U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

December 22, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions for the record posed to Attorney General Michael Mukasey following his appearance before the Committee on July 9, 2008. The hearing concerned Department of Justice Oversight. The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance on other matters.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record Posed to
U.S. Attorney General Michael B. Mukasey
Senate Committee on the Judiciary
DOJ Oversight Hearing on July 9, 2008
Part One

QUESTIONS FROM SENATOR KENNEDY

Kennedy 1. At your confirmation hearing, you said that if waterboarding is torture, it is unconstitutional, and therefore unlawful. That statement was unresponsive and inadequate and nearly prevented your confirmation as Attorney General. During your recent testimony, Sen. Whitehouse asked you about U.S. v. Lee, a Fifth Circuit case decided in 1983, in which a sheriff and his deputies were sentenced to prison for waterboarding suspects to force them to talk. Specifically, Sen. Whitehouse asked whether it would have been negligent or worse for OLC to fail to cite that opinion in its discussion of the lawfulness of waterboarding as an interrogation technique. You sought to distinguish the case by saying that it involved convictions for violations of the civil rights laws. The Department charged the defendants with violations of 18 U.S.C. 241 and 242, which make it a crime to deprive an individual of constitutional rights-in this case, the right embodied in the Due Process Clause of the Fourteenth Amendment not to be subjected to excessive force by law enforcement officers. In other words, it was the view of the Department of Justice that the waterboarding of these detainees was unconstitutional and the jury agreed.

Would you care to revise or elaborate on your answer to Sen. Whitehouse?

ANSWER: Because waterboarding is not part of the current CIA program, the Attorney General has not reached any legal conclusion concerning the lawfulness of the technique. Prior to his confirmation, the Attorney General made clear that if waterboarding were torture, it would be unlawful both under the Anti-Torture Statute and the Constitution. He subsequently reviewed the applicable opinions of the Office of Legal Counsel (OLC) as they apply to current techniques and found the opinions to be correct and sound. Although we cannot discuss the content of classified OLC opinions, nothing in those opinions conflicts with the Department's position in the *United States v. Lee* prosecution.

In his recent testimony, the Attorney General made clear that the Fifth Circuit's decision in *Lee* has no bearing on the lawfulness of the CIA's past use of "waterboarding." The Fifth Circuit's short opinion addressed only a criminal procedure matter; it sheds no light on the lawfulness of the CIA's practices, and thus, it would neither be surprising nor significant that OLC's analysis did not discuss the *Lee* case.

Kennedy 2. Since you believe that waterboarding is unconstitutional if it is torture, does it affect your analysis that the Department has taken the position in the past that waterboarding is unconstitutional?

ANSWER: Please see the response to question 1.

Kennedy 3. You told Sen. Leahy that it would not "serve anybody's interest" to provide the Committee with an index of OLC opinions that remain in effect. You also, of course, have declined to provide the opinions. Yet, because OLC provides definitive legal interpretations of the law that are binding within the Executive Branch, it is enormously important for this Committee and the public to have the fullest accounting possible of those opinions. A democracy under the rule of law can only function when the legislature and the public know what the law is. We all understand that there are matters that must be kept secret, such as identities and operational details, but rarely should a legal opinion fall into that category. As we have seen from opinions that have been leaked or belatedly made public, there is little, if anything, in those opinions that warrants classification, and certainly nothing that could not be protected through limited redactions. It seems obvious that the reason the Department has fought so hard to keep these opinions secret is to protect itself from criticism.

Do you agree that it is important for the law to be a matter of public knowledge to the fullest extent possible in a society committed to the rule of law?

ANSWER: OLC assists the Attorney General in his role as legal adviser to the President and to executive departments and agencies. In connection with that function, OLC provides advice and prepares documents addressing a wide range of difficult and unsettled legal questions involving Executive Branch operations, often in connection with complex and sensitive operations that implicate national security interests. OLC's advice reflects the attorney-client relationship that exists between OLC and other executive offices, and, as in other attorney-client relationships, that advice is confidential. Protecting the confidentiality of OLC opinions helps ensure that decision-makers will be willing to seek legal advice before they act. Indeed, without confidentiality, officials may be reluctant to seek advice at precisely those critical times when it is most needed. Confidentiality also helps to ensure that the legal advice that policymakers receive will be completely candid.

OLC does not "make law" in the same sense that Congress or the courts do. It is true that OLC opinions ordinarily are controlling within the Executive Branch on questions of law. While OLC's legal advice may inform its clients' policy decisions, its legal advice rarely, if ever, compels the adoption of any particular policy; rather, it remains up to policymakers to decide whether and how to act. OLC thus lacks the ability of Congress or the courts to affect private parties directly. Its legal views are not binding on the Legislative Branch, the courts, or the general public. If executive officials choose to adopt a policy that OLC has determined to be legally permissible, the policy will be

public unless it is classified, and appropriate officials can rightly be called upon to explain the basis for their decision, including their legal rationale. (Classified activities are subject to review by the congressional Intelligence Committees.) However, effective policymaking is not possible if the discussions of officials are inhibited by concerns that the advice they receive or their other internal, pre-decisional deliberations will be made public.

Nevertheless, OLC recognizes that many of its opinions address issues of interest to the government or to the public. It is therefore OLC's policy to publish such opinions whenever doing so is consistent with the legitimate confidentiality interests of the President and the Executive Branch. This publication policy is sensitive to Congress's interests in understanding the legal reasoning relied upon by executive agencies. There has historically been a time lag between when an opinion is signed and when it is considered for publication, which reflects the need for confidentiality in the course of ongoing decision-making. Moreover, before publishing an opinion, OLC seeks approval from the office that requested the opinion and generally solicits the views of other agencies and entities within the Executive Branch whose work may be affected by the opinion, a process that can take several months. OLC's current criteria and procedures for publication are consistent with historical practice.

Kennedy 4. Should there be a presumption in favor of disclosing legal opinions of OLC?

ANSWER: Many OLC opinions address issues of relevance to a broader circle of Executive Branch lawyers or agencies than just those officials directly involved in the opinion request. In some cases, the President or an affected agency may have a programmatic interest in putting other agencies, Congress, or the public on notice of the legal conclusions reached by OLC and the supporting reasoning. In addition, some OLC opinions will be of significant practical interest and benefit to lawyers outside the Executive Branch, or of broader interest to the general public, including historians. In such cases, and when consistent with the legitimate confidentiality interests of the President and the Executive Branch, it is the policy of OLC to publish its opinions. In effect, OLC has a presumption in favor of publishing opinions that are believed to be of interest to a broader circle of government lawyers, to Congress, and to the public at large. This approach to publication is consistent with the approach of prior Administrations of both parties.

As of November 10, 2008, OLC has published 96 of its opinions on its Web site since the beginning of 2005. *See* http://www.usdoj.gov/olc/whatsnew.htm. In all, OLC has made approximately 102 of its opinions public in some form since 2005, more than 90 percent of which were signed during this Administration.

Kennedy 5. Are you personally satisfied that every secret OLC opinion that you have reviewed is properly classified or properly withheld from the public on other grounds?

ANSWER: OLC opinions undergo several levels of review to determine their suitability for publication. This process reflects the fundamental continuity that has existed from one Administration to the next in the criteria and procedures that OLC employs to make publication decisions. The Department is confident that publication decisions are based on the legitimate confidentiality interests of the Executive Branch. We are also confident that OLC's classification practices are appropriate.

Kennedy 6. It would be very useful for this Committee in performing its oversight responsibilities to know what OLC opinions exist. Will you reconsider your response to the Chairman and at least provide an index of those opinions? If not, why not?

ANSWER: The Department continues to believe that providing the Committee with such an index would compromise significant Executive Branch confidentiality interests. Policymakers in the Executive Branch need to be able to obtain confidential and deliberative legal advice from OLC, particularly about some of the most sensitive matters of national security. Providing a list of the opinions that OLC has issued to executive departments and agencies, together with a description of the subject matter discussed, would reveal information about the attorney-client deliberative processes throughout the Executive Branch and compromise the confidentiality that is essential to attorney-client relationships. Such a disclosure would discourage future policymakers from requesting advice on difficult or controversial legal subjects.

Kennedy 7. You became Attorney General at a time when the status and reputation of the Department of Justice had been badly tarnished by the actions of your predecessor. Many of us felt that you had an opportunity to exercise bold leadership by beginning the process of rebuilding the Department. To your credit, you have issued directives stating that hiring decisions must be based on merit and restricting communications between the White House and the Department. But you have remained disappointingly passive in responding to the growing body of evidence that the Department has been severely politicized in both its personnel practices and its law enforcement decisions. You have resisted launching your own management-driven investigations to determine what abuses were committed and what effects remain to be remedied. You have not, insofar as you have informed this Committee, undertaken any systematic effort to review management practices, the adequacy of complaint mechanisms for aggrieved employees, the continuing service of individuals who may have participated in or benefited from politicized practices, inquire into allegations that ongoing law enforcement matters may have been undertaken for partisan purposes, or a number of other steps that a manager who assumed personal responsibility for the effective and lawful functioning of his

agency should have launched. Instead, you seem content simply to respond that these matters are under investigation by the IG or OPR. Both of these organizations make valuable contributions, but it is not effective or acceptable management to refer difficult matters to them and wait for their recommendations before acting. The majority of your tenure as Attorney General has now passed while you waited for the IG and OPR to complete investigations into the Department's management failures.

Please describe for the Committee the steps you intend to take to address the following matters:

The likelihood that scores, if not hundreds, of applicants for career attorney and law clerk positions were improperly rejected because of political affiliation or perceived ideology. The first lawsuit following the first IG/OPR report on the matter has now been filed and more can be expected. Is it your intention simply to wait to be sued and pass this problem to your successor?

ANSWER: Contrary to one of the premises of your question, the Attorney General has not waited for OIG and OPR to complete their joint investigations before taking action. The Department has taken a number of affirmative steps to improve Department processes and policies to ensure that these practices do not recur. Many of those steps were taken before OIG and OPR issued their joint reports. In fact, the OIG and OPR Reports recognize many of these improvements. The joint reports also make additional institutional recommendations, which the Attorney General has agreed to implement.

The Department's institutional changes are many, but with respect to the Honors Program and Summer Law Intern Program (SLIP), as the Committee is aware, in April 2007, the Department revised the hiring process for Honors Program candidates and summer law interns. The revisions institutionalized the role of career attorneys in the selection and decision-making process. In July 2008, at the Attorney General's direction and in response to the OIG/OPR report regarding Honors Program and SLIP hiring, the Department strengthened the revised process to clarify that candidates must be reviewed pursuant to merit system principles, and that discrimination based on political affiliation is impermissible.

In September, the Attorney General sent a letter to all of the deselected 2006 Honors Program candidates and offered them the opportunity to interview for the 2008 Honors Program with the component that originally recommended them. Each of the candidates who accept the Department's offer will be evaluated strictly based on merit-system principles.

In short, the Attorney General has been anything but "passive" in his efforts to respond to the allegations of politicization at the Department. We are confident that with the institutional structure now in place, there will not be a recurrence of the problems identified in the joint reports.

Kennedy 8. The related problem that large numbers of career attorneys now working in the Department were selected based on political affiliation and ideology, rather than merit.

ANSWER: It is not correct that a "large number" of career attorneys were selected based on political affiliation. The Inspector General has testified that there are currently approximately 20-30 Immigration Judges which were hired under the flawed system, yet he did not suggest that they should be fired. To the contrary, as recently as October 3, 2008, he testified that the appropriate action regarding the Immigration Judges is to supervise them and take action if they prove incapable of successfully performing their jobs.

With respect to the Honors Program, the individuals selected in 2006 were not selected because of their political affiliation. The report by the Office of Inspector General and the Office of Professional Responsibility examined only the deselection of candidates prior to the interview stage of the hiring process. The Inspector General has likewise testified that those individuals who were approved by the 2006 screening committee were qualified applicants. Furthermore, the selection rate for the approved applicants was about 1 in 4. The Report identified only 16 applicants who were identifiable as Republican and 23 applicants who were identifiable as conservative whom the screening committee forwarded to the components for interviews. Again, all of these candidates had been selected for interviews by the components based on their merit, and there is no evidence to suggest that their ultimate selection was based on anything other than merit. The final hiring decisions were made by the hiring components.

Thus, although the selection process was flawed and problematic, the Department does not agree with the assertion that candidates were selected based only on political affiliation and ideology rather than merit. The career attorneys hired through the flawed process, however, like all Department attorneys, are subject to a period of probation during which their performance is rigorously evaluated. In the case of the Honors Program, for example, political considerations resulted in the deselection of a limited number of candidates from the interview process (and as discussed in the response to question 7, the Department has sought to remedy that situation). However, those attorneys selected for interviews and ultimately offered a position in the Honors Program had been recommended by individual components based solely on their merit. Furthermore, employees undergo regular evaluations even after the probationary period has ended. If anyone – whether Democrat or Republican, whether appointed through a flawed process or a flawless one – is found to be handling or deciding cases based on politics, and not based on what the law and facts require, they will be subject to and will receive appropriate discipline. As the Inspector General himself told the Senate Judiciary Committee, however, the people hired through the flawed process did not, themselves, do anything wrong. It therefore would be unfair – and quite possibly illegal given civil service protections for Schedule A appointees – to fire them or to reassign them without individual cause.

This response should not be read as a defense of the hiring practices because it is not. However, it is important not to overstate the actual impact that the process had on the Department's outstanding career attorney workforce.

Kennedy 9. The possibility that criminal prosecutions, including for vote fraud and of politicians, may have been pursued for partisan purposes.

ANSWER: It is critical to the fair, impartial, and effective enforcement of federal criminal law – and to maintaining public confidence in the Department's criminal enforcement efforts – that all investigations brought and charging decisions made by the Department are handled in a nonpartisan manner. This is especially true for prosecutions involving public officials and other political figures. Accordingly, the Attorney General has repeatedly emphasized, both to Department personnel and publicly, that the selective prosecution of anyone for political purposes will not be tolerated and that cases are to be brought only on the facts and the law.

In February, the Attorney General reiterated this message to all United States Attorneys. In addition, on March 5, 2008, the Attorney General sent a memorandum to all employees reminding them that the Department is entrusted to enforce the law in an impartial and neutral manner and that each employee must be particularly sensitive to safeguarding the Department's reputation for fairness, neutrality, and nonpartisanship. A copy of this memorandum is attached. In July, the Attorney General reiterated this same message to over 160 Assistant United States Attorneys and FBI Special Agents attending the Department's 7th annual Ballot Access and Voting Integrity Initiative. More recently, the Attorney General gave a lengthy public speech on public corruption, in which he stated the following:

> When the Department of Justice pursues [public corruption] cases . . . on behalf of the United States, the Department bears a solemn responsibility. Like the public officials we sometimes investigate and prosecute, we too are public servants, invested with a public trust that we are sworn to uphold. We thus have a duty to ensure that the Department's investigations of public corruption are conducted without fear or favor, and utterly without regard to the political affiliation of a particular public official. After all, a corruption investigation that is motivated by partisan politics is just corruption by another name.
>
> Let me be perfectly clear: Politics has no role in the investigation or prosecution of political corruption or any other criminal offense, and I have seen absolutely no evidence of any such impropriety in my time at the Department, and would not tolerate it.
>
> I consider it one of my paramount responsibilities to ensure that the Department continues to handle its public corruption investigations and prosecutions in a consistent, nonpartisan, and appropriate manner throughout the nation.

The Department's Office of Professional Responsibility is currently investigating several allegations of politically motivated prosecutions, including the prosecutions: (1) in the Middle and Northern Districts of Alabama of former Democratic Governor Donald Siegelman; (2) in the Eastern District of Wisconsin, Georgia Thompson, a state official accused of giving politically motivated preferential treatment to contractors to curry favor

with her Democratic superiors; and (3) in the Southern District of Mississippi of State Supreme Court Justice Oliver Diaz and Paul Minor, a contributor to the Democratic Party. In addition, OPR is inquiring into the denial of a defense motion alleging improper political motivation in the prosecution of Democratic contributor Geoffrey Fieger in the Eastern District of Michigan. We do not believe that any prosecution brought by the Justice Department between 2001 and 2007 was brought for political purposes.

Kennedy 10. The likelihood that civil voting enforcement decisions have been made for partisan political purposes.

ANSWER: In March 2008, the Attorney General issued a memorandum to all Department employees on election year sensitivities. He emphasized that the Department must be particularly sensitive to safeguarding the Department's reputation for fairness, neutrality and nonpartisanship. He stated that politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges; that law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election; and that we must not do anything for the purpose of giving an advantage or disadvantage to any candidate or political party. These principles apply with equal force to criminal investigations as well as civil voting enforcement decisions. The Attorney General reiterated these principles when he spoke to hundreds of Department employees at the Ballot Access and Voting Integrity Symposium in July 2008 and when he visited the Voting Section of the Civil Rights Division in September 2008. The Acting Assistant Attorney General for the Civil Rights Division has repeated the same message at the July 2008 Symposium as well as in other conversations with the Voting Section. She has emphasized that any decisions must be made after a thorough and careful investigation of the facts and analysis of the law. She directed all employees to follow the facts and the law wherever they may lead and let the chips fall where they may.

The Department is committed to the vigorous and even-handed enforcement of the federal civil voting law and making enforcement decisions that do not turn on partisan considerations. Career staff is involved in the recommendation and decision-making process of every enforcement action brought by the Division and their opinions are highly valued. In every matter, we carefully analyze the strengths and weaknesses of arguments on both sides and include all relevant information. In sum, the Department encourages a robust discussion of diverse viewpoints before we come to final enforcement decisions based on the applicable law and the facts before us.

Kennedy 11. Allegations that career attorneys have been transferred, and denied promotions, raises and assignments because of partisan affiliation or perceived ideology.

ANSWER: The Department is in the process of contacting those who may have been improperly denied temporary details to jobs at Main Justice to see if they are interested in any new opportunities that are or may become available. Some of those contacted are no longer interested in the position that may have been improperly denied them. For those interested in a similar opportunity, the dialogue is ongoing, and the Department will seek to match the needs of the Department with the potential detailee's interest as comparable positions become available.

Kennedy 12. The failure of The Department's internal management and complaint systems to prevent the systematic politicization of the Department's personnel practices.

ANSWER: Although the reports revealed problems, the Department does not agree with the assertion that there was a "systematic politicization of the Department's personnel practices." The vast majority of the Department's over 100,000 employees were hired through systematic hiring procedures devoid of any allegations of improper political influence. Nevertheless, the Department has taken affirmative steps to ensure that the personnel practices are understood and followed by all. It has instituted mandatory training for all political appointees regarding Merit System Principles and Prohibited Personnel Practices. It has also instituted a pilot professionalism training requirement for most attorneys, and the Attorney General has made clear, in both private meetings with Department employees and in public appearances, that it is neither permissible nor acceptable to consider political affiliation in the hiring of career Department employees. The Attorney General has expressed confidence that the supervisors working for him know that they are expected to live up to their titles – to supervise – and that they have primary responsibility to ensure that hiring in their divisions and other units is lawful and is proper. We are confident that, if problems were to recur and anyone in the Department became aware of them, those people would promptly alert more senior officials in the Department, up to and including the Attorney General as necessary.

Kennedy 14. Will you commit to sharing with this Committee all of OPR's major reports that have been or will be issued during your tenure as Attorney General?

ANSWER: See response to question 13.

Kennedy 15. OPR has fallen far behind in issuing its annual reports. It only recently issued its annual report for 2005. Will you take steps to improve the timeliness of its reports?

ANSWER: OPR is currently working on annual reports for FY 2006 and 2007 and will issue those reports as soon as it completes them.

Kennedy 16. OPR is severely understaffed for the tasks it has been assigned or has undertaken. Will you reexamine whether all of OPR's current investigations should continue to be conducted by OPR, rather than the IG? Will you ensure that OPR has the resources necessary to complete thorough investigations in a timely fashion?

ANSWER: The Department will take your concerns into consideration as it continues to evaluate whether additional resources and personnel should be committed to OPR. The Attorney General is aware of the matters which OPR has under investigation, each of which is properly within the jurisdiction of OPR, not OIG. The Department is confident that OPR has the experience and expertise to thoroughly investigate these matters.

Kennedy 17. Since 2002, the Department of Justice has made investigation of alleged voter fraud a priority. In Crawford v. Marion County Board of Electors, the Department defended the constitutionality of Indiana's strict in-person voter photo ID law, despite the law's burden on some citizens' right to vote, based on the law's supposed prevention of in-person voter fraud. Nonetheless, the nominee for Assistant Attorney General for Civil Rights has stated that the Criminal Division "is not aware of any individuals prosecuted federally since 2002 for 'in-person voter fraud."

To your knowledge, has the Department of Justice ever prosecuted anyone for in-person voter fraud at the polls? If so, please provide:

a. **The number and dates of prosecutions, if any, brought by the Department alleging in-person voter fraud at a polling place;**

b. **The number of convictions, if any, involving in-person voter fraud at a polling place;**

c. **The number of cases identified in response to question b. in which the in-person fraud was intentional rather than the result of a mistake; and**

d. **The name and case numbers for any criminal cases identified in response to question B.**

ANSWER: Our response to this question must be limited to the period commencing with the creation of the Ballot Access and Voting Integrity Initiative in October 2002, as the Criminal Division did not compile records relating to the Department's prosecution of election fraud and voter fraud offenses prior to that date. Since October 2002, we are not aware of any federal prosecutions of individuals for "in-person voter fraud at the polls." The lack of such prosecutions does not, of course, mean that this sort of offense does not occur. Indeed, in-person voter impersonation is very difficult to detect, particularly in those states that do not have a voter identification requirement. Thus, voter fraud is not always reported to law enforcement authorities. Moreover, over the years, the Criminal

Division has been careful to weed out cases where the evidence demonstrated that the prospective offender had, for whatever reason, a good faith belief that he or she was entitled to vote under the circumstances in question, and where prosecution would therefore be unjustified.

Kennedy 18. Please provide any other information the Department has about the number and nature of the Department's voter fraud prosecutions since 2001, including the number of such prosecutions that have resulted in conviction. In addition, please explain how the Department defines voter fraud for purposes of its enforcement activities.

ANSWER: (a) As noted above, the Department began maintaining data regarding its prosecutions of vote fraud after the establishment of the Ballot Access and Voting Integrity Initiative in October 2002. Since that date, 150 persons have been charged with various vote fraud offenses and 115 persons have been convicted of these crimes.

(b) Under federal law, vote fraud generally involves corruption of one of the three basic components of the voting process: the registration of voters, the obtaining and marking of ballots, or the counting and certification of election results. Common examples of vote fraud include vote buying, multiple voting, ballot-box stuffing, providing false names or other qualifying data to election officials, marking voters' ballots without their knowledge and consent, making false claims of citizenship to register or vote, and conspiring to prevent prospective voters from voting.

Kennedy 23. News accounts suggested that the Federal Bureau of Investigation opened an investigation of the above complaints on deceptive telephone calls to Virginia voters in 2006. If so, please state whether that investigation is ongoing, and whether it has given rise to any prosecution?

ANSWER: The FBI conducted a preliminary investigation of allegedly deceptive telephone calls to Virginia voters in 2006. The investigation has been closed. There were no prosecutions.

Kennedy 24. Has the Department investigated any of the other alleged deceptive practices described above? If so, please state whether those investigations are ongoing and whether they have resulted in any prosecution.

ANSWER: Yes, the FBI conducted a preliminary investigation of an allegedly deceptive flier sent to voters in Allegheny County, Pennsylvania, in connection with the 2004 general elections. The investigation has been closed. There were no prosecutions.

Kennedy 25. The Small Business Administration recently published a proposed rule for implementing the Women's Procurement Program, 72 Fed. Reg. 73,295. The proposed rule states that it was developed with SBA after "discussions with the Department of Justice."

The proposed rule contradicts Congress' intent that the Women's Procurement Program should be used to help level the playing field for women-owned businesses by providing them with significant federal contracting opportunities. The SBA rule restricts the program to just four of the thousands of business industries in which federal contracting dollars are spent. It also requires that before any federal agency may implement the program, the agency must establish that the agency itself has engaged in discrimination against women. The rule also embraces a flawed legal interpretation that suggests that these restrictions on the program – i.e., implementation only in four industries and by agencies that have made agency-specific findings of discrimination – somehow are constitutionally required.

Gender-conscious government programs such as the Women's Procurement Program must be supported by an "exceedingly persuasive justification," i.e., substantially related to an important government interest. Yet the SBA's proposed rule adopts a standard that far exceeds this constitutional requirement. The rule imposes restrictions that exceed even the requirements established by the Supreme Court in reviewing race-conscious government action subject to strict scrutiny, the highest level of constitutional review.

Given that nothing in the Constitution or the women's procurement statute, Section 8(m) of the Small Business Act, mandates such an overly restrictive rule, does the Department contend that the SBA's proposed rule is consistent with legal requirements? If so, please explain in detail.

ANSWER: The Department does not agree that the proposed rule characterizes any aspect of its approach as "constitutionally required." The Department also notes that the proposed rule implements a statutory authorization, not a "mandate." *See* 15 U.S.C. § 637(m)(2). The Department believes the rule is consistent with relevant law, namely the Constitution and the express terms of the authorizing statute (making due allowance for the drafting error contained in 15 U.S.C. § 637(m)(2)(C)), because the proposed rule acts on the statute's authorization to restrict procurement opportunities to women-owned small businesses based on the results of a study the SBA commissioned as required by the statute, and it prescribes a procurement approach that is consistent with the constitutional requirement that gender-based preferences must be substantially related to an important government interest, *see United States v. Virginia*, 518 U.S. 515, 533 (1996); specifically, the interest in remedying discrimination in the economic sphere that will be affected by the gender-based government preference.

Kennedy 26. Do you agree that the SBA rule restricts implementation of the Women's Procurement Program more narrowly than the Constitution requires? If not, please explain in detail the reasons for your answer.

ANSWER: The only thing the Constitution "requires" with regard to implementation of the Women-Owned Small Business Contract Assistance Procedures is that the government implement the gender-based preferences authorized by the statute in a manner consistent with the equal protection component of the Fifth Amendment's Due Process Clause. The Department believes that the proposed rule is consistent with constitutional equal protection as defined by the courts because the proposed rule requires government agencies to award the gender-based preferences authorized by the proposed rule only in circumstances where the preferences are substantially related to the important government interest in remedying gender discrimination in the economic sphere that will be affected by the preference. The fact that the rule may require agency preference programs to be based on more than the bare minimum some courts would consider necessary for a gender-based preference to survive a constitutional challenge does not render the proposed rule "inconsistent" with constitutional or other legal requirements.

Kennedy 27. As I made clear in comments to the SBA, I believe that the proposed rule contradicts Congressional intent and should be withdrawn or substantially revised. Given the inconsistency between the SBA rule and the requirements of current law, do you agree that SBA should withdraw the proposed rule? If not, please identify any judicial decision that you believe supports the SBA's contention that Congress may enact a remedial program only to address discrimination by a federal government agency.

ANSWER: The Department takes no position on whether SBA should withdraw the proposed rule.

Kennedy 45. The federal government has contracted with private companies to house inmates and immigrant detainees. Recently, media reports have raised questions about the treatment of inmates and detainees in facilities administered by the Corrections Corporation of America (CCA).

Has the Department brought any enforcement actions against CCA or entered into any settlements or agreements involving CCA?

ANSWER: The responsibility for housing immigrant detainees lies with the Department of Homeland Security. The Bureau of Prisons has contracts with CCA for the operation of some prisons that house offenders convicted and sentenced in U.S. District Court. The Bureau of Prisons has not brought any enforcement actions against or entered into any settlements or agreements involving Corrections Corporation of America.

Kennedy 46. Does the Department of Justice currently have any open investigations into conditions at CCA facilities?

ANSWER: No. Please note that the Civil Rights Division is not authorized to conduct investigations of privately-run facilities such as those managed by CCA. Pursuant to the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), 42 U.S.C. § 1997, and the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, the Civil Rights Division protects the constitutional and federal statutory rights of persons confined in facilities for individuals who are mentally ill or developmentally disabled, nursing homes, juvenile correctional facilities, and adult jails and prisons owned or operated by state and local governments.

Kennedy 47. For each open or resolved investigation, including closed investigations, involving potential civil rights violations or other abuse, please provide a brief summary of the subject matter of the investigation and identify the agency within the Department that responsible for the investigation.

ANSWER: Please see the response to question 46.

Kennedy 48. Please provide the same information for matters that have been investigated and closed involving CCA.

ANSWER: There are no open or closed investigations initiated by the Bureau of Prisons into conditions at any CCA facility.

Kennedy 49. What steps has the Department taken to ensure that CCA and other private contractors comply with the Constitution and federal statutes that protect the rights of institutionalized persons?

ANSWER: Please see the response to question 50.

QUESTIONS FROM SENATOR KOHL

Kohl 51. At the hearing, I asked you whether you would support the Justice Department possessing the authority to bring antitrust lawsuits against OPEC member nations. In response, you stated that you would need to study the text of my NOPEC bill (The No Oil Producing and Exporting Cartels Act, S. 879), and the conditions in the bill under which the Department would have such authority, before answering the question. In addition, your answer focused on the consequences of bringing an action against OPEC member nations. But the question I asked you was merely whether it would be desirable for the Justice

Department to possess the authority to enforce antitrust law against OPEC member nations.

My legislation does not contain any conditions or limitations on the Justice Department's exercise of authority to bring either a criminal or civil action against OPEC member nations for violating U.S. antitrust law. My legislation simply removes the protections of sovereign immunity or the act of state doctrine from nations participating in oil cartels to limit the supply or fix the price of oil or petroleum products. Whether to bring a case would be entirely within the prosecutorial discretion of the Justice Department. In this regard, an action permitted under the NOPEC legislation would be no different than any other antitrust enforcement action taken against cartels undertaken by the Justice Department – such antitrust actions are undertaken at the sole discretion of the Justice Department.

With this in mind, would you support giving the Justice Department the authority to bring an antitrust action against members of the OPEC cartel when they engage in price fixing or supply limitations designed to raise price, keeping in mind that the decision to bring such an action would be within the sole discretion of the Department?

ANSWER: The Administration believes the appropriate means for achieving a market-based international energy trade and investment system lie in diplomatic efforts by the United States with the countries involved in that trade, rather than lawsuits against those countries in U.S. courts. As the Attorney General mentioned during his appearance before the committee on July 9, 2008, suing foreign sovereign nations under the antitrust laws raises a number of sensitive diplomatic and security considerations with implications far beyond antitrust. Many of these concerns also apply to creating the authority to bring such a suit. For this reason, the current and past Administrations have elected to pursue concerns about OPEC through diplomatic avenues rather than through the courts. Therefore, we do not support legislation giving the Department such authority.

Kohl 52. If you do not support giving the Justice Department such authority, please explain why it would not be desirable to merely grant this authority to the Department when it is the Department's discretion as whether to exercise it?

ANSWER: Enacting such legislation is likely to raise sensitive diplomatic and security considerations. This Administration, as have past Administrations, believes that the appropriate policy is to pursue concerns with OPEC through diplomatic avenues rather than through legislation and the courts.

Kohl 53. Isn't it in the public interest to give the Department this authority to take action against the OPEC cartel, like any other cartel?

ANSWER: No. While cartel enforcement is the Department's top antitrust enforcement priority, as the Attorney General mentioned during the July 9 hearing, suing foreign sovereign nations under the antitrust laws raises a number of sensitive diplomatic and security considerations with implications far beyond antitrust. For this reason, the current and past Administrations have elected to pursue concerns about OPEC through diplomatic avenues rather than through the courts.

QUESTIONS FROM SENATOR SCHUMER

Schumer 54. You testified in the hearing that you regularly meet with the head of the Office of Professional Responsibility (OPR). Are these meetings routine or are they scheduled when you or the Director of OPR determine that there is a need for you to meet?

ANSWER: The Attorney General and the head of the Office of Professional Responsibility meet on a regularly scheduled basis. In addition, they meet on an as needed basis if either OPR's Counsel or the Attorney General determines that a meeting is required.

Schumer 55. Who attends these meetings?

ANSWER: The Attorney General, Deputy Attorney General, head of the Office of Professional Responsibility and certain staff members.

Schumer 56. Is it only Director H. Marshall Garrett [sic] and yourself or do other OPR staff members attend?

ANSWER: Generally, OPR's Counsel and Deputy Counsel attend the regularly scheduled meetings.

Schumer 57. In these meetings, do you discuss particular ongoing investigations?

ANSWER: The Department does not disclose the specifics of what is discussed between the Attorney General and a Department component head. In general, however, the head of the Office of Professional Responsibility sets the agenda and on occasion may notify the Attorney General of the initiation of a significant or high-profile investigation or discuss the results of such an investigation. However, OPR conducts its investigations independently, and the Attorney General is usually not apprised of specific investigative steps or strategies OPR takes in the course of the investigations it conducts.

Schumer 58. If so, are there specific investigations about which you are more regularly briefed than others?

ANSWER: Please see the response to question 57.

Schumer 59. Which investigations?

ANSWER: Please see the response to question 57.

Schumer 60. Have you ever directed OPR to take a different strategy than the investigators originally proposed?

ANSWER: The Department does not disclose the substance of internal discussions between the Attorney General and the head of one of the Department's Components. However, as noted, OPR conducts its investigations independently. In general, the Attorney General is not kept apprised of specific investigative steps or strategies OPR takes in the course of the investigations it conducts. Consistent with the Department's long standing practice, OPR is free to take whatever investigative steps it believes are necessary.

Schumer 61. Have you ever directed OPR investigators to expand their lists of interviewees?

ANSWER: Please see the response to question 60.

Schumer 62. Do you ever disagree with the decisions OPR makes regarding continuing or ending an investigation?

ANSWER: Please see the response to question 60.

Schumer 63. Has OPR interviewed Karl Rove?

ANSWER: Please see the response to question 60.

Schumer 64. If they have not, will you direct them to interview Karl Rove about the Don Siegelman case?

ANSWER: Please see the response to question 60.

Schumer 65. A recent LA Times article on the OPR suggested that the office had been "operating under a growing shroud of secrecy." It also says that in 2001, the Department of Justice (DOJ), "reversed a decade-old policy of publicly disclosing detailed summaries of OPR investigations."

Will you re-examine the policy of not disclosing summaries of OPR investigations, even in significant and high profile cases?

ANSWER: Please see response to question 13.

Schumer 66. In a time when there is increased public concern about the DOJ, do you believe that we should we have more public summaries?

ANSWER: Please see the response to question 13.

Schumer 67. If, as some have suggested, there is a resource problem, what additional resources would be required to allow greater transparency through, among other things, more frequent public releases of information?

ANSWER: The Department believes that OPR has sufficient resources to carry out its mission effectively.

Schumer 68. J. William Leonard, the top government official in charge of classification from 2002 until his retirement this year, has expressed his complete dismay at the Office of Legal Counsel's (OLC) classification practices. He says that the so-called March 2003 "Yoo Memo" on interrogation techniques should never have been classified because it contained "purely legal analysis."

Are you prepared to say that every word of every currently secret legal opinion would harm national security if made public?

ANSWER: No officials within OLC have original classification authority, and any classified memoranda produced by the Office of Legal Counsel are either classified by another office or agency with original classification authority or are derivatively classified based on the classification of the documents and information from which they are derived. OLC has taken and will continue to take appropriate steps to ensure that its classification practices comply with appropriate classification procedures, including Executive Order 12958 and its implementing directive, 32 C.F.R. Part 2001.

The March 2003 memorandum was classified under the authority of the Department of Defense ("DoD"), using that agency's classification authority because the memorandum related to the guidance of a DoD working group charged with developing recommendations for the Secretary of Defense concerning a range of possible

interrogation techniques for use with alien unlawful combatants detained at Guantanamo Bay. The subject matter addressed by that working group project was classified at that time because it related to the conduct of current intelligence collection activities and other military operations the public disclosure of which, including to al Qaeda and other adversaries of the United States, reasonably could have been expected to cause serious damage to national security and foreign relations interests of the United States.

Schumer 69. Will you commit to reviewing DOJ's policy on classification of OLC opinions?

ANSWER: The Department will ensure that OLC's classification practices comply with all applicable classification procedures.

Schumer 70. Will you commit reviewing all the OLC's classified opinions and ensure that any non-sensitive information, such as "purely legal analysis," is released?

ANSWER: The Department will ensure that OLC's classification practices comply with all applicable classification procedures. Note that even "purely legal analysis," if it concerns highly classified programs and information, may itself legitimately be classified.

Schumer 71. What criteria does DOJ use to determine whether such memos from previous administrations can be released?

ANSWER: Requests for the release of classified OLC opinions occur most often under the Freedom of Information Act, 5 U.S.C. § 552. When the Department receives such a request, it generally refers the classified opinion to the original classifying authority for a declassification review. If the original classifying authority concludes that the information in the opinion is no longer classified, the Department will release the opinion, provided that the release is consistent with other legitimate Executive Branch confidentiality interests.

Schumer 73. As you know, some department documents are the subject of disputed subpoenas or requests for information from Congress. In particular, Congress has requested from the DOJ documents relating to the Valerie Plame investigation, interrogation policies, detention policies, the U.S. Attorneys firings, and attorney hiring practices. Of course, the Administration has claimed executive privilege or various other privileges to avoid disclosing much of the information requested, and these claims are still being disputed and negotiated.

Will you make a commitment to personally see to it that all documents requested by Congress from the DOJ at any point during the Bush Administration – including documents you have so far refused to release – will be preserved for the next Administration?

ANSWER: The Department has preserved, and will continue to preserve, documents formally requested or subpoenaed by congressional committees and will continue to maintain documents pursuant to its record retention requirements.

Schumer 74. As you know, last month, the Supreme Court ruled in *District of Columbia v. Heller* that the Second Amendment protects an individual's right to possess a firearm. While the court identifies a number firearms laws and regulations that will probably not be affected by the decision, it can be argued that the court's opinion is significant in the questions it *does not* answer. I am concerned that the decision may open the door to challenges to reasonable existing federal laws aimed at the transfer, possession, or use of illegal firearms.

In your, or the Justice Department's view, does anything in the Supreme Court's decision in *Heller* call into question the constitutionality of any provision in the United States Code?

ANSWER: No. The Court's ruling is in accordance with the text of the Second Amendment, historical practice, and the Attorney General's 2001 guidance on the scope of the Second Amendment. As was made clear in that 2001 guidance, the Department "will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws."

Schumer 75. Does anything in the decision call into question the constitutionality of the federal background check system for firearms purchases?

ANSWER: No.

Schumer 76: How might the Justice Department's strategy or approach to prosecuting firearm offenses (be) any different in light of *Heller*?

ANSWER: Please see the response to question 77. *Heller* does not change the Department's present strategy or approach in the prosecution of federal firearms offenses.

Schumer 77: What assurances can you give about the Justice Department's commitment to continuing to prosecute firearms offenses, in light of *Heller*?

ANSWER: The Department of Justice's commitment to prosecuting firearms offenses is not impacted by *Heller*. *Heller* made clear that an individual's right to "keep and bear arms" under the Constitution is not a right without restrictions. The Court cited a non-exhaustive list of permissible restrictions regarding firearms possession and ownership, to include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. ____ (2008), at 54. Often-used statutes, such as Title 18 U.S.C. §§ 922(g) and 924(c), remain effective tools in the Department's efforts to combat gun violence and illegal gun possession.

QUESTIONS FROM SENATOR DURBIN

Durbin 84. The DOJ Inspector General and Office of Professional Responsibility recently issued a scathing report about unlawful hiring practices used by the Justice Department from 2002 to 2006 in hiring career attorneys, and even summer interns. The report indicates at least 359 applicants who had worked for Democrats or liberal public interest groups were denied interviews and jobs at DOJ. For example:

- **One applicant graduated #1 in his class from my alma mater, Georgetown Law School, but was rejected because he had served as a summer intern for Senator Feingold and for the group Human Rights Watch**

- **Another applicant was a Rhodes Scholar and member of the law review at Yale Law School – but she was rejected because she had been a research assistant to a liberal law professor and had interned at the Minnesota Advocates for Human Rights and at a legal services organization**

- **A Harvard Law School student with an A- average was rejected because he had written an essay expressing regret that he had not participated in the 1999 World Trade Organization protest in Seattle**

- **Another applicant was denied consideration because she was clerking for a Clinton-appointed federal judge and had written an article on gender discrimination in the military**

I appreciate the statement you released in response to this IG/OPR report and your willingness to implement its recommendations. But the chief culprits – Michael Elston and Esther McDonald – have not been subject to discipline by DOJ because they left their jobs before the report came out and are no longer employed by DOJ. At last week's hearing, Senators Feinstein and Feingold asked you about this matter and you expressed little interest in punishing the violators.

What punishment – other than public criticism contained in the IG/OPR report -- do you think should be meted out to individuals like Mr. Elston and Ms. McDonald who violated civil service laws and DOJ policies but who are no longer employed by DOJ?

ANSWER: As the question notes, because Mr. Elston and Ms. McDonald are no longer employed by the Department, they can not be subject to disciplinary action by the Department. Furthermore, as the Attorney General recently stated, not every wrong, or even every violation of the law, is a crime. With respect to Mr. Elston and Ms. McDonald, the joint report found violations of the civil service laws, but not violations of criminal law. The conduct of Mr. Elston and Ms. McDonald has now been laid bare by the Justice Department for all to see, and we will follow the recommendation in the Report that we consider the findings should either Ms. McDonald or Mr. Elston apply in the future for another position with the Department. As a general matter in such cases, where disciplinary referrals are appropriate, they are made. But, as this Committee is well aware, the Justice Department cannot bring any type of prosecution where there is no violation of the criminal laws.

Durbin 85. What punishment would be appropriate for individuals who violated civil service laws and DOJ policies and who continue to work at DOJ?

ANSWER: It would be inappropriate for the Department to speculate as to what discipline might be appropriate in the situation described above. The Department evaluates discipline on a case-by-case basis, after examining all of the facts and circumstances, as required by *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

Durbin 86. A recent article in *Legal Times* indicates that D.C. and Virginia bar officials are reviewing the IG/OPR report. Do you believe Mr. Elston and Ms. McDonald should be disbarred as a result of their infractions?

ANSWER: It would be inappropriate for the Attorney General to comment on what action, if any, the D.C. and Virginia Bar Associations should take with respect to such referrals

Durbin 88. What remedies will you provide to the hundreds of applicants who were discriminated against over the past seven years based on their partisan affiliations?

ANSWER: Please see response to question 7.

Durbin 89. In your testimony, you indicated that voting rights enforcement was one of your highest priorities. In recent years, there have been many press reports

about the mistreatment and demoralization of career employees in the Civil Rights Division's Voting Section. Career attorneys have been second-guessed, overruled, and driven out by political appointees and their hand-picked managers. The most recent allegations concern career employees in the Voting Section's "Section 5" unit.

According to a June 2, 2008 article in *Legal Times* entitled "Civil Rights Division Employee Sues DOJ, Alleges Discrimination," a recent lawsuit was filed against the Justice Department alleging that your managers in the Voting Section circumvented regular hiring procedures in order to avoid giving African-American employees in that section an opportunity to apply for Section 5 analyst positions. The complaint also alleges that three male attorneys in the Voting Section made racially and sexually derogatory remarks about female analysts in the section.

What steps have you taken to investigate these allegations of discrimination and harassment in the Civil Rights Division's Voting Section, and to remedy the problem?

ANSWER: The Department takes allegations of discrimination very seriously. There are well-established Equal Employment Opportunity complaint procedures in place at the Department of Justice to investigate and address allegations of discrimination. The Voting Section's management and Civil Rights Division leadership are in regular contact and are available to address any problems that arise. Additionally, last year all employees of the Civil Rights Division were required to receive training on harassment in the workplace. The Division also has an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns. Finally, the Division's leadership has issued a memorandum to all employees as a reminder that "there will be no discrimination based on race, color, national origin, gender, age, political affiliation (including using ideological affiliation as a proxy for determining political affiliation), disability, marital status, sexual orientation, status as a parent, membership or non-membership in an employee organization, or personal favoritism." As for the specific allegations referenced in the question, the parties have reached a settlement agreement that resolves the matter.

Durbin 90. Did the Voting Section, in fact, discontinue its practice of advertising Section 5 analyst positions in 2006? If so, please explain why.

ANSWER: Between 2006 and 2007, four (4) Voting Section analysts were hired directly from the Department's Intern Program rather than through advertised job postings. However, since December 2007, all analyst positions have been filled through advertised job postings and the Department ended any earlier practice of filling analyst positions without first posting them.

Durbin 92. Please provide information about which Civil Rights Division employees, if any, are required to attend racial and sexual harassment training and please provide information about the nature and length of any such training.

ANSWER: In 2007-2008, the Civil Rights Division required all Division employees, interns, and contract employees to attend 90 minutes of live training in non-discrimination issues, including sexual and racial harassment. Managers were provided training separately from non-managers. The Civil Rights Division has continued to provide No Fear Act training to all incoming employees during their administrative orientation, which includes information regarding employees' rights and remedies under anti-discrimination and whistleblower protection laws. Because the No Fear Act training is required biannually, the Civil Rights Division plans to require every employee to receive an hour of No Fear Act training by the end of 2008.

Durbin 93. Hans von Spakovsky, whose nomination to the Federal Election Commission was rejected by the U.S. Senate due to his efforts while at the Justice Department to advance a partisan agenda at the expense of minority voting rights, wrote a recent article for the Heritage Foundation entitled "The Threat of Non-Citizen Voting." In this article, he made the following recommendation: "The DOJ should file enforcement actions against all states that allow an individual to register to vote when he or she has not answered the citizenship question on the voter registration form required by HAVA."

This is a troubling recommendation. Many eligible citizens make mistakes when filling out voter registration forms for which they should not be disenfranchised. For example, the federal mail-in registration form has a "check box" for citizenship and an additional requirement to sign an oath stating that you are a citizen. Some voters, assuming they need to affirm their citizenship only once, either don't sign the card or don't check the box. Mr. von Spakovsky's recommendation is that states that grant voting rights to such individuals – who are voter-eligible U.S. citizens – should be sued.

Will you assure this committee that the Justice Department will not follow this misguided recommendation of Mr. von Spakovsky?

ANSWER: Section 303(b)(4) of the Help America Vote Act of 2002, 42 U.S.C. § 15483(b)(4), requires the citizenship question and checkbox to be included on the mail voter registration form developed under Section 6(a) of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-4(a). Although the Civil Rights Division has not filed any lawsuits against any states for their failure to enforce completion of the citizenship checkbox by voter registration applicants, the question of whether the Civil Rights Division would file such a lawsuit would depend upon the evidence surrounding the practices of the state in question.

QUESTIONS FROM SENATOR GRASSLEY

Grassley 95. After Hurricane Katrina, the Executive Office for the United States Trustees provided guidance for bankruptcy cases during natural disasters, including allowing for flexibility of bankruptcy deadlines and other bankruptcy filing requirements, as well as extending waivers of credit counseling and debtor education requirements.

I understand that those guidelines and waivers worked well during Hurricane Katrina, is that correct?

ANSWER: Yes, the guidelines did work well in the aftermath of Hurricane Katrina, and the Executive Office for United States Trustees reissued its guidance on enforcement discretion after the beginning of the Midwest floods.

Grassley 96. Do those guidelines apply to folks filing for bankruptcy in areas of Iowa and other states impacted by the recent flooding disaster?

ANSWER: Yes, the guidelines apply to all natural disaster victims, including those affected by the Midwest floods.

Grassley 97. Have you seen any problems with respect to bankruptcy filings in Iowa?

ANSWER: The bankruptcy system is fully operational in Iowa, and debtors in need of relief are able to file their bankruptcy petitions. The United States Trustee acted quickly to assess the situation and has worked closely with the courts and the debtor bar to address issues. After careful consideration of many factors, the United States Trustee did determine that a waiver of the credit counseling and debtor education requirements in Iowa's two judicial districts was not warranted. To date, there have been no reported instances of debtors not being able to obtain these services.

Grassley 98. What kind of flexibility do the U.S. Trustee Program enforcement guidelines provide for?

ANSWER: Among other things, the guidelines provide that United States Trustee Program attorneys will deem financial hardships caused by the floods to be a "special circumstance" for purposes of applying the statutory means test governing eligibility for chapter 7 relief. The guidelines also provide for flexibility in the United States Trustees' enforcement of various Bankruptcy Code provisions, including deadlines for the production of financial documents by debtors whose personal papers may have been destroyed by the floods.

Grassley 102. During confirmation hearings I asked Attorney General Mukasey about the False Claims Act and how important this statute is for recovering money lost to fraud against the Government. On July 2, 2008, the Washington Post reported that there are nearly 900 False Claims Act cases under seal at the Department of Justice.

What the article did not point out was that in responses to written questions from a January hearing, the Justice Department noted that of the 900 cases, 540 have been under seal longer than 13 months, and more astonishingly, 130 have been under seal for more than 36 months. FCA cases are complex and often involve significant resources, but I'm worried that such a large volume of cases being held under seal causes problems.

Specifically, I'm concerned that holding these cases under seal may harm *qui tam* whistleblowers that are often at risk of retaliation when cooperating with the government and it may also allow known frauds to continue against the American taxpayer.

On average, how many FCA cases does the Department dispose of, either through settlement, declination, or via trial, per year?

ANSWER: The 900 cases referenced in the July 2, 2008 *Washington Post* article represents the active cases under investigation by the Justice Department's Civil Division and U.S. Attorney's Offices. Contrary to the implication of the article, a new case does not wait in a queue for earlier cases to be completed. The investigation of a *qui tam* case begins immediately upon filing. The number of cases under investigation has remained essentially constant since at least FY 2004, and according to current data, during that period, the average length of time from the Civil Division's receipt of a *qui tam* case until the Department notifies the court of its election decision is approximately 15 months.

During that same period, on average, the number of *qui tam* cases that were disposed of by settlements, judgments, declinations, or dismissals has exceeded 300 annually. The number of *qui tam* cases disposed of each year has roughly equaled the number of new *qui tam* cases filed.

Grassley 103. Does the Department need additional resources in the Civil Division to clear this extensive backlog of FCA cases?

ANSWER: As explained in the preceding response, the 900 cases under seal represent the current active docket under investigation by the Justice Department's Civil Division and U.S. Attorney's Offices. Thus, there is no "backlog" of FCA cases.

As previously explained, the major sources of funds available to support the Department's enforcement efforts include the Health Care Fraud and Abuse Control account ("HCFAC") and the Three Percent Fund. The HCFAC was established by the

Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Three Percent Fund was established as part of the fiscal year 1994 appropriation for the Departments of Commerce, Justice, and State. The fiscal year 1994 appropriation allowed the Attorney General to use up to three percent of all amounts recovered by the Department's civil debt collection activities. False Claims Act litigation comprises the vast majority of the recoveries contributing to the Three Percent Fund.

The Department's base budget for the Civil Division is devoted almost exclusively to defensive litigation – cases that *require* representation to ensure that the government does not lose hundreds of billions of dollars in adverse judgments and settlements. As the number of defensive cases has outpaced the availability of appropriated funds, funding for affirmative cases has increasingly relied on non-appropriated sources such as the HCFAC and the Three Percent Fund.

The President's budget this year requested an additional $18.967 million for the Department to handle health care fraud matters. A significant way that Congress can support the Department's ability vigorously to pursue fraud cases is to support the President's budget.

Grassley 104. Does the Department of Justice anticipate that the current statute of limitations for False Claims Act cases will force the Department to settle cases prematurely in order to reach a resolution before the statute of limitations runs?

ANSWER: The Department is mindful of statute of limitations considerations in all of its cases and takes appropriate measures to ensure that cases are resolved in a timely fashion. For example, we do this by prioritizing time-sensitive matters, negotiating tolling agreements, and, where supported by the evidence, filing suit.

Grassley 105. If so, how many cases does the Department believe are in jeopardy of lapsing because of the statute of limitations?

ANSWER: Please see the response to question 104.

Grassley 106. Just a few weeks ago, the Supreme Court issued a decision interpreting portions of the False Claims Act in *Allison Engine Company*. This opinion created a new intent requirement for the Government and *qui tam* relators to prove before liability can attach to certain claims. I'm afraid that this new requirement will hinder the ability of the Government to recover Government money lost to fraud.

My concerns were heightened when a Judge in my home state of Iowa recently dismissed a False Claims Act case on his own motion despite objections from the

Justice Department. I'm alarmed that this case, *U.S. v. Hawley*, represents the beginning of a series of case dismissals that may occur.

In fact, the decision is very damaging to the FCA because the Judge said that a false statement can never be "material to the Government's decision to pay" when a private entity pays the claim and then seeks reimbursement from the Government.

Does the Department of Justice agree that the decision in Allison Engine is a set back for the Federal Government in prosecuting FCA cases?

ANSWER: To date, only a handful of district courts have had an opportunity to consider the Supreme Court's decision in *Allison Engine*. Moreover, only the *Hawley* court has relied upon *Allison Engine* to dismiss claims brought by the government. The government has appealed the decision in that case, and recently filed its opening brief. Accordingly, in the Department's view, it is too early to determine the impact of *Allison Engine* and how it will be interpreted and applied by the lower courts.

Grassley 107. My staff has contacted the Department to see if a legislative fix is necessary, but hasn't heard any substantive feedback yet. Has the Department of Justice determined what the full impact of *Allison Engine* will be?

ANSWER: With respect to your question whether the Department has determined what the full impact of *Allison Engine* will be, please see the answer to question 106. Given the uncertainty about the impact of this decision, the Department has not yet formulated a position on the necessity of a legislative fix.

Grassley 108. When can my staff expect to hear some substantive feedback from the Department on this?

ANSWER: As noted in the preceding response, the Department has not yet formulated a position on the need for a legislative response to the *Allison Engine* decision. The Department would be happy to review any proposals that the committee may have, however, and looks forward to working with the committee on this issue.

Grassley 116. As you know, Americans are being pinched by outrageously high gasoline prices at the pump. Some say that this is the result of speculation and manipulation of crude oil in the marketplace. I've written to the Commodities Futures Trading Commission (CFTC) to look into the speculative trading of energy commodities, and to pursue policies to guarantee the integrity of energy future markets.

Mr. Attorney General, what role does the Justice Department play in making sure that illegal activity is not going on with respect to energy trading?

ANSWER: The Department of Justice has made the protection and safeguarding of our markets a priority. Manipulation of the commodity markets will not be tolerated.

We have worked closely with the Commodity Futures Trading Commission and our other financial and regulatory partners when potential criminal matters have been brought to our attention, just as we have done historically with respect to efforts to manipulate trade settlement prices in the natural gas and propane markets.

The Department also plays an instrumental role in several multi-agency working groups, through which we identify and discuss investigative and prospective trends, strategies, issues and matters. The Criminal Division's Fraud Section regularly convenes meetings of the inter-agency Securities and Commodities Fraud Working Group ("SCFWG"). The SCFWG provides a forum for the enforcement community to exchange information on developing trends, new laws and regulations, and law enforcement issues and techniques. Participants include representatives from federal law enforcement agencies, securities and commodities regulatory agencies (including the Securities and Exchange Commission and the Commodity Futures Trading Commission), and securities and commodities exchange self-regulatory organizations.

We continue to maintain a proactive role in this area.

Grassley 117. I understand that the CFTC is in charge of ensuring proper oversight of the commodities market and investigating illegal activity, and that it refers cases to the Justice Department to prosecute, is that accurate?

ANSWER: Yes. The Department of Justice, including the Criminal Division's Fraud Section and the 94 U.S. Attorney's Offices, works closely with the Commodity Futures Trading Commission and our other financial and regulatory partners when potential criminal matters have been brought to our attention. This has been the case historically with respect to efforts to manipulate trade settlement prices in the natural gas and propane markets.

Grassley 118. Can you tell me about the Justice Department's role in this area? For example, have there been many referrals specifically with respect to the crude oil market, and has the Department brought any cases?

ANSWER: The Department has pursued several investigations of natural gas traders working for large energy companies and their subsidiaries. These cases have involved individuals who were alleged to have provided false information about speculative trades to commercial publications who published settlement indices. Several investigations have resulted in large fines and Deferred Prosecution Agreements with American Electric Power (Ohio), Mirant (Atlanta), and Williams (Oklahoma). Each company also settled enforcement actions with the CFTC. Nine traders from these three companies have

entered guilty pleas, and one trader is currently under indictment and pending trial in Washington, D.C. The U.S. Attorney's Office for the Southern District of Texas has also been prosecuting matters involving traders working for El Paso, Dynegy and other companies, resulting in several guilty pleas and trial convictions.

In addition, in an agreement with the Fraud Section of the Criminal Division, British Petroleum ("BP") entered into a Deferred Prosecution Agreement and simultaneous settlements with regulatory agencies arising from its efforts to corner and manipulate prices in the propane market. One trader has entered a guilty plea and three others are under indictment for conspiracy to manipulate and "squeeze" the Texas Eastern Transmission propane markets in February 2004.

Grassley 119. How many?

ANSWER: There are several other cases that are currently under investigation. We are still working to determine whether criminal charges are appropriate in any of these matters.

Grassley 120. Have you seen widespread problems in this area?

ANSWER: The dramatic increases in the price of crude oil earlier this year demands greater attention by law enforcement and regulators. Thus, we are monitoring the situation very closely. We are working with our partners to ensure that the U.S. energy futures markets function properly and operate free from manipulation and abuse, and that there is transparency and integrity in the accounting and financial statements of publicly traded companies.

Grassley 122. The St. Louis Post-Dispatch published a series of articles earlier this year regarding the serious shortcomings of the National Criminal Information Center (NCIC) managed by the FBI. The article reported that dangerous fugitives from justice can roam freely in our country committing more crimes or evading law enforcement because states don't enter these warrants into NCIC and/or refuse to pay for extraditing criminal back to their jurisdictions. NCIC is a crucial tool for both police officers and for public safety.

The DOJ has recently spent $78 million on a new experimental computer program called Law Enforcement National Data Exchange or N-DEx. I have been informed N-DEx will allow all law enforcement to share information about ongoing criminal investigations. N-DEx will require millions of dollars (if not billions) more and years to be implemented by all local, state, and federal law enforcement agencies. Instead of branching out on N-DEx, do you believe it would have been more prudent to invest DOJ funds on improving state compliance in the existing NCIC system?

ANSWER: The Department believes that diverting N-DEx funding to NCIC improvements at the local level would not be a wise decision. The Department is primed for a success with the initial launch of N-DEx, and the system has received endorsement from all four major police associations. N-DEx shares data about current and past investigations (incident data), which is a very different data set from that which is shared via NCIC. Many large cities and jurisdictions are already doing the programming necessary to share data with N-DEx, and changing these commitments at this time would not be well received in the local law enforcement community. Congress and the President have clearly instructed agencies to share more data, and N-DEx is the Department's flagship information-sharing program to help protect this country from criminal enterprises and terrorists. N-DEx will dismantle walls that previously existed among federal, state, local, and tribal agencies in the law enforcement arena.

Both systems serve a distinct purpose, and both systems have different sets of users. NCIC is operationally oriented and built for the officer on the street to inform him or her of potentially dangerous situations. N-DEx serves the "big picture" needs of analysts and detectives to link criminal activity within and across jurisdictions and is more analytic in nature. The problems identified in the article are local process challenges and are not related to the federal systems.

Grassley 123. I also understand that the FBI has established a taskforce to determine how to fix the gaps in information that states input into the NCIC system. Do you think it would be prudent to delay any additional spending on N-DEx before the taskforce has a chance to issue findings on how to fix the gaps in NCIC?

ANSWER: The Department does not believe spending for N-DEx should be delayed based on activities involving NCIC because NCIC and N-DEx are entirely separate systems, serving completely different segments of the criminal justice process. NCIC contains information on stolen property and identifying/descriptive information on wanted felons, missing persons, terrorists, and other individuals of interest to law enforcement. NCIC information represents the culmination of the investigative process. N-DEx will be a comprehensive national repository of police incident/investigative reports and is a compilation of information from the earlier stages of an investigation. The typical users of NCIC are patrol officers on the street, whereas the typical users of N-DEx will be investigators and information analysts. NCIC warrant information originates from the courts, ideally from automated warrant systems. N-DEx information is primarily derived from police departments' records management systems. This diversity in both information origin and use make NCIC and N-DEx distinctively separate systems.

The FBI's Criminal Justice Information Services Division is working with the Advisory Policy Board and its Warrant Task Force to develop means of increasing the number of warrants entered into the NCIC system. Although participation in and entry of records into the NCIC system are voluntary, law enforcement agencies across the country make extensive use of the system. An average of 167,000 records are entered each month, with the highest concentration being in extraditable felony warrants. While

warrant record entry and removal are highly dynamic, at any given time NCIC contains records for approximately 1.4 million subjects. Approximately 1,000 fugitives are apprehended each day through law enforcement use of the NCIC system.

Grassley 124. It was recently reported that the ATF and FBI have been involved in a jurisdictional squabble over domestic bombing investigations since ATF merged into DOJ in 2002. In 2004, then AG Ashcroft wrote a memo in an attempt to tackle the coordination of explosives investigations. To date, this dispute which involves every aspect of a bombing investigation remains unresolved.

The FBI has fought very hard not to relinquish any jurisdiction over bombing cases. The DOJ has not taken any steps to delegate all bombing investigations or data collection to the ATF. The FBI's reluctance to allow the ATF to investigate domestic bombing cases stems from the belief that FBI serves as the lead law enforcement for the analysis of terrorism intelligence and information.

What steps have you taken as U.S. Attorney General to resolve these troubles between the ATF and FBI?

ANSWER: The Department, under the leadership of the Deputy Attorney General, has made great progress coordinating ATF's and FBI's explosives programs within the Department. Officials at the Deputy Director level within each agency have been personally tasked with ensuring a unified departmental effort in this regard. As a result, the two agencies have signed a Memorandum of Understanding to coordinate response, incident management, and investigation of explosive attacks; developed a plan to integrate the Department's bomb databases to allow for a seamless user experience, including for our federal, state and local partners as well as for users within the Department; agreed on unified canine training protocols; collaborated on joint interagency training; and collaborated, along with our interagency partners, in developing the overarching national strategy to combat terrorist use of explosives.

The Department has deep expertise in preventing, responding to, investigating and prosecuting crimes related to the use of explosive devices, as a result of, among other things, its exclusive jurisdiction over terrorist acts. The Department employs world-renowned technical experts and has demonstrated years of experience in designing and implementing explosives and forensic-related programs. These include the FBI's Hazardous Devices School, the National Center for Explosives Research and Training, FBI's Critical Incident Response Group, ATF's Arson and Explosives National Response Team, the Terrorist Explosive Device Analytical Center, ATF's Canine Training Facility and the forensic and research capabilities of the Department's laboratories. The goal is to be able to utilize and coordinate this world-class expertise so that the best of both agencies is dedicated to the effort.

These efforts have led to much greater coordination in the field. The successful investigation and arrest of the individuals responsible for the May 2008 bombing of the

federal courthouse in San Diego is one recent example of this coordination. As a result of the close cooperation between FBI and ATF during the investigation, three defendants were indicted on a variety of terrorism and firearms violations just three months after the crime and are currently awaiting trial.

Grassley 125. Given that less than 2 percent of domestic bombing incidents in the U.S. are ever linked to terrorism, until a terrorism nexus is identified, can you give details as to why the ATF is not the primary investigative agency for all domestic bombing cases?

ANSWER: In light of the new levels of cooperation and coordination between FBI and ATF as outlined above, the Department does not believe a blanket rule regarding a division of labor needs to be imposed on the field at this time. We will monitor the situation and should facts warrant it, we will revisit the issue.

Grassley 132. The DOJ has settled the case United Ex rel. [UNDER SEAL] v. Medtronic Inc et al., Civil Action No. 02-2709 (W.D. Tenn.). The case currently remains under seal.

Please explain why the case was placed under seal and why it remains under seal after settlement.

ANSWER: By order of the district court, this matter was placed under seal and remains under seal. We are not at liberty to disclose the reasons for the district court's order, which are also subject to the seal in this case.

Grassley 133. Please provide the Committee with a copy of the settlement agreement and an unredacted copy of the complaint.

ANSWER: A copy of the settlement agreement is attached. We are unable to provide an unredacted copy of the complaint because it is under seal.

Grassley 134. Describe in detail how the Department determined the monetary value of the settlement?

ANSWER: As in every case, in arriving at a settlement value in this matter, the Department evaluated a number of factors, including the amount of the government's loss and the degree of litigation risk the Department would face at trial. Further details about how the Department applied those factors in this case could potentially jeopardize the Department's and relators' ability to pursue, and settle, future matters.

QUESTIONS FROM SENATOR SESSIONS

Sessions 135. An audit report by the Office of Inspector General found that the COPS Office substantially failed to close grants after those grants expired. *The Department of Justice's Grant Closeout Procedures, OIG Audit Report 07-05, p.16 (December 2006).* The report found that 10,603 COPS grants expired, but were never closed. *Id.* Has COPS implemented any new procedures to ensure that grants are closed once they expire; and if so, what are these new procedures, and how successful have they been?

ANSWER: In December 2006, the Office of the Inspector General released a final audit report entitled "The Department of Justice's Grant Closeout Processes," which examined the grant closeout activities of the COPS Office, the Office of Justice Programs ("OJP"), and the Office on Violence Against Women ("OVW"). The critical areas reviewed included the timeliness of grant closeouts, drawdowns on expired grants, and unused funds on expired grants.

In response to the audit, the COPS Office implemented procedural changes to address OIG's recommendation that the COPS Office adopt and adhere to the six-month closeout timeframe. COPS has also revised the drawdown process to ensure that grantees are restricted to drawing down funds within the 90-day period immediately following grant expiration (unless an extension is formally requested). As a result of these two new processes, the COPS Office is now de-obligating unused funds expeditiously, and thereby addressing the OIG's concern with respect to the timeline for recouping unused funds.

Based on the success of the new procedures implemented by the COPS Office, the OIG officially closed the COPS-related portion of the closeout process audit report on January 2, 2008.

Sessions 136. An audit report by the Office of Inspector General studied the COPS Management System ("CMS"), the "database that the COPS Office uses to manage and track grants." *The Office of Community Oriented Policing Services Methamphetamine Initiative, OIG Audit Report 06-16, p.14 (March, 2006).* The report found significant "weaknesses in this system related to security and data accuracy and reliability." *Id.* For example, the OIG requested the COPS Office to provide a list of all "Meth Initiative grants awarded from the inception of the program in Fiscal Year 1998 through Fiscal Year 2004," and the COPS Office provided a list generated from the CMS." *Id.* The report by OIG revealed that the CMS "omitted at least six grants from the list" and that the list "contained numerous [other] errors and omissions." *Id.* The report found, "(1) a lack of standardization in data entry, (2) a CMS user manual that was relatively unknown and out-of-date, and (3) a lack of policy requiring periodic review of grant data for accuracy and completeness." *Id.*

Does the COPS Office still rely on the CMS as a source of information about grants and if so, has the COPS Office improved the CMS so that it provides accurate and reliable information?

ANSWER: In response to the recommendations made by the OIG in its March 2006 audit report of the Methamphetamine Initiative, the COPS Office made significant improvements to the accuracy and reliability of the COPS Management System (CMS) database. To address the need for the periodic review of grant data, appropriate maintenance and quality control procedures were implemented to ensure that the data is accurate and complete. To address the audit findings related to both the standardization of data entry and the need for an updated CMS user manual, a program-specific "COPS Methamphetamine Training Manual" was designed and introduced for these purposes. This stand-alone document was both distributed to COPS staff in hard copy and uploaded to the COPS Intranet.

Based on the success of the management actions taken by COPS, the OIG closed these recommendations related to database management on August 17, 2006. The OIG officially closed the entire audit of the COPS Methamphetamine Initiative on July 30, 2008.

Sessions 137. An audit report by the Office of Inspector General found that the COPS Office did "not provide consistent training or guidance" to grant specialists responsible for the administration of awards. *The Office of Community Oriented Policing Services Methamphetamine Initiative, OIG Audit Report 06-16 p.9 (March, 2006).* The report stated that COPS' "ad-hoc approach to the training of new staff relies heavily on the knowledge and competency levels of current staff . . . As a result, the information passed on to new staff may be inconsistent and could be inaccurate." *Id.* at 27. Please explain in detail whether COPS has developed any type of training or guidance program for its incoming grant specialists so that they can efficiently administer COPS grant awards?

ANSWER: In response to this recommendation made by the OIG in its March 2006 audit report of the Methamphetamine Initiative, the COPS Office made significant enhancements to the training provided to new Grant Program Specialist staff. In addition to the implementation of the use of a mentor checklist during on-the-job training for staff, a "Methamphetamine Initiative Team Training Guide" was developed to provide employees with detailed information regarding guidelines for the administration of the program, starting with an overview of the grant life cycle and continuing through to the closeout process. Database "screenshots" are included as part of this training documentation, as are attachments providing the user with standard forms and documents. The purpose of this manual is to ensure that all staff and grant-making divisions within COPS follow standardized procedures in administering the Methamphetamine Initiative.

Based on the success of the management actions taken by COPS, the OIG closed this recommendation related to Grant Program Specialist training on May 30, 2007. The OIG officially closed the entire audit of the COPS Methamphetamine Initiative on July 30, 2008.

Sessions 138. An audit report by the Office of the Inspector General found that the COPS Office and OJP issued duplicative grants. *Streamlining of Administrative Activities and Federal Financial Assistance Functions In the Office of Justice Programs and the Office of Community Oriented Policing Services, OIG Audit Report 03-27 p.14 (August, 2003).* In written answers submitted to the Judiciary Committee on June 27, 2008 Attorney General Mukasey stated that "in FY 2007, OAAM began an aggressive program to improve the monitoring efforts of OJP and COPS grant managers, beginning with the creation of an OJP/COPS-wide programmatic and fiscal monitoring plan, which included all planned on-site monitoring activity for the year." Please explain in detail whether this program reduced the amount of duplicative grants awarded by COPS and OJP?

ANSWER: In response to this recommendation made by the OIG in its August 2003 audit report regarding the streamlining of administrative activities, the COPS Office and the Office of Justice Programs established formal procedures to address the OIG's finding that the offices should develop and implement a method of coordination to identify proposed programs and grants that have similar purposes and eliminate any duplication of effort to ensure that awards are not made to the same grantee for similar purposes.

In March 2005, an agreement entitled "Method of Coordination between the Office of Community Oriented Policing Services and the Office of Justice Programs for Avoiding Duplication by Coordinating on Relevant Grants and Grant Programs" was issued. This document, established to formalize processes for avoiding duplication in grants awarded and grant programs administered, detailed the procedures to be jointly followed by both COPS and OJP at key stages of the budget formulation process and after the enactment of the annual appropriation for DOJ, including the following:

- Reviewing any new guidance in conjunction with the relevant statutory provisions affecting the grants or grant programs in question and identifying the potential for duplication in the allowable uses of said grants and grant programs;
- Including, as a grant condition for both COPS and OJP awardees, the requirement that grantees not use COPS and OJP grant funds for the same costs, inconsistent with the unallowable costs under each grant;
- To monitor compliance with this condition, incorporating appropriate procedures into on-site program and financial monitoring visits. [In FY2007, this process was further formalized and coordinated through the establishment of the OJP/COPS-wide programmatic and fiscal monitoring plan developed by the Office of Audit, Assessment, and Management (OAAM).]

Based on the success of these management actions, the OIG officially closed the COPS-related portion of the "Streamlining of Administrative Activities" audit report on June 16, 2005.

Sessions 139. An audit report by the Office of the Inspector General found that the COPS Office did not provide potential grantees the option to submit grant applications online. *Streamlining of Administrative Activities and Federal Financial Assistance Functions In the Office of Justice Programs and the Office of Community Oriented Policing Services, OIG Audit Report 03-27 p.16 (August, 2003).* The report found, "potential grantees must mail, fax, or e-mail the applications to the COPS Office and the COPS Office must then manually enter the application data into the [COPS Management System], a database used to manage grants. *Id.* The report recommended that the COPS Office develop a program that allows applicants to apply for grants online and records the application data into a COPS database. *Id.* Such action should make the application data available to COPS grant managers more quickly and speed up the grant approval and award process." *Id.* Has the COPS Office developed a program that allows applicants to apply online; and if so, please explain in detail the results of that program.

ANSWER: Since FY 2004, the COPS Office has posted and accepted submissions of grant application materials on-line through the Grants.gov website. Grants.gov was established as a governmental resource named the E-Grants Initiative, part of the President's 2002 Fiscal Year Management Agenda to improve government services to the public. The website serves as a central storehouse for information on over 1,000 grant programs across the government and provides access to approximately $400 billion in annual awards. Based on the initial success of the availability of COPS program applications through Grants.gov, the OIG officially closed the COPS-related portion of the "Streamlining of Administrative Activities" audit report on June 16, 2005.

Agency participation has steadily increased in the years since COPS application materials were first made available through Grants.gov, and in FY 2007, 74% of all COPS applications were submitted through the Grants.gov website. Please note that potential grantee agencies without Internet access, or those which prefer not to utilize the on-line system, still maintain the option of submitting application materials via mail.

QUESTIONS FROM SENATOR COBURN

Coburn 140. On June 19, 2008, the Project on Government Oversight (POGO) released a report on the Byrne Discretionary Grant Program administered by the Office of Justice Program's (OJP) Bureau of Justice Assistance (BJA), which awards grants to crime-fighting organizations. BJA claims the grant process is competitive, but POGO found that "in FY2007, at lease thirteen Byrne grant applicants were given special treatment: they did not go through a peer review process, but were awarded grants anyway."

What will you do to ensure OJP/BJA's problems are resolved – or at least improved – during the remainder of your tenure at DOJ?

ANSWER: The Department is committed to supporting innovative and effective approaches to law enforcement, preventing violent crime and protecting America's youth from crime and delinquency. The Department has a long-standing history in awarding grants through formula, competitive and invited solicitation processes. All grants, including those awarded in FY 2007, are awarded in accordance with the law and within Department guidelines to address the needs of the criminal justice community.

Transparency and oversight are among the Department's highest priorities. The Office of Justice Programs (OJP) is committed to issuing grant awards in an unbiased and transparent manner. Every grant awarded, whether competed for and peer reviewed or recommended by subject matter expert staff, demonstrably provides clear benefit to public safety and the criminal justice community throughout the country. Each fiscal year the grant making procedures are reviewed and updated as necessary.

As a result of the Department of Justice Reauthorization Act of 2005, OJP established the Office of Audit, Assessment, and Management (OAAM). This Office works in support of OJP to ensure effective financial grant compliance and auditing of OJP's internal controls to prevent waste, fraud, and abuse. Among its accomplishments, OAAM has evaluated OJP's monitoring efforts to determine where improvements were needed, published a standard set of peer review policies and procedures that will be used in making awards in FY 2009 and beyond.

Additionally, in FY 2008, OJP moved its peer review management services under one umbrella to ensure that peer reviews are conducted consistently and in a transparent manner across program offices. Also, any grant award decisions that vary from peer reviewers' recommendations must be fully documented, including the reasons why such a decision was made.

Coburn 141. Prior to FY2007, Byrne Grants had been increasingly allocated through congressional earmarks. With the continuing resolution in FY2007, OJP/BJA had an opportunity to show it could award grants based on merit. Given the claims of the POGO report, do you believe that OJP/BJA is capable of establishing a legitimate, unbiased, competitive process for awarding Byrne grants? Why or why not?

ANSWER: Yes. The Office of Justice Programs (OJP) is committed to issuing grant awards in an unbiased, transparent and competitive manner. Every grant awarded, whether competed for and peer reviewed or recommended by subject matter expert staff, demonstrably provides clear benefit to public safety and the criminal justice community throughout the country. OJP continues to strengthen the grant making process to ensure

all decisions are properly documented and justified. Each fiscal year, the Department will continue to review our grant making procedures and update them as necessary.

Coburn 142. What was the process used to evaluate applicants in FY2007?

ANSWER: In FY 2007, in the absence of earmarks, OJP administered discretionary funding in two ways: 1) interested applicants could submit proposals via competitive grant solicitations; or 2) projects that were determined by OJP to have national significance were invited to apply for funds. In the Bureau of Justice Assistance (BJA), attention was given to programs that help local communities improve the capacity of local justice systems, projects of national significance and training and technical assistance programs that were strategically targeted to address local needs. Funds were awarded to demonstration, replication, expansion, enhancement, training, and/or technical assistance programs.

Coburn 143. Who made up the team of OJP/BJA employees reviewing the applications?

ANSWER: Programs determined to be of national significance were identified and reviewed by OJP and BJA subject matter expert staff. The remaining grants were reviewed by outside expert peer review panels.

Coburn 144. How was that structure determined?

ANSWER: The structure of the review process was determined by the Director of BJA in consultation with the then-Assistant Attorney General for the Office of Justice Programs. The peer review process was used to identify proposals that addressed a broad array of needs. Experts reviewed applications to determine whether the proposals met the requirements set forth in the funding solicitation. Each applicant received a score measured against the solicitation.

Coburn 145. Is this methodology made public to applicants?

ANSWER: In their grant writing workshops sponsored throughout the nation, BJA makes public to applicants the review process for grant making decisions as well as essential elements of grantsmanship.

Coburn 146. Do oversight mechanisms currently exist within OJP and/or BJA that evaluate the grant awarding process?

ANSWER: Yes.

Coburn 147. If so, what are those standards?

ANSWER: Grant applications for programs are reviewed, scored and evaluated for funding based upon a variety of factors including funding availability, geographical distribution, grantee history and audit issues, as well as departmental priorities. Recommendations are made by subject matter expert staff through the Director of the bureau/office to the Assistant Attorney General for OJP. All grants are made in full accordance with the procedures outlined in the OJP Grant Manager's Manual.

In FY 2007, OJP established the Office of Audit, Assessment and Management (OAAM) to ensure effective financial grant compliance and auditing of OJP's internal controls to prevent waste, fraud, and abuse and to conduct programmatic assessments of grant programs.

Coburn 148. If so, how did they fail to catch the grants identified in the POGO report?

ANSWER: Please see the response to question 142, which describes the process.

The grants identified by POGO represent programs that were invited to apply for funding based on their national significance, geographic importance and Departmental priorities.

Coburn 149. Does the public have access to information detailing the recipients who receive Byrne grants and/or the value of the grant awarded each year?

ANSWER: The public has access to information detailing the recipients who received Byrne grant awards and the value of the grant initiatives. The Office of Management and Budget (OMB) posts all of OJP's grant awards on its transparency website (www.usaspending.gov). Additionally, BJA publishes grant awards on its website (www.ojp.gov/BJA).

Coburn 150. On June 19th and 20th, *The Washington Post*, published two articles detailing the newly opened criminal investigation of J. Robert Flores, head of the Office of Juvenile Justice & Delinquency Prevention (OJJDP). He was called to the House Oversight and Government Reform Committee to testify regarding why he "brushed aside recommendations from career staff members to hand out more than $8 million in awards last year." According to the House Oversight Committee staff memo, "Mr. Flores decided to fund only five of the 18 recommended programs, awarding them $3.88 million in funding. He also chose to fund five programs that were not recommended, awarding them $4.32 million in funding. Concerns about

Mr. Flores' selections have been raised by *Youth Today* and the ABC *Nightline* program.

What will you do to ensure OJJDP's problems are resolved – or at least improved – during the remainder of your tenure at DOJ?

ANSWER: Transparency and oversight are among the Department's highest priorities. The Office of Justice Programs (OJP), of which the Office of Juvenile Justice and Delinquency Prevention is a component, is committed to issuing grant awards in an unbiased and transparent manner. Every grant awarded, whether competed for and peer reviewed or recommended by subject matter expert staff, demonstrably provides clear benefit to public safety and the criminal justice community throughout the country. Each fiscal year the grant making procedures are reviewed and updated as necessary.

As a result of the Department of Justice Reauthorization Act of 2005, OJP established the Office of Audit, Assessment, and Management (OAAM). This Office works in support of OJP to ensure effective financial grant compliance and auditing of OJP's internal controls to prevent waste, fraud, and abuse. Among its accomplishments, OAAM has evaluated OJP's monitoring efforts to determine where improvements were needed, published a standard set of peer review policies and procedures that will be used in making awards in FY 2009 and beyond.

Additionally, in FY 2008, OJP moved its peer review management services under one umbrella to ensure that peer reviews are conducted consistently and in a transparent manner across program offices. Also, any grant award decisions that vary from peer reviewers' recommendations must be fully documented, including the reasons why such a decision was made.

Coburn 151. What is the process of review for awarding grants at OJJDP?

ANSWER: OJJDP's application review process generally consists of four steps: 1) application review, 2) programmatic review, 3) financial review, and 4) award notification. Every grant application received by OJP, including Congressionally mandated awards, passes through this multi-stage process to ensure that all applicable requirements are satisfied.

Coburn 152. What are the selection criteria for awarding OJJDP grants?

ANSWER: The selection criteria may vary according to solicitation and program goals. In general, however, criteria include ensuring applicants met basic minimum requirements, potential geographic considerations, funding availability, past performance, peer review scores, and Administration, Department, and OJP policy priorities.

Coburn 153. Is all available grant money awarded, even if there is a lack of qualified applicants in a given year?

ANSWER: OJP is committed to selecting quality grant applications to fund and developing ways to measure the effectiveness of the programs to ensure the wise investment of taxpayer dollars. Every effort is made to award all grant funds in a given year.

Coburn 154. In FY2007, due to the continuing resolution, OJJDP had the opportunity to distribute awards in a truly competitive process. Do you feel applicants were evaluated solely based on merit?

ANSWER: The FY 2007 applicants were evaluated based on many criteria. In FY 2007, discretionary funding was administered in two ways: 1) interested applicants submitted proposals via competitive grant solicitations or 2) projects that were determined by OJP to have national significance were invited to apply for funds.

Every grant application received by OJP, including Congressionally mandated awards, passes through a multi-stage process, including application review, programmatic review, financial review, and award notification. This process ensures that all applicable requirements are satisfied and awards are made to best serve the public's interest. Additionally, a peer review process was used to identify proposals that addressed a broad array of needs. Experts reviewed applications to determine whether the proposals met the requirements set forth in the funding solicitation.

Solicitations stated information and requirements applicants needed to include for a strong application, and explained the role of peer review scores in the decision process as advisory only. Solicitations also stated that consideration to geographic distribution and regional balance may also be given. The selection criteria included the review process as well as potential geographic considerations, funding availability, past performance, peer review scores, and Administration, Department, and OJP policy priorities. Applicants were evaluated by combining all of these factors.

Coburn 155. Do you believe DOJ is capable of managing a truly competitive grant awarding process?

ANSWER: Yes. The Department has a longstanding history in awarding grants through formula, competitive and invited solicitation processes. We are committed to issuing grant awards in an unbiased, transparent and competitive manner. Every grant awarded, whether competed for and peer reviewed or recommended by subject matter expert staff, provides clear benefit to public safety and the criminal justice community throughout the country. DOJ maintains this high level of commitment and will review grant processes each year to ensure that this standard is consistently met.

Coburn 156. Are there any oversight mechanisms to review the actions of subdivision heads, such as Mr. Flores?

ANSWER: Yes.

Coburn 157. If so, please explain this process.

ANSWER: In addition to the oversight mechanisms mentioned in the response to question 147, the Assistant Attorney General (AAG) for the Office of Justice Programs has ultimate authority to award discretionary grants based on recommendations made by bureau and office heads, such as Mr. Flores.

When reviewing those recommendations, the AAG may request further information or make alternate selections. The AAG recognizes that the bureau and program office heads are most familiar with the issues affecting their respective offices and with the application review process and makes every effort to concur with the recommendations.

Additionally, the Department has implemented a new policy that any grant award decisions that vary from peer reviewers' recommendations be fully documented, including the reasons why such a decision was made.

Coburn 158. If so, how did it fail in this case?

ANSWER: The selection process, including AAG review, did not fail with respect to the awarding of FY 2007 discretionary grants.

Coburn 159. Were there OJJDP employees evaluating the grant applicants who may have had connections to any of the final grantees?

ANSWER: The Department does not believe that any OJJDP employees conducting peer review of grant applications had connections to any of the final grantees. All OJP employees receive ethics training after entering on duty. Additionally, under the Office of Government Ethics regulations, every three years OJP employees involved in "grant or contract administration" are required to receive formal ethics training.

Coburn 160. Does the public have access to information detailing the recipients who receive OJJDP grants and/or the value of the grant awarded each year?

ANSWER: Yes. The public has access to information detailing the recipients who received grant awards. OJJDP publishes grant awards on its website. Additionally, the

Office of Management and Budget posts all of OJP's grant awards on its transparency website (www.usaspending.gov).

Office of the Attorney General

Washington, D.C.

March 5, 2008

TO: ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

RE: ELECTION YEAR SENSITIVITIES

Department of Justice employees are entrusted with the authority to enforce the laws of the United States and with the responsibility to do so in a neutral and impartial manner. This is particularly important in an election year. Now that the election season is upon us, I want to remind you of the Department's existing policies with respect to political activities.

I. INVESTIGATION AND PROSECUTION OF ELECTION CRIMES

The Department of Justice has a strong interest in the prosecution of election fraud and other election-related crimes, such as those involving federal and state campaign finance laws, federal patronage laws, and corruption of the election process. As Department employees, however, we must be particularly sensitive to safeguarding the Department's reputation for fairness, neutrality and nonpartisanship.

Simply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges. Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission and with the Principles of Federal Prosecution.

If you are faced with a question regarding the timing of charges or overt investigative steps near the time of a primary or general election, please contact the Public Integrity Section of the Criminal Division for further guidance. Please remember also that consultation with the Public Integrity Section of the Criminal Division is required at various stages of all criminal matters that focus on violations of federal and state campaign-finance law, federal patronage crimes, and corruption of the election process. More detailed guidance is available in sections 1-4 and 9-85 of the United States Attorneys' Manual, which can be accessed on line at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/>.

II. HATCH ACT

As you are aware, the Hatch Act generally prohibits Department employees from engaging in partisan political activity while on duty, in a federal facility or using federal property. Please note that this prohibition includes using the internet at work for any political

activities. The Act also prohibits us from using our authority for the purpose of affecting election results; soliciting (or discouraging) political participation; soliciting, accepting or receiving political contributions; and generally from running as a candidate in a partisan election.

In addition to restrictions on what Department employees may and may not do while on duty, using government property, and in off-duty activities, certain employees are further restricted from engaging in certain political activity even while not on duty. The degree to which an employee is restricted in his or her off-duty activities depends on his or her position, *i.e.* career, further restricted, or noncareer appointee. Further restricted employees are members of the career SES, administrative law judges, employees of the Criminal Division, National Security Division and the Federal Bureau of Investigation, Criminal Investigators and Explosives Enforcement Officers of the Bureau of Alcohol, Tobacco and Firearms, and noncareer appointees in the Department. If you are unclear on these restrictions or the classification of your position, please consult with your component's designated ethics official about the limits of permissible activity *prior* to engaging in any political activity. You can also visit the Justice Management Division's Ethics page at <www.usdoj.gov/jmd/ethics/politic.html> for more detailed information.

It is critical that each one of us comply with this Act. For one, it contributes to maintaining a work environment free of political pressure and ensures the public retains its confidence that we are adhering to our responsibility to administer justice in a neutral manner. For another, violations of the Act carry strict penalties, including presumptive removal from federal service.

Thank you.

SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement is entered into between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), on the one hand, and Medtronic, Inc. ("Medtronic") and Medtronic Sofamor Danek USA, Inc. ("MSD"), on the other hand, through their authorized representatives.

II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. Medtronic and MSD have been named as defendants in two *qui tam* actions, United States ex rel. [UNDER SEAL] v. Medtronic, Inc., et al., Civil Action No. 02-2709 (W. D. Tenn.), and United States ex rel. Poteet v. Medtronic, Inc., et al., Civil Action No. 03-2979 (W. D. Tenn.) (the "Qui Tam Lawsuits"), both of which allege that Medtronic and MSD violated the False Claims Act, 31 U.S.C. 3729, *et seq.*, by paying illegal kickbacks to certain physicians which resulted in the submission of false or fraudulent claims to federal health care programs.

B. The United States contends that between January 1, 1998 and April 30, 2003, MSD made payments and provided other remuneration to a number of physicians and entities in connection with its spinal products in the form of (1) payments and other remuneration for physicians' attendance and expenses at medical education events, think tanks, VIP/MVP events, and meetings at resort locations; (2) services and payments for services to physicians through MSD's Healthcare Economic Services and eBusiness Departments (formerly called the Physician

Provider Services or "PPS" Department); and (3) payments made pursuant to consulting, royalty, fellowship and research agreements with the physicians and entities listed as defendants in the Qui Tam Lawsuits ("the Covered Conduct"). Notwithstanding clause (3) of the preceding sentence and with respect only to that clause, the Covered Conduct does not include any payments or remuneration that MSD provided to individuals who were associated with the entities named as defendants in the Qui Tam Lawsuits, but were not named individually as defendants in the Qui Tam Lawsuits.

C. Based on its investigation, the United States contends that certain of the payments, services, and remuneration discussed above were improper, resulted in the submission of false or fraudulent claims, and give rise to certain legal claims, as described in paragraph 4 below. Medtronic and MSD deny that they engaged in any wrongdoing, and specifically deny that any of the payments, services or remuneration were illegal or improper or resulted in any false or fraudulent claims. Inclusion of or reference to a particular physician or entity in the Covered Conduct does not necessarily constitute a finding by the United States that any payments, services or remuneration provided to that particular doctor or entity was illegal or improper in any way.

D. To avoid the delay, uncertainty, inconvenience and expense of protracted litigation of these claims, the Parties reach a full and final settlement as set forth below. This Agreement is neither an admission of liability by Medtronic or MSD nor a concession by the United States that its claims are not well founded.

E. Medtronic and MSD have entered into a Corporate Integrity Agreement ("CIA") with the Department of Health and Human Services Office of Inspector General ("OIG-HHS"),

attached hereto as Attachment 1, which is incorporated into this Agreement by reference.

F. Medtronic and MSD are in negotiations with representatives of the National Association of Medicaid Fraud Control Units to reach an agreement that provides for distribution of certain sums to the several states with which Medtronic and MSD agree to a settlement concerning the Covered Conduct (the "Participating States").

III. TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth below, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. Medtronic agrees to pay to the United States and the Participating States, collectively, $40 million ("the Settlement Amount"). Within fourteen days after this Agreement has been executed, Medtronic shall deposit the Settlement Amount into an interest-bearing Escrow Account that will be established by Medtronic on terms acceptable to the Government. Not more than forty-five (45) days after the entry of Orders dismissing each of the Qui Tam Lawsuits, and the entry of decisions affirming those dismissals in any and all appeals taken from the Orders of dismissal, all funds in the Escrow Account, other than the $2,900,000 allocated to the Participating States and any interest that has accrued in the Escrow Account on that portion of the Settlement Amount, will be transferred to the United States pursuant to written instructions to be provided by the United States Attorney for the Western District of Tennessee.

2. If the courts refuse to issue Orders of Dismissal in the Qui Tam Lawsuits or if an appellate court reverses either Order, this agreement shall be null and void at the option of either

the United States or Medtronic and MSD upon notice to all Parties through counsel in writing within five business days of the Court's denial of a motion to dismiss either *qui tam* or of an appellate court's reversal of an Order of Dismissal in either suit. If this agreement is rescinded, all funds in the Escrow Account shall be returned to Medtronic. In that event, Medtronic and MSD will not plead, argue or otherwise raise any defense under theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions or proceedings which are brought by the United States (including by means of intervening in the Qui Tam Lawsuits) within 90 calendar days of notification to all parties of that rescission, except to the extent that such defenses were available on September 11, 2002.

3. In the event that Medtronic and MSD do not reach a final settlement agreement or agreements with the Participating States, Medtronic and MSD shall be entitled to withdraw some or all of the $2,900,000 allocated to the Participating States, plus any interest that has accrued in the Escrow Account on that portion of the Settlement Amount, from the Escrow Account.

4. Subject to the exceptions in Paragraph 6 below, in consideration of the obligations of Medtronic and MSD set forth in this Agreement, conditioned upon timely payment in full of the Settlement Amount, the United States (on behalf of itself, its officers, agents, agencies and departments) agrees to release Medtronic, MSD and all current employees thereof from any civil or administrative monetary claim or cause of action the United States has or may have against Medtronic or MSD under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 - 3812; or under the common law or equitable theories of payment by mistake, unjust

enrichment, conversion, fraud, breach of contract, and recoupment, for the Covered Conduct. In addition, the United States agrees to petition the district court to dismiss both of the Qui Tam Lawsuits with prejudice to the relators.

5. Subject to the exceptions in Paragraph 6 below, in consideration of the obligations of Medtronic and MSD set forth in this Agreement and in the attached CIA, conditioned upon timely payment in full of the Settlement Amount, the OIG-HHS agrees to release and refrain from instituting, directing or maintaining any administrative claim or any action seeking exclusion from the Medicare, Medicaid and other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Medtronic or MSD under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities), for the Covered Conduct, except as reserved in this Paragraph. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Medtronic and MSD from the Medicare, Medicaid and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 6, below.

6. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including Medtronic and MSD) are any and all of the following:

a. Any claims of any kind whatsoever arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs pursuant to 42 U.S.C. § 1320a-7(a);

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;

f. Any claims against individuals or entities other than Medtronic, MSD or the current employees thereof; and

g. Any claims based upon such obligations as are created by this Agreement.

7. Medtronic and MSD release the United States and its agencies, officers, agents, employees, and contractors and their employees, from any and all claims, causes of action, adjustments, and set-offs of any kind arising out of or pertaining to the Covered Conduct, including the investigation of the Covered Conduct.

8. Medtronic and MSD waive and will not assert any defenses they may have to any criminal prosecution or administrative action relating to the Covered Conduct, which defenses may be based in whole or in part on the Double Jeopardy or Excessive Fines Clause of the Constitution or the holding or principles set forth in *United States v. Halper*, 490 U.S. 435 (1989), and *Austin v. United States*, 509 U.S. 602 (1993), and agrees that the Settlement Amount is not punitive in nature or effect for purposes of such criminal prosecution or administrative action. Nothing in this

Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue Laws, Title 26 of the United States Code.

9. Medtronic and MSD agree to the following:

a. Unallowable Costs Defined: That all costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47 and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Medtronic, MSD, or their current and former parent corporations, subsidiaries, division, affiliates, brother and sister corporations, predecessors, successors and assigns, along with their current and former employees, officers and directors, in connection with the following are unallowable costs on government contracts and under the Medicare Program, Medicaid Program, TRICARE Program, Veterans Affairs Program ("VA"), and FEHBP (Federal Employee Health Benefits Program):

(1) the matters covered by this Agreement,

(2) the Government's audit(s), civil and criminal investigation(s), and litigation of the matters covered by this Agreement,

(3) Medtronic's and MSD's investigation, defense, and corrective actions undertaken in response to the Government's audit(s), civil and criminal investigation(s), and litigation in connection with the matters covered by this Agreement (including attorneys' fees),

(4) the negotiation and performance of the Settlement Agreement,

(5) the payments made pursuant or ancillary to this Settlement Agreement,

including any costs and attorneys' fees, and any payments Medtronic or MSD may make to relators, including costs and attorneys' fees, and

(6) the negotiation of, and obligations undertaken pursuant to the Corporate Integrity Agreement to:

(i) Retain independent review organizations to perform annual reviews as described in Section III. of the CIA; and

(ii) prepare and submit reports to the OIG-HHS.

However, nothing in this Paragraph 7(a)(6) that may apply to the obligations undertaken pursuant to the Corporate Integrity Agreement affects the status of costs that are not allowable based on any other authority applicable to Medtronic or MSD. (All costs described or set forth in this Paragraph 7(a) are hereafter, "unallowable costs").

b. Future Treatment of Unallowable Costs: These unallowable costs shall be separately determined and accounted for in non-reimbursable cost centers by Medtronic and MSD, and Medtronic and MSD will not charge such unallowable costs directly or indirectly to any contracts with the United States or any State Medicaid Program, or seek payment for such unallowable costs through any cost report, cost statement, information statement or payment request submitted by Medtronic, MSD, or any of their current and former parent corporations, subsidiaries, divisions, affiliates, brother and sister corporations, predecessors, successors and assigns, along with their current and former employees, officers and directors, to the Medicare, Medicaid, TRICARE, VA or FEHBP programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment:

Medtronic and MSD further agree that within 90 days of the Effective Date of this Agreement, they shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid, VA and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid Program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Medtronic, MSD, or any of their current and former parent corporations, subsidiaries, divisions, affiliates, brother and sister corporations, predecessors, successors and assigns, along with their current and former employees, officers and directors, and shall request, and agree, that such cost reports, cost statements, information reports or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. Medtronic and MSD agree that the United States, at a minimum, will be entitled to recoup from Medtronic and MSD any overpayment plus applicable interest and penalties as a result of the inclusion of such unallowable costs on previously submitted cost reports, information reports, cost statements, or requests for payment. If Medtronic or MSD fails to identify such costs in past filed cost reports in conformity with this Paragraph, the United States may seek an appropriate penalty or other sanction in addition to the recouped amount.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by Medtronic or MSD on the effect of inclusion of unallowable costs (as defined in this Paragraph) on the cost reports, cost

statement, or information reports of Medtronic or MSD.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine Medtronic's or MSD's books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

10. Medtronic and MSD agree to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Medtronic and MSD will make reasonable efforts to facilitate access to, and encourage the cooperation of, their directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals, and will furnish to the United States, upon reasonable request, all non-privileged documents and records in its possession, custody, or control relating to the Covered Conduct.

11. This Agreement is intended to be for the benefit of the Parties only, including their current and former parent corporations, subsidiaries, predecessors, successors, and assigns, and by this instrument the Parties do not release any claims against any other person or entity.

12. Medtronic and MSD agree that they waive and will not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as the Covered Conduct. Medtronic and MSD represent that they have no direct billing relationship with health care beneficiaries, their insurers or any federal health care program.

13. Except as expressly provided to the contrary in this Agreement, each Party shall

bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

14. Medtronic and MSD represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever and they have been advised with respect hereto by counsel prior to entering into this Settlement Agreement.

15. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between the United States and Medtronic or MSD under this Agreement will be the United States District Court for the Western District of Tennessee, except that disputes arising under the attached Corporate Integrity Agreement shall be resolved exclusively under the dispute resolution provisions of that agreement.

16. This Agreement and the Corporate Integrity Agreement among Medtronic, MSD, and OIG-HHS constitute the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties, except that only OIG-HHS and Medtronic and MSD must agree in writing to modification of the Corporate Integrity Agreement.

17. The individuals signing this Agreement on behalf of Medtronic and MSD represent and warrant that they are authorized to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

19. All parties consent to the United States' disclosure of this Agreement, and

information about this Agreement, to the public.

20. This Agreement is effective on the date of signature of the last signatory to the Agreement ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED: July 13, 2006 BY: _____
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED: July 18 2006 BY: _____
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____ BY: _____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

information about this Agreement, to the public.

20. This Agreement is effective on the date of signature of the last signatory to the Agreement ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED:_____ BY: _____
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED:_____ BY: _____
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 7/17/06 BY: _____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

DATED: 7-14-06 BY: _____

JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: 7/17/06 BY: _____

TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor Danek USA, Inc.

AMENDMENT TO SETTLEMENT AGREEMENT

This AMENDMENT TO SETTLEMENT AGREEMENT is made as of the 31st day of July, 2006 by and between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), on the one hand, and Medtronic, Inc. ("Medtronic") and Medtronic Sofamor Danek USA, Inc. ("MSD") on the other hand, through their authorized representatives. The United States, Medtronic, and MSD are referred to collectively herein as "the Parties.

WHEREAS, the Parties entered into a Settlement Agreement ("Agreement") on July 18, 2006, and

WHEREAS, the Parties desire to amend the Agreement in accordance with the terms set forth below,

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which each Party separately acknowledges, the Parties agree as follows:

1. Pursuant to Paragraph 16 of the Settlement Agreement dated July 18, 2006 among the Parties (the "Settlement Agreement"), Paragraph 1 of the Settlement Agreement is amended effective as of the date hereof and re-stated in its entirety as follows:

> 1. Medtronic agrees to pay to the United States and the Participating States, collectively, $40 million ("the Settlement Amount"). By September 1, 2006, Medtronic shall deposit the Settlement Amount into an interest-bearing Escrow Account that will be established by Medtronic on terms acceptable to the Government. Not more than forty-five (45) days after the entry of Orders dismissing each of the Qui Tam Lawsuits, and the entry of decisions affirming those dismissals in any and all appeals taken from the Orders of dismissal, all funds in the Escrow Account, other than the $2,900,000 allocated to the Participating States and any interest that has accrued in the Escrow Account on that portion of the Settlement Amount, will be transferred to the United States pursuant to written instructions to be provided by the United States Attorney for the Western District of Tennessee.

2. The individuals signing this Amendment on behalf of Medtronic and MSD represent and warrant that they are authorized to execute this Amendment. The United States signatories represent that they are signing this Amendment in their official capacities and that they are authorized to execute this Amendment.

3. This Amendment may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

4. All parties consent to the United States' disclosure of this Amendment, and information about this Amendment, to the public.

5. This Amendment is effective on the date of signature of the last signatory to the Amendment ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Amendment.

6. As of the Effective Date the provisions of this Amendment shall be considered part of, and governed by, the terms of the Settlement Agreement (as so modified). Any reference to the Settlement Agreement as of and following the Effective Date shall be deemed to be a reference to the Settlement Agreement, as amended by this Amendment.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED: 8/1/06 BY: DK/David T. Cohen

DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED: 8/1/06 BY: David T. Cohen

DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 8/1/06 BY: GED/David T. Cohen

GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

DATED: July 28, 2006 BY: _____
JANICE M. SYMSHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: _____ BY: _____
TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

DATED: _____ BY: _____

JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: 8/1/06 BY: _____

TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

SECOND AMENDMENT TO SETTLEMENT AGREEMENT

This SECOND AMENDMENT TO SETTLEMENT AGREEMENT is made as of the 31st day of August, 2006 by and between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), on the one hand, and Medtronic, Inc. ("Medtronic") and Medtronic Sofamor Danek USA, Inc. ("MSD") on the other hand, through their authorized representatives. The United States, Medtronic, and MSD are referred to collectively herein as "the Parties.

WHEREAS, the Parties entered into a Settlement Agreement on July 18, 2006 and an Amendment to the Settlement Agreement on July 31, 2006 (collectively referred to herein as the "Agreement") and

WHEREAS, the Parties desire to amend the Agreement in accordance with the terms set forth below,

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which each Party separately acknowledges, the Parties agree as follows:

1. Pursuant to Paragraph 16 of the Settlement Agreement dated July 18, 2006 among the Parties (the "Settlement Agreement"), Paragraph 1 of the Settlement Agreement is amended effective as of the date hereof and re-stated in its entirety as follows:

> 1. Medtronic agrees to pay to the United States and the Participating States, collectively, $40 million ("the Settlement Amount"). By September 15, 2006, Medtronic shall deposit the Settlement Amount into an interest-bearing Escrow Account that will be established by Medtronic on terms acceptable to the Government. Not more than forty-five (45) days after the entry of Orders dismissing each of the Qui Tam Lawsuits, and the entry of decisions affirming those dismissals in any and all appeals taken from the Orders of dismissal, all funds in the Escrow Account, other than the $2,900,000 allocated to the Participating States and any interest that has accrued in the Escrow Account on that portion of the Settlement Amount, will be transferred to the United States pursuant to written instructions to be provided by the United States Attorney for the Western District of Tennessee.

2. The individuals signing this Amendment on behalf of Medtronic and MSD represent and warrant that they are authorized to execute this Amendment. The United States signatories represent that they are signing this Amendment in their official capacities and that they are authorized to execute this Amendment.

3. This Amendment may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

4. All parties consent to the United States' disclosure of this Amendment, and information about this Amendment, to the public.

5. This Amendment is effective on the date of signature of the last signatory to the Amendment ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Amendment.

6. As of the Effective Date the provisions of this Amendment shall be considered part of, and governed by, the terms of the Settlement Agreement (as so modified). Any reference to the Settlement Agreement as of and following the Effective Date shall be deemed to be a reference to the Settlement Agreement, as amended by this Amendment.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED: 8/31/06 BY: DK /David T. Cohen
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED: 8/31/06 BY: David T. Cohen
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 8/31/06 BY: GED /David T. Cohen
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

DATED: 8/31/06

BY: for JMS

JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: 8/31/06

BY: for TC

TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

THIRD AMENDMENT TO SETTLEMENT AGREEMENT

This THIRD AMENDMENT TO SETTLEMENT AGREEMENT is made as of the 15th day of September, 2006 by and between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), on the one hand, and Medtronic, Inc. ("Medtronic") and Medtronic Sofamor Danek USA, Inc. ("MSD") on the other hand, through their authorized representatives. The United States, Medtronic, and MSD are referred to collectively herein as "the Parties.

WHEREAS, the Parties entered into a Settlement Agreement on July 18, 2006 and Amendments to the Settlement Agreement on August 1, 2006 and August 31, 2006 (collectively referred to herein as the "Settlement Agreement"), and

WHEREAS, the Parties desire to amend the Settlement Agreement in accordance with the terms set forth below,

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which each Party separately acknowledges, the Parties agree as follows:

1. Pursuant to Paragraph 16 of the Settlement Agreement, Paragraphs 1, 2 and 3 of the Settlement Agreement are amended effective as of the date hereof and re-stated in their entirety as follows:

> 1. Medtronic agrees to pay to the United States and the Participating States, collectively, $40 million, plus interest at the average rate of 5.25% per annum compounded annually ($5,753.42 per day for the first year) from August 1, 2006 and continuing until and including the day before complete payment is made ("the Settlement Amount"). The Settlement Amount shall constitute a debt due and owing to the United States and the Participating States forty-five (45) days after the entry of Orders dismissing each of the Qui Tam Lawsuits and the entry of decisions affirming those dismissals in any and all appeals taken from the Orders of dismissal. This debt is to be discharged by payments to the United States and the Participating States under the following terms and conditions:
>
> A. Medtronic shall pay to the United States the sum of $37.1 million, plus interest accrued thereon at the rate of 5.25% per annum compounded annually ($5,336.30 per day for the first year) from August 1, 2006 continuing until and including the day before complete payment is made (the "Federal Settlement Amount"). The Federal Settlement Amount shall be paid by electronic funds transfer no later than ten (10) business days after the debt becomes due and owing and Medtronic receives written payment instructions from the United States.
>
> B. Medtronic shall pay to the Participating States the sum of $2,900,000, plus interest accrued thereon at the rate of 5.25% per annum

compounded annually ($417.12 per day for the first year) from August 1, 2006 continuing until and including the day before complete payment is made (the "State Settlement Amount"). The State Settlement Amount shall be paid no later than ten (10) business days after the debt becomes due and owing, Medtronic and MSD reach an agreement with the Participating States that provides for distribution of the State Settlement Amount, and Medtronic receives written payment instructions from the Participating States.

2. If the courts refuse to issue Orders of Dismissal in the Qui Tam Lawsuits or if an appellate court reverses either Order, this agreement shall be null and void at the option of either the United States or Medtronic and MSD upon notice to all Parties through counsel in writing within five business days of the Court's denial of a motion to dismiss either *qui tam* or of an appellate court's reversal of an Order of Dismissal in either suit. In that event, Medtronic and MSD will not plead, argue or otherwise raise any defense under theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims, actions or proceedings which are brought by the United States (including by means of intervening in the Qui Tam Lawsuits) within 90 calendar days of notification to all parties of that rescission, except to the extent that such defenses were available on September 11, 2002.

3. In the event that Medtronic and MSD do not reach a final settlement agreement or agreements with the Participating States, Medtronic and MSD shall be entitled to retain some or all of the $2,900,000 allocated to the Participating States.

2. Pursuant to Paragraph 16 of the Settlement Agreement, Paragraphs 21, 22, 23 and 24 as stated in their entirety below are hereby added to the Settlement Agreement effective as of the date hereof:

21. Medtronic and MSD expressly warrant that they have reviewed their financial situations and that they are currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I) and will remain solvent following payment to the United States hereunder. Further, the Parties expressly warrant that, in evaluating whether to execute this Agreement, the Parties (a) have intended that the mutual promises, covenants and obligations set forth herein constitute a contemporaneous exchange for new value given to Medtronic and MSD, within the meaning of 11 U.S.C. § 547(c)(1), and (b) have concluded that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange. Further, Medtronic and MSD warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Medtronic or MSD were or became indebted, on or after the date of the transfer of the Federal Settlement

Amount and State Settlement Amount, all within the meaning of 11 U.S.C. § 548(a)(1).

22. In the event Medtronic or MSD commences, or another party commences, before complete payment of the Settlement Amount, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization or relief of debtors, (a) seeking to have any order for relief of Medtronic's or MSD's debts or seeking to adjudicate Medtronic or MSD as bankrupt or insolvent, or (b) seeking appointment of a receiver, trustee, custodian or other similar official for Medtronic or MSD or for all or any substantial part of their assets, Medtronic and MSD respectively agree that:

A. Medtronic's and MSD's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547 or 548, and neither Medtronic nor MSD will argue or otherwise take the position in any such case, proceeding or action that: (i) Medtronic's or MSD's obligations under this Agreement may be avoided under 11 U.S.C. § 547 or 548; (ii) Medtronic or MSD was insolvent at the time this Agreement was entered into or became insolvent as a result of the payment made to the United States hereunder; or (iii) the mutual promises, covenants and obligation set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Medtronic and MSD;

B. In the event that Medtronic's or MSD's obligations hereunder are avoided for any reason, including but not limited to the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind the releases in this Agreement and bring any civil and/or administrative claim, action or proceeding against Medtronic and MSD for the claims that would otherwise be covered by the releases provided in this Agreement. If the United States chooses to do so, Medtronic and MSD agree that, for purposes only of any case, action or proceeding referenced in the first clause of this Paragraph, (i) any such claims, actions or proceedings brought by the United States (including any proceedings to exclude Medtronic or MSD from participation in Medicare, Medicaid or other federal health care programs) are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case or proceeding described in the first clause of this Paragraph, and neither Medtronic nor MSD will argue or otherwise contend that the United States' claims, actions or proceedings are subject to an automatic stay; (ii) neither Medtronic nor MSD will plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions or proceedings that are brought by the United States within 30 calendar days of written notification to Medtronic that the releases herein have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on September 11, 2002; and (iii) the United States and the Participating States have valid claims against Medtronic and MSD in the amount of at least $40 million, and they may pursue their claims, inter alia,

in the case, action or proceeding referenced in the first clause of this Paragraph, as well as in any other, case, action, or proceeding; and

C. Medtronic and MSD acknowledge that their agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

23. Default. In the event that Medtronic fails to pay any amount as provided in Paragraph 1 within ten (10) business days of the date upon which such payment is due, Medtronic shall be in Default of its payment obligations ("Default"). The United States will provide written notice of the Default, and Medtronic shall have an opportunity to cure such Default within ten (10) business days from the date of receipt of the notice. Notice of Default will be delivered to Janice M. Symchych, Vice President and Deputy General Counsel, or to such other representative as Medtronic shall designate in advance in writing. If Medtronic fails to cure the Default within ten (10) business days of receiving the Notice of Default, the remaining unpaid balance of the Settlement Amount shall become immediately due and payable, and interest shall accrue at the rate of 12% per annum compounded daily from the date of Default on the remaining unpaid total (principal and interest balance). Medtronic shall consent to a Consent Judgment in the amount of the unpaid balance, and the United States, at its sole option, may: (a) offset the remaining unpaid balance from any amounts due and owing to Medtronic by any department, agency, or agent of the United States at the time of the Default; or (b) exercise any other rights granted by law or in equity, including the option of referring such matters for private collection. Medtronic agrees not to contest any offset imposed and not to contest any collection action undertaken by the United States pursuant to this Paragraph, either administratively or in any state or federal court. Medtronic shall pay the United States all reasonable costs of collection and enforcement under this Paragraph, including attorney's fees and expenses.

24. Exclusion. In the event of Default as defined in Paragraph 23, above, OIG-HHS may exclude Medtronic or MSD from participating in all Federal health care programs until Medtronic pays the Settlement Amount. OIG-HHS will provide notice of any such exclusion by letter to Janice M. Symchych, Vice President and Deputy General Counsel, or to such other representative as Medtronic shall designate in advance in writing. Medtronic and MSD waive any other notice of the exclusion. In the event of default, Medtronic and MSD agree not to contest such exclusion either administratively or in any state or federal court. The scope and effect of such exclusion is defined by 42 C.F.R. § 1001.1901. Medtronic or MSD will not be reinstated unless and until the OIG-HHS approves a request for reinstatement pursuant to 42 U.S.C. §§ 1001.3001-.3005.

3. The individuals signing this Amendment on behalf of Medtronic and MSD represent and warrant that they are authorized to execute this Amendment. The United States signatories represent that they are signing this Amendment in their official capacities and that they are authorized to execute this Amendment.

4. This Amendment may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

5. All parties consent to the United States' disclosure of this Amendment, and information about this Amendment, to the public.

6. This Amendment is effective on the date of signature of the last signatory to the Amendment ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Amendment.

7. As of the Effective Date the provisions of this Amendment shall be considered part of, and governed by, the terms of the Settlement Agreement (as so modified). Any reference to the Settlement Agreement as of and following the Effective Date shall be deemed to be a reference to the Settlement Agreement, as amended by this Amendment.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

DATED: 9/15/06 BY: DK / by David T. Cohen
DAVID KUSTOFF
United States Attorney
Western District of Tennessee

DATED: 9/15/06 BY: David T. Cohen
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED:_____ BY: _____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

Health and Human Services

DATED: 9-15-06 BY: _____

JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED: 9/15/06 BY: _____ for TC

TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.

DATED:_____ BY: _____
DAVID T. COHEN
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 9/14/06 BY: _____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Inspector General
Office of Counsel to the Inspector General
United States Department of
Health and Human Services

DATED: _____ BY: _____
JANICE M. SYMCHYCH, ESQ.
Vice President and Deputy General Counsel
Medtronic, Inc.

DATED:_____ BY: _____
TY COBB
HOGAN & HARTSON
Counsel for Medtronic, Inc. and
Medtronic Sofamor-Danek USA, Inc.