

## *Record DOJ Fraud Recoveries Underscore Need for Robust Corporate Compliance Programs*

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The Justice Department announced Tuesday that during the past fiscal year, it recovered over \$5.6 billion in criminal and civil fraud cases.<sup>1</sup> That \$5.6 billion figure is the highest in the history of the DOJ, representing civil recoveries of approximately \$3.4 billion and criminal recoveries of approximately \$2.2 billion.<sup>2</sup> These massive numbers underscore the need for companies, their officers and directors to design, implement, and update robust compliance programs to ensure that they do not run afoul of the myriad federal and state statutes that have recently tripped up major global companies, leading to recoveries in the hundreds of millions and, in certain cases, prison terms for executives.

Anti-fraud and anti-corruption efforts have been a major focus of the DOJ since the Obama Administration took office, particularly in the area of health care enforcement. The Department has also benefitted from recent changes in the enforcement landscape which have made prosecuting fraud cases easier, and has not been shy about using the new tools it has at its disposal.

In 2009, Congress passed the Fraud Enforcement and Recovery Act ("FERA"), which broadly expanded businesses' exposure and liability under the False Claims Act ("FCA"). The FCA has been on the books since the Civil War, but only became a potent weapon in the DOJ's anti-fraud arsenal since it underwent substantial amendments in 1986. Among other things, the FCA allows private individuals, often referred to as "relators" or "*qui tam* plaintiffs," to bring civil actions on behalf of the government where false or fraudulent claims for payment have been made. FERA strengthened the FCA by eliminating its former specific intent requirement, liberalizing the definition of materiality, expanding whistleblower protection, penalizing reverse false claims and expanding the use of civil investigative demands ("CIDs"), which provide for pre-complaint discovery in the civil context.<sup>3</sup>

In prepared remarks announcing the DOJ's record fraud recoveries, Deputy Attorney General James Cole described how the DOJ recovered approximately \$900 million in the last fiscal year from eight drug companies. These cases generally involved allegations of submitting inflated claims for repayment to the federal government.<sup>4</sup>

Cole also highlighted two fraud cases which resulted in both heavy fines and criminal penalties. In *United States ex rel. Pallares v. American Grocers et al.*, the DOJ obtained a \$15 million civil settlement over allegations that the company and its principal purchased expired or soon-to-be expired foods at discount, altered the labels on the food to extend the expiration date, and sold the

goods to the U.S. military at inflated prices. These allegations also resulted in a 24 month prison sentence for the head of the company.<sup>5</sup>

Three co-owners of American Therapeutic Corporation, a company that managed mental health clinics in Miami, Florida, have recently been sentenced to prison terms ranging from 35 to 50 years in prison over allegations that they submitted more than \$200 million in fraudulent claims to Medicare that subsidized extravagant personal lifestyles but failed to provide the services for which the defendants sought payment.<sup>6</sup> The prison sentences were in addition to a court order that the co-defendants jointly and severally repay \$87 million in restitution.<sup>7</sup>

Taken together, these examples and the Department's demonstrated focus on ferreting out and prosecuting frauds demonstrate the need for businesses to have robust compliance and training programs in place. Given that DOJ prosecutors are required to consider whether, and to what extent, companies have compliance programs in place prior to deciding whether to charge an organizational defendant with a crime, companies would be well advised to ensure that they have proper programs in place, update them regularly, and are vigilant in identifying and investigating any allegations of wrongdoing. Being proactive now can save millions later.



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<sup>1</sup> Press Release, U.S. Dep't of Justice, Deputy Attorney General James M. Cole Speaks on a Press Conference Call Regarding the Campaign to Cut Waste (Dec. 13, 2011), available at <http://www.justice.gov/iso/opa/dag/speeches/2011/dag-speech-111213.html> ("DOJ Release").

<sup>2</sup> Elizabeth Murphy, *Department Says FY 2011 Fraud Recoveries Surpass Record*, MAINJUSTICE (Dec. 13, 2011), available at <http://www.mainjustice.com/2011/12/13/justice-department-says-fy-2011-fraud-recoveries-surpass-record/>.

<sup>3</sup> See generally Thomas P. O'Brien, Adam Schneir & John J. O'Kane IV, *Recent Changes in Federal Law and Investigative Tactics Signal Heightened Enforcement Under False Claims Act*, HEALTH CARE FRAUD & GOVT. CONT. REP., June 10, 2010.

<sup>4</sup> DOJ Release.

<sup>5</sup> U.S. Dep't of Justice, S. Dist. Tex., Civil Div., <http://www.justice.gov/usao/txs/1Divisions/civil.html> (last visited Dec. 14, 2011).

<sup>6</sup> DOJ Release; see also Jay Weaver, *Medicare money paid for posh life for owners of Miami-based mental health clinics, court files show*, PALM BEACH POST, Oct. 23, 2010, available at <http://www.palmbeachpost.com/news/crime/medicare-money-paid-for-posh-life-for-owners-989221.html>.

<sup>7</sup> Press Release, *Owner of Miami-Area Mental health Company Sentenced to 35 Years in Prison for Orchestrating \$205 Million Medicare Fraud Scheme*, U.S. Dep't of Justice (Dec. 8, 2011), available at <http://www.justice.gov/opa/pr/2011/December/11-crm-1604.html>.