not have separate funding. While the Task Force does provide an annual report (see http://www.stopfraud.gov/docs/FFETF-Report-LR.pdf), the report does not identify how member agencies spend their money.