

# United States Senate

WASHINGTON, DC 20510

December 17, 2010

## Via Electronic Transmission

The Honorable Kathleen Sebelius  
Secretary  
U.S. Department of Health and Human Services  
330 Independence Avenue, SW  
Washington, D.C. 20201

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Secretary Sebelius and Attorney General Holder:

As a senior member of the United States Senate, Ranking Member of the Committee on Finance, and a senior member of the Committee on the Judiciary (Committee), I have a unique role in conducting oversight of both the Department of Justice (DOJ) and Department of Health and Human Services' (HHS) efforts to combat fraud against federal health care programs, including Medicare and Medicaid. I have been a strong advocate for strengthening and enforcing federal civil and criminal laws targeting these crimes which cost the government billions of dollars each year. I write today seeking additional information regarding the way your departments allocate and utilize taxpayer monies appropriated for the Health Care Fraud and Abuse Control (HCFAC) Program and to express my concerns with the stagnating number of criminal prosecutions for health care fraud.

The HCFAC Program was established as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and is jointly administered by both your departments. As amended by the Tax Relief and Health Care Act (TRHCA), HCFAC appropriates mandatory amounts of money to an account, the Health Care Fraud and Abuse Control Account (Account), where the monies are then distributed to various agencies according to statutory specifications. These mandatory funds are available until expended and are annually increased subject to changes in the consumer price index for all urban consumers.

In fiscal year 2009, Congress made a commitment to fighting health care fraud by appropriating \$198 million in discretionary funding for the HCFAC Program to supplement the \$266.4 million in mandatory funding the program received—excluding the \$126 million mandatory funding to the Federal Bureau of Investigation (FBI). In addition to the HCFAC program, you both announced the Health Care Fraud Prevention & Enforcement Action Teams (HEAT) initiative on May 20, 2009. The HEAT initiative is an interagency task force that includes senior officials from both DOJ and HHS and includes Medicare Fraud Strike Force teams that collaborate on data driven efforts to combat health care fraud. HEAT Medicare Fraud Strike Forces originally operated in Southern Florida and Southern California with recent expansions to Detroit, Michigan; Brooklyn, New York; Baton Rouge, Louisiana; and Houston, Texas. Since implementation, the Strike Forces have had some successes, including charging a record number of health care fraud defendants. While I applaud the successes of the HEAT Strike teams to date, a more detailed review of the huge taxpayer expenditures on health care fraud is necessary.

After conducting a comprehensive analysis of HCFAC statistics detailing civil and criminal convictions, a number of questions arose. For example, the annual reports on the HCFAC program do not adequately explain how the funding is being used and allocated within each office of HHS and DOJ, nor do they adequately show which programs are having the most impact at stopping health care fraud. This lack of information prevents Congress from being able to ensure that the most effective programs receive the proper amount of funding.

Further, in reviewing statistics related to health care fraud criminal prosecutions it appears that despite significant investments by Congress, criminal prosecutions for health care fraud have remained stagnant (see charts below). According to statistics provided to my office by DOJ and recent responses to the Committee from Assistant Attorney General Tony West, the number of health care fraud investigations opened by DOJ has reached 1014 for FY2009, with the total number of criminal cases at 481, and the total of defendants reaching a record high of 803 in FY2009. While that record is commendable, it represents only six more criminal defendants from FY2008 and only seventeen more than FY2007. It also shows that DOJ filed twenty one fewer criminal health care fraud cases in FY2009 over FY2008.

Perhaps most concerning is that despite the record number of defendants, actual criminal convictions for health care fraud violations are down in FY2009 to 583 from 588 in FY2008. In fact, regardless of the increased expenditures, criminal convictions in health care fraud cases have remained consistent between 523 and 583 since FY2005. This has resulted in a conviction rate of around 72% for the last three fiscal years, down from nearly 90% in FY2005 and FY2006.

Of additional concern is statistical data surrounding the HEAT initiative. In FY2009, HEAT criminal investigations increased from 30 in FY2008, to 82. Despite this increase in HEAT investigations, the number of criminal cases filed is down. This raises a question of whether the focus of the HEAT initiative is actually redirecting resources away from overall criminal enforcement of health care laws. For example, HEAT cases were up in FY2007 at 74, while total health care fraud criminal cases were down to 434. Similarly, when HEAT cases were down in FY2008 to 30, total health care fraud criminal cases were up to 502. The cycle repeated itself in FY2008, with HEAT numbers up and total numbers down. While this may be a statistical anomaly, it is clear that despite the HEAT initiative, criminal cases for health care fraud remain virtually unchanged since the initiative began.

| Fiscal Year | HCFAC Mandatory \$ | HCFAC Discretionary \$ | FBI Mandatory \$ | Criminal HCFAC Investigations Opened | HCFAC Criminal Cases Filed | HEAT Criminal Investigations | HCFAC Pending Criminal Investigations |
|-------------|--------------------|------------------------|------------------|--------------------------------------|----------------------------|------------------------------|---------------------------------------|
| 2009        | \$266,425,206      | \$198,000,000          | \$126,300,000    | 1014                                 | 481                        | 82                           | 1600                                  |
| 2008        | \$255,196,557      | \$0                    | \$120,900,000    | 957                                  | 502                        | 30                           | 1612                                  |
| 2007        | \$249,459,000      | \$0                    | \$118,200,000    | 878                                  | 434                        | 74                           | 1677                                  |
| 2006        | \$240,558,000      | \$0                    | \$114,000,000    | 836                                  | 355                        | N/A                          | 1689                                  |
| 2005        | \$240,558,000      | \$0                    | \$114,000,000    | 935                                  | 382                        | N/A                          | 1626                                  |

| Fiscal Year | Total Criminal Defendants (Cases Filed) | Criminal Convictions | HCFAC New Civil Cases | HCFAC Pending Civil Fraud Cases | Total HCFAC Judgments and Settlements | Total HCFAC Transfers to Treasury and CMS, or others |
|-------------|-----------------------------------------|----------------------|-----------------------|---------------------------------|---------------------------------------|------------------------------------------------------|
| 2009        | 803                                     | 583                  | 886                   | 1155                            | \$1,630,000,000                       | \$2,576,122,000                                      |
| 2008        | 797                                     | 588                  | 843                   | 1311                            | \$1,000,000,000                       | \$2,140,880,114                                      |
| 2007        | 786                                     | 560                  | 776                   | 743                             | \$1,800,000,000                       | \$1,100,000,000                                      |
| 2006        | 579                                     | 547                  | 915                   | 2016                            | \$1,780,000,000                       | \$1,784,563,987                                      |
| 2005        | 652                                     | 523                  | 778                   | 1334                            | \$1,470,000,000                       | \$1,708,945,056                                      |

Looking at this same data, a review of civil health care fraud cases paints a better picture when compared to that of the criminal statistics. For FY2009 new civil health care fraud cases are 886 compared to 843 filed in FY2008. Judgments and settlements in these civil cases are also up significantly from \$1 billion in FY2008 to \$1.6 billion in FY 2009. Additionally, the backlog of pending health care fraud civil cases appears to be easing downward. This is good news for the American taxpayers as civil fraud cases at DOJ represent a significant deterrent for corporations seeking to defraud federal health care programs.

That said, given the significant expenditures of taxpayer dollars for FY2009—including increases of funding to criminal law enforcement entities (DOJ Criminal Division, FBI, and HHS/OIG)—the decline in criminal cases filed, the stagnant number of criminal defendants, and the low level of actual convictions raise serious questions about how DOJ and HHS are allocating resources to combat criminal health care fraud. Accordingly, I ask that you provide responses to the following:

- (1) Provide a detailed breakdown of the following statistics for FY2010:
  - a. The number of criminal health care fraud investigations opened by DOJ, HHS/OIG, and FBI.
  - b. The number of criminal health care fraud investigations originated by FBI.
  - c. The number of criminal health care fraud investigations originated by HHS/OIG.
  - d. The number of criminal cases filed by DOJ for health care fraud.
  - e. The number of criminal defendants charged by DOJ for health care fraud violations.
  - f. The number of criminal convictions for health care fraud prosecuted, or plea bargained, by DOJ.
  - g. The number of criminal cases attributed to HEAT strike forces.
  - h. The number of pending criminal investigations, including a breakdown of how many of those pending cases are being investigated by HEAT strike forces.
- (2) Provide a detailed breakdown of the costs to fund each HEAT task force. Include all sources of funding for each individual HEAT team, both from DOJ and HHS, specifying the source of the funding—HCFAC, direct appropriation, 3% fund at DOJ...etc.
- (3) Provide a detailed breakdown of all criminal cases brought by each HEAT task force, including the number of defendants, and a detailed breakdown of all criminal convictions.

- (4) In testimony before the Senate Committee on the Judiciary on October 28, 2009, Assistant Attorney General Tony West stated that FBI-led investigations into health care fraud resulted in nearly 700 convictions in FY2008. However, the FY08 annual report stated that there were only 588 health care fraud convictions that year.
- Why is there a discrepancy between the two numbers? Do the 700 convictions include state convictions not calculated in the total health care fraud convictions outlined in the annual HCFAC reports?
  - Are FBI health care fraud cases and convictions counted in the HCFAC program differently than other criminal cases and convictions?
- (5) The statistical breakdown derived from the HCFAC reports shows that over the last three fiscal years criminal conviction rates for health care fraud cases have fallen significantly from levels in FY2005 and FY2006. Why have the rates fallen from nearly 90% to 70%? How many of those cases where no conviction or plea is reached are re-filed? How many are closed? Does DOJ have a plan to deal with the decreasing conviction rate? If so, please provide a detailed summary of that plan.
- (6) How many U.S. Attorneys or Assistant U.S. Attorneys specialize in health care fraud? How many U.S. Attorneys or Assistant U.S. Attorneys have received specialized training in prosecuting health care fraud cases? How many U.S. Attorneys, or Assistant U.S. Attorneys, have been found by the Office of Professional Responsibility to have violated any rule, regulation, procedure, or law while prosecuting health care fraud cases? If any, how many of those attorneys were disciplined?
- (7) According to the most recent HCFAC report, FY2009, HHS allocated over \$390 million to its subordinate agencies for the purpose of combating health care fraud. The report detailed expenditures to the Office of Inspector General, Office of the General Counsel, Administration on Aging, and Centers for Medicare & Medicaid Services. However, it failed to detail how the funds were allocated within each subordinate entity. Provide a detailed breakdown of how HCFAC monies are allocated within each subordinate agency and what programs and activities those monies funded.
- (8) Provide a detailed breakdown of how mandatory HCFAC funding is allocated at the Federal Bureau of Investigation. This breakdown shall include a list of offices where funded agents and support personnel are allocated. It should also include a list of full and half time employees funded by HCFAC funding. Additionally, please provide a detailed breakdown of funds not used directly for personnel matters that are utilized for "operational support for major health care fraud investigations and national initiatives currently focusing on Internet Pharmacy fraud, Training and the DOJ Strike Force" as outlined in the latest HCFAC report. Finally, include a breakdown of HCFAC funds utilized for "individual investigative need such as the purchase of specialized equipment and expert witness testimony."
- (9) Provide the number of criminal cases and defendants that originated from leads developed from False Claims Act relators. Provide the number of False Claims Act cases that were settled including a criminal charge. Provide the number of False Claims Act

cases that were filed based upon cases originally filed under a state false claims act by a *qui tam* relator. Additionally, provide the number of criminal health care fraud cases that resulted from leads developed in state false claims act cases.

- (10) Provide the number of outstanding False Claims Act cases currently pending under seal with the Department of Justice?
- How many of these cases involve potential false claims to Medicare or Medicaid?
  - How many of these cases involve pharmaceutical pricing fraud?
  - How many of these cases involve off-label marketing of pharmaceutical fraud?
  - How many of these cases involve hospital up-coding Medicare and Medicaid payments?
- (11) How many False Claims Act cases have been resolved in the last five years?
- (12) What is the average length of time that an FCA case is filed under seal in Federal court while DOJ conducts a review of the case to determine if intervention is necessary?
- (13) What percentage of FCA cases has DOJ intervened on behalf of *qui tam* relators for the last five years? Please break this out for the total five year period and individual years.
- (14) Over the last five years, how many FCA cases has DOJ declined intervention in initially, only to later intervene with the case for settlement purposes? How many of those cases also contained a state FCA claims?
- (15) Provide an estimate of the total potential recovery of all the current FCA cases pending against the pharmaceutical industry (including both sealed and non-sealed cases).
- (16) Provide an estimate of the total potential recovery of all the current FCA cases pending against the hospitals (including both sealed and non-sealed cases).

Thank you for your cooperation and attention to this important matter. Please respond to the questions set forth in this letter no later than January 7, 2011.

Sincerely,



Charles E. Grassley  
United States Senator