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Rewarding whistleblowers as good citizens

**Response to the
Home Office consultation**

Introduction

We welcome the Government's decision to start a debate on whether citizens and employees who alert the authorities to crime and unlawful activity should be rewarded with a percentage of the penalties or damages paid by the wrongdoer.

This subject raises competing - and at times conflicting - cultural, fiscal, legal, moral, practical and social issues. Unless these are weighed carefully before we identify a way forward, there is a risk that the result that will do more harm than good. For these reasons, while this debate has been initiated in the context of a Home Office review of how the Assets Recovery Agency can meet its targets of recovering £250 million a year by 2010 and £1 billion a year during the next decade, it will be counter-productive if these targets were to be the driving force behind any decision.

The Home Office asks whether and how we should "enlist the citizen to combat fraud" by offering them rewards, advancing the case for this on the experience in the USA of the False Claims Act 1986. This entitles citizens (almost invariably workplace whistleblowers) who formally notify the authorities of a fraud on the US government to a cut of between 15-30% of the damages recovered from the fraudster. This aspect of the legislation applies where the whistleblower registers a claim under the Act in the courts and this is then considered by the authorities. The reward aspect is known as *qui tam,* a reference to a phrase that means when a citizen takes legal action on behalf of the state/Crown, he does so also for himself.

The Home Office point out that the US authorities see the False Claims Act as an 'unarguable success' which brings $15 into public funds for every $1 spent. In the fiscal year 2006/7, the US Government recovered $2 billion under the False Claims Act of which $177 million went to whistleblowers. These figures do not include recoveries made at state level where similar legislation also exists.

Is the idea a novel concept?

The Home Office paper states that "Clearly the *qui tam* provisions in the False Claims Act are embedded in a very different historical, legal and cultural context. They would be a novel import into England and Wales". The US authorities and courts, however, firmly place the historical, legal and cultural origins of *qui tam* in England. As shown in Annex A, Justice Scalia records in a 2000 Supreme Court judgment that the *qui tam* concept of

rewarding informers began in England in the 13th century and continued to operate here under a statutory scheme until 1951.

An illuminating summary on the origins of *qui tam* in England and of its role in the USA today can be found in Information as a Commodity in the Regulatory World[1] by Professor Pamela Bucy of the University of Alabama. As to its origins, this explains that the *qui tam* doctrine was an essential development for the rule of law in England from the early middle ages as there was neither a police force nor a prosecuting authority. In the shift from a church to a secular state, *qui tam* - by involving and rewarding citizens in the detecting, proving and deterring of crime - helped give the public confidence that society could protect them from wrongdoing. However, as the article relates, the system of paying informers became subject to a series of abuses[2] and this led to the courts and Parliament taking various measures to counter these abuses.

These abuses culminated in the repeal of what was left of the general statutory scheme in the Common Informers Act 1951. It was, coincidentally, at this time that the UK was embarking on a wholesale increase in the role of the state through nationalisations, an extension of welfare provision and an assumption of other responsibilities.

Why information matters

For any law to be enforced, the courts or state need information about its breach. It is safe to assume that those people who are victims of a breach will have good reason to report the matter or pursue a private claim for compensation. The difficulty of relying on this route is that it can only be taken after the event when damage has been done. Another way that laws are enforced is by the authorities obtaining information from perpetrators who have been or believe they are soon to be caught and who, in exchange for the evidence that secures the conviction of their collaborators, are offered immunity or reduced sentences.

A third way is to enable, reassure and encourage those people who are neither victims nor perpetrators but who witness wrongdoing that they can or should challenge it themselves or report it to the authorities. Such conduct is part of the fabric of most communities and of most successful societies. It is often viewed as part of one's human obligations and, ethically, it is based on the maxim of *do unto others as you would be done by*. However, where a state seeks to harness and govern this ethic to strengthen its own power at the expense of that of the society – as most tyrannies and totalitarian regimes have by encouraging anonymous informing direct to the authorities – it invariably leads to the destruction of the society and subsequently of the state.

In most cases, the police are able to enforce the law and clear up crime only with information from victims, from perpetrators and/or from witnesses or good citizens. As to this last group, the criminal courts have long had a power to give rewards to good citizens who openly help stop, detect or prove a crime, but this operates as an expression of gratitude for - rather than an inducement to - such conduct. More recently in the UK, Crimestoppers was established to offer a convenient, anonymous route for witnesses / good citizens to tip off the police about crimes. While it advertises rewards of up to £1000 for successful tip-offs, only 4% of those eligible claim theirs.

[1] www.houstonlawreview.org/archive/downloads/39-4_pdf/**Bucy**.pdf

[2] Collusion between a wrongdoer and an ally to settle the claim for a minimal figure to thwart further action or recovery; filing claims in distant courts where they could not be disputed; and filing claims under obsolete (and often sectarian) Acts to pursue a private campaign.

Why whistleblowing matters

Whistleblowing is a particularly relevant but potentially sensitive part of the picture about why information matters. Where someone suspects or discovers crime or wrongdoing at work, their position is different from that of the passer by. They rely on their employment to support themselves and their family. Often the workplace can provide social status and, increasingly today, operate as a social hub for people. Even where this is not the case, most people will have established ties of friendship, if not bonds of loyalty, with colleagues. They will almost invariably be under legal duties of confidentiality that seek to deter them from passing information outside of the workplace. For a long time, the result has for been that whether they were to report their concern internally or to the authorities, they would have feared that this will damage their employment, career or social standing.

While the provision of information is recognised as critical to deterrence and detection of crime and wrongdoing in society, in the workplace the provision of the same information has for long been viewed as distasteful or undesirable. This has been the case whether the crime or wrongdoing has been on, in or by the organisation. In the last twenty years there have been moves – most notably in the US and UK, though in differing ways – to put right this anomaly. Professor Bucy's thesis is that the need for whistleblowing has become ever greater in the modern world:

> "What has changed in recent years is the nature of the wrongdoing the regulatory world seeks to control. Because of the information revolution created by computerization and the interconnectedness resulting from globalization, massive fraud, and corruption and graft of every kind are easier to commit and harder, if not impossible, to detect. More ominously, the impact of such wrongdoing is more pervasive and more cataclysmic than ever before. In short, the stakes are higher.
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> This new world requires a more effective regulatory response. An indispensable component of such a response is information from knowledgeable persons about the wrongdoing committed by others for economic gain. Without such information, public regulation is doomed to too little, too late, and too expensive in public resources."[3]

Whistleblowing in the UK today

In 1998 the UK Parliament passed the Public Interest Disclosure Act. Rather than offering whistleblowers a monetary award[4], the Act operates by protecting them from reprisals by their employers, provided they are not acting in bad faith. The protection can extend to reemployment orders but is mostly by providing compensation for any losses they suffer. There is no limit on the compensation available and the highest award to date was £3.8 million[5].

The Act promotes and protects whistleblowing (a) internally, (b) to the authorities and (c) publicly. The protection operates on a tiered approach: it is almost automatically available for internal disclosures and is available without great difficulty for regulatory disclosures. Protection is available for a public disclosure where the disclosure is both justified and

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[3] See Note 1, page 977/8.

[4] However, PIDA does state that its protection is not affected by any reward or benefit provided by or under statute. This is a reference to discretionary rewards that can be given by authorities such as the Revenue or Customs for information received. By contrast, PIDA states that protection for a public disclosure is lost if it was made for a reward or benefit (eg. cheque book journalism).

[5] Backs & List v Chestertons – dismissed for alerting City regulators to misconduct.

reasonable. The Act applies to financial malpractice (whether on the government or someone else) and to other forms of malpractice that threaten the public interest. These include crimes, dangers, environmental damage, illegality and cover-ups.

The main problem with the Act at present is that under a misconceived rule [6] introduced by the Department of Trade & Industry in 2004 all information about whistleblowing claims is kept secret until and unless the claim ends with a formal hearing and legal decision. As the Act most readily protects internal whistleblowing, this rule enables the wrongdoer to buy off the whistleblower so as to keep the crime or fraud secret. Contrary to the public interest, this secrecy thwarts the authorities and victims from taking preventative or legal action. While the Department of Trade & Industry no longer exists[7], the rule presently remains.

How do the UK & US schemes differ?

There are a number of significant differences in the way UK and US legislation on whistleblowing work. While the UK has one whistleblowing statute (PIDA), in the US there is presently a patchwork of different provisions[8]. For the purposes of this particular debate, in the brief snapshot below, the comparison is with the USA's False Claims Act (FCA).

- The FCA applies to frauds, while PIDA covers almost all wrongdoing.
- The FCA applies to frauds that have happened or are happening, while PIDA also applies to those that are likely to happen.
- The FCA applies only where the victim is the Government, while PIDA applies whoever is threatened or injured by the wrongdoing.
- The FCA applies only where the whistle is blown to the authorities (and so can act a disincentive to raise the concern internally), while PIDA applies where the whistle is blown internally, to the authorities and or more widely.
- The FCA applies where the whistleblower is proven right, while PIDA applies where the whistleblower has a genuine and reasonable concern (even if it is not substantiated on investigation).
- The FCA encourages the whistleblower to become a private investigator, while PIDA does not.
- The FCA applies irrespective of whether the whistleblower suffers any loss, while PIDA is only triggered where the whistleblower is victimised.
- The FCA offers the whistleblower the prospect of a large reward, while PIDA offers protection against reprisal and, failing that, compensation.
- The FCA operates as an anti-trust law so enabling the government to recover damages three times the amount of the fraud, while PIDA makes no provision as to any proven wrongdoing leaving this to the relevant civil, criminal and regulatory laws.

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[6] An investigation by the Parliamentary Ombudsman (report PA-3002/0058, 2005) criticized the DTI on six separate grounds in its role in preparing promoting this secrecy rule. As a result the DTI was obliged to pay this charity £130,000 for wasting our time.

[7] This part of its functions are now run by Department for Business, Enterprise and Regulatory Reform.

[8] The most recent is the Sarbanes Oxley Act, introduced in the wake of the collapse of Enron. This applies to listed companies and is concerned primarily with financial malpractice. It differs from the UK approach in that (a) the Act promotes anonymous informing and (b) the scheme does not operate a tiered approach to the readiness with which differing disclosures are protected.

- The FCA arrangements involve private sector lawyers in making the case and proving the fraud, while PIDA involves lawyers in the claims for compensation
- The FCA's large recoveries and shares for whistleblowers make this rewarding and attractive work for lawyers skilled in uncovering fraud and who operate on contingent fees, while PIDA operates in employment tribunals where (while individuals can represent themselves) the lawyers tend to specialise in labour law, and
- Critics of the FCA say it is open to abuse in that a whistleblower has an incentive to delay reporting the fraud and so maximising the reward, critics of PIDA say it is open to abuse in that a worker has an incentive to raise a spurious whistleblowing concern if and when his job is on the line.

What are the results of the US *qui tam* law?

In the year 2006/7, the Department of Justice says that of the $2 billion it recovered under the FCA, $1.45 billion came in suits initiated by whistleblowers. This has brought whistleblowers rewards totalling £177 million so far. Examples of the recoveries in 2006/7 include:

- $311 million for inducing surgeons to recommend and use particular products for hip and knee replacements;
- $172 million for excluding pregnant women and sickly people from a federally funded welfare scheme to boost the contractor's profits;
- $105 million for underpaying royalties for natural gas;
- $98 million for overcharging on computer software; and
- $34 million for destroying 77,000 individual tax returns and payment cheques rather than processing them as the company was paid to do[9].

As noted above, the recovery is usually three times the size of the sum defrauded due to the triple damage rule for anti-trust claims. The US group Taxpayers Against Fraud lists the top twenty recoveries since the False Claims legislation was amended and extended in 1986[10]. The largest of these is $900 million paid by Tenet Healthcare in July 2006 for fraudulently billing the Medicare system and for paying 'kickbacks'. Nineteen out of the top twenty recoveries listed relate to health and pharmaceutical sectors. The Department of Justice's press release of the figures for 2005/6 states that 72% of the recoveries were in health care and 20 percent in defence.

While attention invariably focuses on massive recoveries, it is worth noting that the False Claims legislation also operates on a smaller scale. Taxpayers Against Fraud detail the range of settlements so far this year under the False Claims Act on their website[11]. At the low end, these recoveries include

- $200,000 for overstating the warranty for an epoxy paint
- $145,000 for submitting duplicate claims
- $110,000 for diverting money from a welfare to work programme
- $ 30,000 for fraudulent billing by a dentist, and
- $ 12,000 for substituting a cheaper cut of meat for a US prison.

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[9] Reproduced in Annex B to this paper - Press release 1 Nov 2007 – "*Justice Department Recovers $2 Billion for Fraud Against the Government in Fin Year 2007; More than $20 Billion since 1986*"

[10] See www.taf.org/top20.htm

[11] See www.taf.org/total2007.htm

What do these results tell us?

What is striking about these results is that there are companies in the health / pharmaceutical, IT and defence sector that seem to consider the benefits such that - notwithstanding the triple damages rule and the huge rewards available to whistleblowers - it is still worth defrauding the US Government and taxpayer. While no doubt there is a deterrent effect and the Department of Justice do often insist on improved compliance systems as part of any settlement, the fact that the FCA recoveries increase year on year gives the impression that deterrence is outstripped by greed (perhaps bolstered by a belief among companies that they have smarter officials and auditors than the government).

As many of the groups in the health / pharmaceutical, defence and IT sectors operate internationally, the results of the False Claims Act should be a cause for concern for the UK Government and taxpayer. As an example, five out of the ten largest FCA recoveries in 2006/7 – totalling almost $1 billion – included companies or groups which also operate in the UK, most through dealings with the UK Government: Bristol Myers Squibb, Smith & Nephew / Zimmer, Aventis, Oracle, and Conoco Phillips. The previous year included a $565 million settlement of a defence procurement fraud by the Boeing Company, the second largest defence company in the US.

Unless the financial checks and controls used in comparable arrangements by the UK Government are notably more effective than those operated by the US Government, the risk is that the types of frauds uncovered in the US by the False Claims Act may also go undetected here[12]. If anything, we imagine the risks will be higher in the UK than in the US where the FCA's triple damages rule and prospect of substantial rewards for whistleblowers should have a deterrent effect.

Cultural considerations

While we have much in common with our American cousins, there remain some important cultural and social differences which are relevant in considering whether and how we could best learn from and build on their experience in this area.

Very substantial awards for individuals are one characteristic of the American legal system. These are decided without regard to any loss the individual has suffered, but are essentially a fine or penalty on the wrongdoer that is paid to one arbitrarily selected victim of its misconduct. There is no analogy in the UK whereby a claimant can receive a substantial windfall as opposed to compensation for the losses he or she suffered as a result of the wrong.

In the US there is no general employment law protection and, until 2003, there was no protection for private sector employees who blew the whistle internally or to a regulator. The nearest thing to protection or compensation was the possibility of substantial rewards available under *qui tam* suits, but only for frauds on the US Government.

In the US, the debate has long been characterised by a sense that whistleblowers are and should be viewed as wounded heroes[13]. In the wake of Enron and World Com, there has been a recognition that you do not have to be wounded to be a whistleblower (*Time* magazine made whistleblowers its people of the year in 2003) but the US still likes to

[12] As Professor Bucy notes when people commit substantial complex frauds, it can be expected that they will also create a paper trail to conceal the fraud. This is one reason why information from a whistleblower can be so vital in combating such frauds.
[13] See note 1, pages 948-958.

portray them as lone heroes or heroic loners. By contrast, the UK has seen a welcome shift in attitudes toward whistleblowing. In a YouGov survey in May 2007, 85% of people in work said they would raise a whistleblowing concern internally. When asked what they would do if they were not confident about the internal route, over half said they would most likely raise the matter outside[14]. An Ernst & Young survey in March 2007, on attitudes across Europe among staff in multinationals which had promoted whistleblowing, suggested that their British workforce are much more likely to blow the whistle than their European colleagues (86% as against 54%).

Finally as we have noted, the US operates a rule of triple damages in this and other areas of anti-trust law. The thinking behind the rule is not only to punish the wrongdoer (something that in the UK is a function of the public law system as the courts will only exceptionally award punitive damages) but additionally to encourage citizens to take legal claims on behalf of the public interest – acting as if they were private attorneys general.

A moral quandary

The frauds that the False Claims Act uncovers and sanctions are motivated by greed. The main way that the Act operates is by entitling those who report frauds to rewards and the more substantial the fraud, the more substantial the reward. To a large extent this is using greed to combat greed. While some may maintain that this is a necessary response to the problem of fraud and an example of fighting fire with fire, we think it creates not only moral hazards but real risks.

While fighting fire with fire may be a sensible and effective tactic in a forest[15] , it would be both dangerous and counter-productive in a village or city. Certainly as the standard response to the problem (rather than the one of last resort), it would be unlikely to command the support or inspire the confidence of the inhabitants[16].

Considerations as we go forward

We agree that steps should be taken to enlist the help of citizens in the fight against fraud. We maintain that whatever constructive steps are taken to enlist them in the fight against fraud should also be taken to enlist their help in the fights against other crime and wrongdoing.

We agree that the aim should be to enlist citizens – i.e. the public generally – in combating fraud, crime and wrongdoing, rather than to focus on employee whistleblowers.

We maintain that while reporting to the authorities is one important way to combat fraud, crime and wrongdoing it is not the only way. Encouraging people to challenge fraud, crime and wrongdoing within their community or workplace is at least as important (and in many cases will be a more commendable act).

We agree that the results of the False Claims Act suggest that the Government is vulnerable to substantial fraud on major contracts, particularly those in the health / pharmaceutical, defence and IT sectors.

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[14] 56% said they would most likely go to the police, a regulator or a named outside body, 32% said they were unsure what they would do and 12% said they would most likely do nothing.
[15] Where it is used to create a barren barrier (or firewall) that can contain the approaching flames.
[16] It is interesting that the US in the Sarbanes Oxley Act introduced after the collapse of Enron did not set up a reward based scheme for whistleblowers but opted for one offering protection.

We agree there is a sound case for rewarding good conduct. However we think there are moral hazards and real risks if a reward is an entitlement of right as it would become and be seen to be the motivation that enlists the public in the fight against crime and wrongdoing.

In the context of whistleblowing, we agree, subject to the preceding point above, with Professor Bucy's conclusion that

> "The regulatory world must recognize that such information is an essential commodity and must be willing to pay adequately for it. The compensation package needed to "purchase" inside information consists of four components: a responsive regulatory system that is able to work with insiders; public access to information; supportive cultural values; and a significant monetary reward."[17]

As to the first component, we think more needs to be done with and by UK regulators to promote whistleblowing in their respective sectors. Regulators should promote the role of and protection for employees blowing the whistle internally, to them as regulators and beyond as a means to encourage and help responsible employers to (a) establish effective internal compliance systems and (b) adopt open and constructive relationships with them as regulators. As to public access to information in the context of fraud and wrongdoing, the secrecy that presently smothers public interest disclosure claims should be removed. As to supportive cultural values, the survey data at the top of page 7 suggests that there has been real progress here in Britain. As to significant monetary rewards, we think that if the model of the False Claims Act – with its entitlement as of right to a cut of the money recovered - were replicated here, it this would undermine the supportive cultural values that Professor Bucy sees as equally necessary.

<u>Conclusion and recommendations</u>

We welcome this debate on how we may better enlist citizens to combat fraud (and, in our view, other wrongdoing). We agree that better use can and should be made of whistleblowers and whistleblowing to deter and detect serious wrongdoing. We also agree that the False Claims Act has proved an unarguable success in the USA. In the last financial year, the Act secured $2 billion for public funds - bringing in $15 for each $1 spent. The rewards for whistleblowers (set between 15-30% of the sums recovered) are – along with the triple damages rule - the major reasons for its success. However, in the light of the considerations set out in this paper, we do not recommend that this same approach is adopted in the UK. Rather, we recommend the following ways forward:

1) Public Interest Disclosure Act

Insofar as the fight against fraud goes, the main problem with the UK legislation is that the present tribunal secrecy invites and enables fraudsters and wrongdoers to buy off whistleblowers and so cover up and continue their crimes. The Department for Business, Enterprise and Regulatory Reform is expected to review this rule and we call on Home Office ministers to use their influence and good offices to encourage the Government to put information about claims under the Public Interest Disclosure Act on the public record.

2) Government contracts

We recommend that the Public Accounts Committee, Department of Health, Ministry of Defence and Treasury review the decisions and settlements under the False Claims Act and assess to what extent the Government is at risk of similar frauds on similar substantial

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[17] See note 1, p 978. This sentence ends the quotation reproduced on page 3 of this paper.

contracts. Whether or not they consider the options for treble damages, we recommend they explore good faith duties on contractors to (a) notify HMG of any relevant claim, settlement or finding of fraud (whether in the UK or not), and (b) to promote effectively to their staff that they are authorised to raise whistleblowing concerns on the project either with the contractor or the Government. If it is considered that rewards for whistleblowers have a role to pay in deterring fraud on such contracts, we recommend they be channelled to and operated by the Good Citizen Fund, see below.

3) Good Citizen Fund

We recommend the Government explores and consults on the scope of an independent scheme to promote, encourage and thank citizens who help stop, deter or detect crime, fraud, danger and other wrongdoing that threatens the community. The recipients should be those citizens who have acted as witnesses, rather than those who have provided information in the role of perpetrator[18] or victim. We envisage awards going to a wide range of good citizens – be it, a child who alerts a train driver to a danger on the track, a witness who gives evidence in open court against a local thug, a care worker who sounds the alarm on suspected sexual abuse by the home's owner, a nurse who has a good idea to combat MRSA in her Trust, an employee who blows the whistle on a fraud and a holidaymaker who reports the discharge of a dangerous pollutant in a river[19].

If the Government were to provide £1 per person in England & Wales for its launch, it would start with over £52 million. Thereafter the Fund could sensibly and fairly receive 10% of all fines, penalties and recoveries received by public funds (assessed either nationally or also at the relevant local level). The costs of administering the Fund should be kept to a minimum by designing the scheme to build on existing entities, by putting any central operation out to tender and, in any event, by limiting the administrative costs to no more than 10%.

The funds would be distributed to or for good citizens on the basis of a wide but transparently exercised discretion rather than as an entitlement to a given percentage of the money recovered. Sums that were not distributed to individuals could sensibly go on local independent initiatives combating crime and wrongdoing and schemes promoting good citizenship. While all these matters should be for consultation, we suggest that nominations would be made by courts, tribunals, churches, media, regulators, employers, health providers, auditors, ombudsmen, community groups, unions, schools and the police rather than the individuals themselves.

We think it important that any such scheme be operated in a positive, engaging and fun way, with a large part of its activity happening on a local level. Insofar as the aim is to enlist and promote the role of citizens in combating fraud, crime and wrongdoing, at a local level it could be based around courts, with local people involved in the distribution and award process three or four times a year.

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[18] The Home Office leaves open the option of rewards for perpetrators, saying this it would need to consider carefully how to proceed in these cases. In our view, perpetrators should not be eligible for rewards from the Good Citizen Fund.

[19] The Fund might also consider making good PIDA awards which are unfulfilled because the employer has ceased trading.

Annex A

Justice Scalia, US Supreme Court summarising the English origins of Qui Tam in Vermont Agency of Natural Resources v. United States ex. rel. Stevens, 529 U.S. 765 (2000) at paras 774-776:

"Qui tam actions appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf. See, e. g., Prior of Lewes v. De Holt (1300), reprinted in 48 Selden Society 198 (1931). Suit in this dual capacity was a device for getting their private claims into the respected royal courts, which generally entertained only matters involving the Crown's interests. See Milsom, Trespass from Henry III to Edward III, Part III: More Special Writs and Conclusions, 74 L. Q. Rev. 561, 585 (1958). Starting in the 14th century, as the royal courts began to extend jurisdiction to suits involving wholly private wrongs, the common-law qui tam action gradually fell into disuse, although it seems to have remained technically available for several centuries. See 2 W. Hawkins, Pleas of the Crown 369 (8th ed. 1824).

At about the same time, however, Parliament began enacting statutes that explicitly provided for qui tam suits. These were of two types: those that allowed injured parties to sue in vindication of their own interests (as well as the Crown's), see, e. g., Statute Providing a Remedy for Him Who Is Wrongfully Pursued in the Court of Admiralty, 2 Hen. IV; ch. 11 (1400), and-more relevant here-those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves, see, e. g., Statute Prohibiting the Sale of Wares After the Close of Fair, 5 Edw. III, ch. 5 (1331); see generally Common Informers Act, 14 & 15 Geo. VI, ch. 39, sched. (1951) (listing informer statutes). Most, though not all, of the informer statutes expressly gave the informer a cause of action, typically by bill, plaint, information, or action of debt. See, e. g., Bill for Leases of Hospitals, Colleges, and Other Corporations, 33 Hen. VIII, ch. 27 (1541); Act to Avoid Horse-Stealing, 31 Eliz. I, ch. 12, § 2 (1589); Act to Prevent the Over-Charge of the People by Stewards of Court- Leets and Court-Barons, 2 Jac. I, ch. 5 (1604).

For obvious reasons, the informer statutes were highly subject to abuse, see M. Davies, The Enforcement of English Apprenticeship 58-61 (1956)-particularly those relating to obsolete offenses, see generally 3 E. Coke, Institutes of the Laws of England 191 (4th ed. 1797) (informer prosecutions under obsolete statutes had been used to "vex and entangle the subject"). Thus, many of the old enactments were repealed, see Act for Continuing and Reviving of Divers Statutes and Repeal of Divers Others, 21 Jac. I, ch. 28, § 11 (1623), and statutes were passed deterring and penalizing vexatious informers, limiting the locations in which informer suits could be brought, and subjecting such suits to relatively short statutes of limitation, see Act to Redress Disorders in Common Informers, 18 Eliz. I, ch. 5 (1576); Act Concerning Informers, 31 Eliz. I, ch. 5 (1589); see generally Davies, supra, at 63-76. Nevertheless, laws allowing qui tam suits by informers continued to exist in England until 1951, when all of the remaining ones were repealed. See Note, The History and Development of Qui Tam, 1972 Wash. U. L. Q. 81, 88, and n. 44 (citing Common Informers Act, 14 & 15 Geo. VI, ch. 39 (1951))."

Annex B

Department of Justice

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Justice Department Recovers $2 Billion for Fraud Against the Government in Fy 2007; More Than $20 Billion Since 1986

WASHINGTON -- The United States obtained $2 billion in settlements and judgments in the fiscal year ending September 30, 2007, pursuing allegations of fraud against the federal government, the Justice Department announced today. This brings total recoveries since 1986, when Congress substantially strengthened the civil False Claims Act, to more than $20 billion.

“This year's outstanding recoveries in civil fraud cases demonstrate this administration's unwavering commitment to root out fraud against the government and to ensure that citizens' tax dollars are well spent,” said Peter D. Keisler, Acting Attorney General and Assistant Attorney General for the Civil Division. “It also attests to the fortitude of whistleblowers who report fraud and the tireless efforts of the civil servants who investigate and prosecute these cases.”

Mr. Keisler also paid tribute to Senator Charles Grassley of Iowa and Representative Howard L. Berman of California, who sponsored the 1986 amendments to the False Claims Act, the government's primary weapon to fight fraud against the government. “Without this important legislation strengthening the Act and, in particular, the qui tam provisions which give ordinary citizens the courage and protection to blow the whistle on those who defraud the government, such recoveries would not have been possible."

Of the $2 billion, $1.45 billion is associated with suits initiated by whistleblowers under the False Claims Act's qui tam provisions. These whistleblower provisions authorize individuals, known as "relators," to file suit on behalf of the United States against those who have falsely or fraudulently claimed federal funds. Such cases run the gamut of federally funded programs from Medicare and Medicaid to defense procurement contracts, disaster assistance loans, and agricultural subsidies. Persons who knowingly make false claims for federal funds are liable for three times the government’s loss plus a civil penalty of $5,500 to $11,000 for each claim. Relators recover 15 to 25 percent of the proceeds of a successful suit if the United States intervenes in the qui tam action, and up to 30 percent if the United States declines and the relator pursues the action alone. In fiscal year 2007, whistleblowers were awarded $177 million. (This figure does not include relator shares for fiscal year 2007 which have not yet been awarded or were awarded after September 30, 2007.)

As in the last several years, health care accounted for the lion's share of fraud settlements and judgments–$1.54 billion. This number includes both whistleblower claims and those initiated by the United States in independent fraud investigations. Cases involving fraud against the Department of Health and Human Services reaped the biggest recoveries, largely attributable to its Medicare program and the federal/state Medicaid program, which funds health care for the needy. Recoveries were also obtained for the Office of Personnel Management, which administers the Federal Employees Health Benefits Program, the Department of Defense for its TRICARE insurance program, the Department of Veterans Affairs, and others.

The largest health care recoveries came from pharmaceutical companies and related entities. Settlements with Bristol-Myers Squibb Co., Aventis Pharmaceuticals, Inc., Medco Health Solutions, Inc., Purdue Pharma L.P. and Purdue Frederick Co., and InterMune, Inc. accounted for more than $800 million of the $1.5 billion. In addition to federal recoveries, pharmaceutical fraud cases returned $264 million to state Medicaid programs.

The Civil Division's investigation of the pharmaceutical industry is part of a Department-wide effort. Typical allegations involve illegal promotion of drugs or devices and causing the government to pay for uses that were neither found by the Food and Drug Administration to be safe and effective, nor supported by the medical literature, also known as "off-label" marketing; paying kickbacks to physicians, wholesalers, and pharmacies to induce drug or device purchases; establishing inflated drug prices knowing that federal health care programs use these prices to reimburse providers, then marketing the "spread" between the federal reimbursement and the provider's lower cost to induce drug purchases; and failing to report the company's true "best price" for a drug to reduce rebates owed to the Medicaid program.

Outside the health care arena, fraud against the Department of Defense accounted for $48.4 million in settlements. In cases involving other agencies, Burlington Resources, Inc., a subsidiary of Conoco Phillips, paid the United States $105.3 million based on claims that it had underpaid natural gas royalties to the Department of Interior. In a record General Services Administration settlement, Oracle Corporation paid the government $98.5 million to resolve allegations that PeopleSoft, Inc. (acquired by Oracle in 2005) engaged in defective pricing of its software and services under the company's multiple award schedule with GSA. And Mellon Bank, N.A. paid the United States $34.6 million to settle claims that it violated its contract with the Internal Revenue Service to process individual income tax returns and payments.

The Department also achieved favorable verdicts after lengthy trials in two cases. The United States won a $172 million judgment against Amerigroup, Illinois Inc. based on claims that Amerigroup's HMO in Illinois illegally increased its profits by discriminating against pregnant women and individuals with pre-existing medical conditions when enrolling Medicaid-eligible applicants. Amerigroup is appealing the jury's verdict. In the second case, the United States won a $90 million judgment against several companies for conspiring to rig bids on contracts financed by the U.S. Agency for International Development for the construction of wastewater treatment facilities in Cairo, Egypt.

FACT SHEET: SIGNIFICANT RECOVERIES IN FISCAL YEAR 2007

Among the Department's most significant settlements and judgments in fiscal year 2007 were: **$328 million from Bristol-Myers Squibb Company** (BMS) and its generic division, Apothecon, to resolve a broad array of allegations involving illegal drug pricing and marketing activities. BMS and Apothecon paid an additional $187 million to state Medicaid programs based on the same allegations. The civil settlement arises from seven qui tam actions and resolves allegations that (1) BMS and Apothecon set and maintained inflated prices knowing that federal health care programs used these prices for reimbursement, and then marketed the "spread"–the difference between the reported price and cost–to induce sales by increasing providers' profits; (2) BMS paid kickbacks to

doctors in the form of bogus consulting fees to induce them to purchase BMS's drugs; (3) BMS paid kickbacks to wholesalers and retail pharmacies to induce purchases of generic products; (4) BMS promoted its atypical antipsychotic drug, Abilify, for juvenile use and to treat dementia related psychosis–uses that were not approved by the Food and Drug Administration; and (5) BMS violated the Medicaid Drug Rebate Act, 42 U.S.C. § 1396r-8, by reporting false "best prices" to the government for its drug Serzone, which resulted in BMS underpaying quarterly rebates owed to the Medicaid program. The six relators will share a $52 million award plus additional amounts from the states.

$311 million from four manufacturers of hip and knee surgical implant products– Zimmer, Inc., Depuy Orthopaedics, Inc., Biomet Inc., and Smith & Nephew, Inc.–to settle claims that from at least 2002 through 2006 these companies used consulting agreements with orthopedic surgeons to induce the purchase of their devices. The government's investigation revealed that the firms paid surgeons hundreds of thousands of dollars a year for consulting contracts and lavished them with trips and other expensive perquisites in exchange for using the companies' products exclusively. In addition to the civil settlements, the four companies executed deferred prosecution agreements requiring new corporate compliance procedures and the appointment of federal monitors to review their compliance with these procedures.

$180 million from Aventis Pharmaceuticals, Inc. to resolve allegations that the company engaged in a scheme (1) to set and maintain fraudulent and inflated prices for its drug, Anzemet, knowing that federal health care programs established reimbursement rates based on those prices, and (2) to use the difference between the inflated prices reported and the actual prices charged to its customers to market, promote, and sell the drug. In addition, Aventis paid $10 million to several state governments based on the same allegations. The relators shared a $33 million award.

$172 million judgment after trial against Amerigroup, Illinois Inc. finding that Amerigroup fraudulently skewed enrollment in its Medicaid HMO program by refusing to register pregnant women and by discouraging registration by individuals with pre-existing conditions. Amerigroup had entered into contracts with the Illinois Department of Public Health requiring the company to provide health care services to Medicaid eligible individuals in Illinois. In violation of these contracts, Amerigroup engaged in a cherry-picking scheme to ensure that those who enrolled in its HMO program represented a disproportionately healthy population of Medicaid-eligible individuals. As a result, Amerigroup reduced its medical losses and increased its profits. Amerigroup has appealed the judgment.

$155 million from Medco Health Solutions, Inc. to settle allegations that Medco submitted false claims in connection with the mail order prescription drug benefit offered under the Federal Employee Health Benefits Program. The government alleged that Medco cancelled prescriptions it could not fill timely to avoid late penalties, shorted pills, and billed for pharmacy services it didn't provide. The government also alleged that Medco solicited kickbacks from pharmaceutical manufacturers to favor their drugs on Medco's formulary, and paid kickbacks to health plans to obtain business. The settlement resolved two qui tam lawsuits and a separate federal investigation prompted by Medco's disclosure to the government concerning billing problems for diabetic supplies. The relators received $23.9 million as their award. Medco also entered into a corporate compliance agreement with the Department of Health and Human Services and the Office of Personnel Management.

$100.6 million ($109 million including interest) from Purdue Pharma L.P. and Purdue Frederick Company, Inc. to settle allegations of fraud against Medicaid and other federal health care programs. The government alleged that Purdue fraudulently misbranded OxyContin as being less addictive and less subject to abuse and diversion than other pain medications. The civil settlement resolved allegations that, based on these misleading marketing claims, Purdue knowingly caused the submission of false claims for OxyContin that were not eligible for federal reimbursement. In addition, Purdue paid $60 million to state Medicaid programs, forfeited $276 million to the United States, set aside $130 million to resolve private civil claims (with unclaimed amounts to revert to

the United States), paid $5.3 million to the Virginia Attorney General's Medicaid Fraud Control Unit to fund future health care fraud investigations, and paid $20 million to fund the Virginia Prescription Monitoring Program. Finally, Purdue paid $500,000 in criminal fines–the maximum allowed under the statute.

$97.5 million ($105.3 million including interest) from Burlington Resources, Inc., a subsidiary of Conoco Phillips, the third largest integrated energy company in the United States, to settle claims that Burlington underpaid royalties owed on natural gas produced under federal and Indian leases. The government alleged that Burlington systematically underreported the value of the natural gas it produced under onshore federal and Indian leases from March 1, 1988, to March 31, 2005, to reduce its obligation to pay royalties to the United States and Indian tribes.

$98.5 million from Oracle Corporation, in a record fraud settlement involving the General Services Administration (GSA), to resolve allegations that PeopleSoft Inc., which was acquired by Oracle in 2005, violated the False Claims Act. The allegations arose from a qui tam suit filed by a former employee of PeopleSoft, who alleged that PeopleSoft provided GSA with pricing disclosures for its software and related maintenance services that were not complete, accurate and current. As a result of the defective disclosures, federal agencies that purchased PeopleSoft software and services between March 17, 1997, and September 30, 2005, under the company's multiple award schedule with GSA, paid inflated prices. The relator received $17.7 million as his statutory award.

$90 million judgment after trial against Harbert International, Inc.; Bill Harbert International Construction, Inc.; Bilhar International Establishment f/k/a Harbert International Establishment, a Liechtenstein company; and Harbert Corporation. Harbert Construction Services (U.K.) Ltd., a British company, and Elmore Roy Anderson are also liable for portions of the judgment. Following a seven-week trial, a jury found the defendants liable for conspiracy to rig bids on contracts to construct wastewater treatment facilities in Cairo, Egypt. These contracts were financed by the U.S. Agency for International Development. The jury found damages of $34 million. Pursuant to the False Claims Act, the court trebled the amount of damages and added a $10,000 penalty for each of 111 false claims. The final award was reduced by amounts previously received by the government in settlement with the defendants' co-conspirators: J. A. Jones Construction Company; Philipp Holzmann A.G., a German company; ABB SUSA, Inc.; Archirodon Group, Inc.; and Bilfinger + Berger Bauaktiengesellschaft, a German company. The relator's award has yet to be determined.

$42.65 million to settle allegations of fraud against Maximus, Inc. in connection with claims to the Medicaid program. The District of Columbia Child and Family Services Agency (CFSA) hired Maximus to assist it in submitting claims to Medicaid for targeted case management services provided by the District to children in its foster care program. The United States alleged that Maximus caused CFSA to submit claims for every child in the foster care program whether or not targeted case management services had been provided to the child. Maximus also entered into a deferred prosecution agreement with the U.S. Attorney's Office. The relator, a former division manager with Maximus, received $4.93 million as his share of the recovery.

$34.6 million from Mellon Bank, N.A., to resolve allegations that the bank violated the False Claims Act when in April, 2001, several of its employees hid and then destroyed approximately 77,000 individual income tax returns, together with approximately $1.3 billion in tax payment checks, instead of processing the returns and checks as required by its Lockbox Depositary Agreement with the Internal Revenue Service (IRS). Through a massive effort lasting more than a year, the IRS was able to obtain copies of the tax returns and replacement checks from most of the taxpayers. Although Mellon Bank had paid IRS for its costs and for interest on the destroyed tax revenue, the out-of-court settlement resolved the government's claim that the bank was liable for multiple damages and civil penalties under the False Claims Act.