

Client Alert

Latham & Watkins
Litigation Department

Mission Impossible? With a Proven Track Record Combating Procurement Fraud, The National Procurement Fraud Task Force Takes on a New Mission: Recovery Act and Other Financial Fraud

Introduction

Earlier this year, the Department of Justice (DOJ) outlined an expanded mission for the National Procurement Fraud Task Force (NPFTF or Task Force): redressing fraud which underlay the financial crisis and perpetrated under the American Recovery and Reinvestment Act of 2009 (Recovery Act).¹ This expansion followed the NPFTF's prosecution of almost 900 cases over its first three-and-a-half years by partnering with 50 federal and state investigative and law enforcement agencies.² Since its creation in October 2006, the Task Force has targeted government contractors in criminal and civil cases for engaging in procurement fraud, operating under its mission to promote the detection, prevention, and prosecution of procurement and grant fraud.³ The Task Force has recovered monetary payments exceeding \$2 billion, and secured prison sentences longer than one year in over a quarter of its reported criminal cases over the course of its operation.

In conjunction with its expanded mission, the NPFTF became the

operational arm for the Financial Fraud Enforcement Task Force (FFETF) chaired by Attorney General Eric Holder and led by the DOJ. The NPFTF is the third entity to take on this role, as President Obama established the FFETF in late 2009 in order to replace former President Bush's Corporate Fraud Task Force created back in 2002. According to the DOJ, the FFETF would "build upon efforts already underway to combat mortgage, securities and corporate fraud" in the financial system, in response to the recent "financial meltdown" and "to prevent another financial meltdown from happening."⁴

In order to help companies proactively mitigate their exposure to Task Force efforts, Latham & Watkins LLP undertook an extensive data collection and analysis of the Task Force's past criminal prosecutions and civil cases, and examined the patterns that these cases show. In light of the Task Force's amended responsibilities and the FFETF's mission, it remains to be seen to what extent Recovery Act fraud efforts will affect the Task Force's procurement fraud work. Nevertheless, understanding the Task Force's prior efforts is critical

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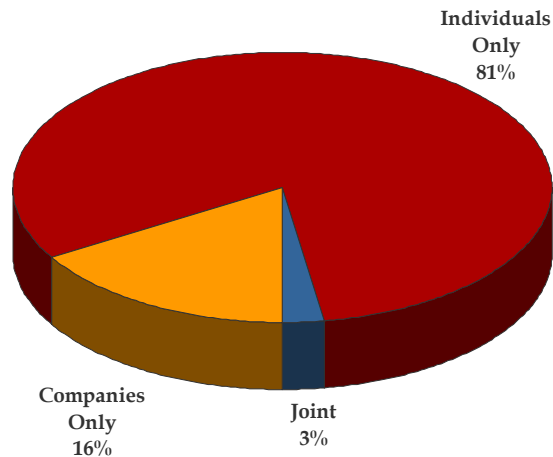
This *Alert* presents a summary of data collected from the almost 900 Task Force cases reported in its press releases from October 2, 2006 until April 2, 2010.⁵ The primary industries targeted have been the armed services, construction/real estate, transportation/shipping, education and public works — with other noteworthy industries including technology and health care. The data provide potential Task Force targets with a window into the Task Force's past actions and insight into its future prosecutions — exhibiting its areas of demonstrated experience and showing the likely agencies with which it will continue to coordinate.⁶

Past Task Force Enforcement

The NPFTF set a strong precedent of enforcement in the few years since its creation, and the following trends warrant particular attention.

Type of Defendant. Almost 20 percent of defendants were companies, while approximately 80 percent were individuals. This fact is particularly striking in light of the collateral consequences of charging companies and the limitations on prosecutorial discretion imposed by the factors outlined in the Principles of Federal Prosecution of Business Organizations. Moreover, cases frequently involved not only a single company but also multiple individuals. Although the Task Force jointly charged a corporate and individual defendant in only about 3 percent of cases, larger investigations regularly resulted in both corporate and individual defendants being charged over time. See *Chart 1*.

Chart 1 Types of Defendants - Companies vs. Individuals



Types of Cases and Charges. The Task Force pursued more criminal than civil cases. About 90 percent of the cases were criminal, approximately 10 percent were civil, and the Task Force reached joint civil and criminal resolutions in a handful of cases. *See Chart 2.*

In its criminal investigations the Task Force pursued a variety of charges, including more than 25 types of

statutory violations — with the most prevalent being fraud, such as mail and wire fraud (and conspiracies to commit them), bribery and kickbacks, and false statements.⁷ Other charges included violations of the Arms Export Control Act and Procurement Integrity Act, extortion, money laundering, embezzlement and tax improprieties. *See Chart 3.*

Chart 2 **Types of Cases - Civil vs. Criminal**

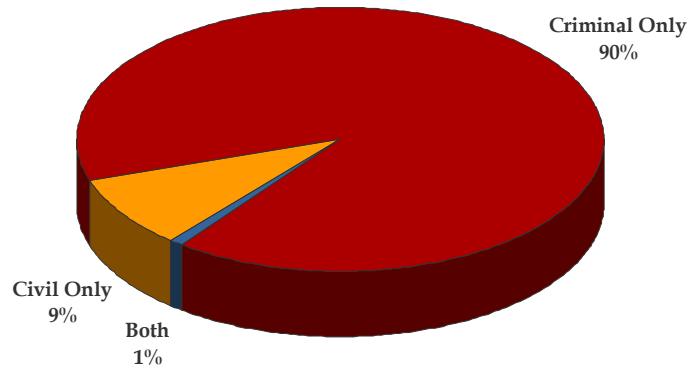
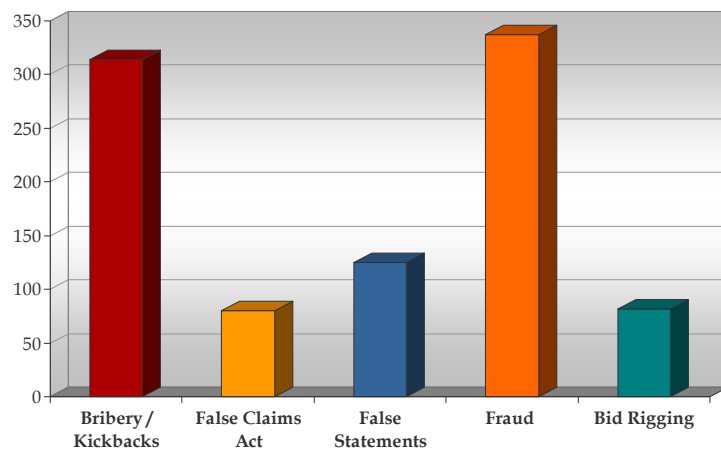


Chart 3 **Most Common Charges Seen in Task Force Cases**



Conspiracy charges appeared in almost half of the Task Force's cases. Conspiracies to commit fraud, bribery and to rig bids accounted for about 80 percent of the conspiracy charges, and other criminal conspiracy charges included conspiracy to commit extortion, conflicts of interest and conspiracy to steal trade secrets.⁸ See *Chart 4*. The prevalence of conspiracy charges suggests that the Task Force prioritized cases where multiple individuals were involved. Within the civil cases it pursued, the Task Force pursued False Claims Act (FCA)⁹ allegations almost exclusively — often through the government's intervention after an initial *qui tam* or whistleblower suit had been filed.

Penalties of Imprisonment. The Task Force's efforts have resulted in severe penalties for individuals. Of the approximately 800 criminal cases, just over a quarter contained at least one defendant that received a prison sentence for one year or longer. See *Chart 5*. The bulk of these individuals received sentences within the one-to-two year range, but a substantial portion of sentences exceeded five years. Bribery investigations, in particular, have resulted in significant prison sentences for corporate contractor employees — for example, 17-year prison sentences arose from bribery, kickback, and money-laundering schemes.

Chart 4 Conspiracy Charges Seen in Task Force Cases

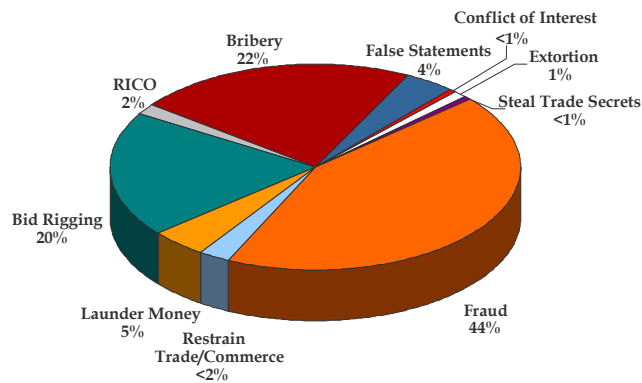
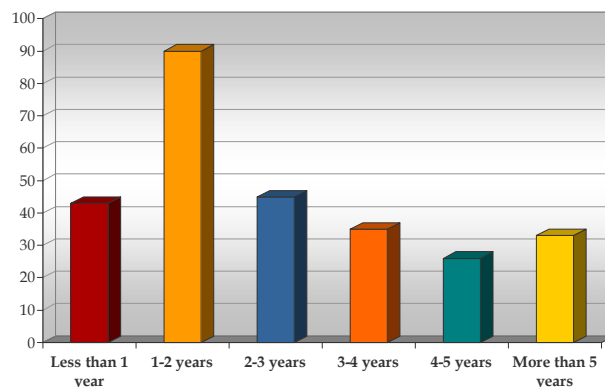


Chart 5 Lengths of Sentences for Individuals



The individual defendants receiving sentences longer than one year have ranged from high-level corporate officers to high-ranking government officials to owners of local businesses and their employees, across the public and private sectors and in a variety of industries and locations. Within the cases of individuals who received prison sentences longer than one year, the most common industries were armed services, construction/real estate, public works, and education — and approximately 20 percent of these cases involved conduct occurring outside of the United States. The average prison sentence was approximately three years long. See *Chart 6*.

Monetary Penalties. In addition to these prison sentences, the Task Force succeeded in securing monetary penalties totaling over \$2 billion. These penalties included fines imposed by courts in civil and criminal cases, restitution ordered by courts in criminal cases, and negotiated settlements in

civil cases, against both companies and individuals. Although companies have been subject to all three forms of monetary penalties — fines, restitution, and settlements — civil settlements accounted for the bulk of payments and approximately 40 percent of the corporate cases ended in settlement. Corporate settlements accounted for more than \$1.5 billion in recovery, with a wide range of payouts — up to \$407 million — and approximately two-thirds of the settlements were over \$1 million.

In the criminal, and joint civil and criminal, cases approximately 60 percent of the corporate fines issued exceeded \$1 million, and corporate fines accounted for about \$450 million. Corporate restitution payments accounted for almost \$20 million of recovery — with almost a quarter of the restitution payments exceeding \$1 million — and appeared in approximately 10 percent of the corporate criminal cases reported. See *Chart 7 on the following page*.

Chart 6 **Individual and Company Penalties Combined**

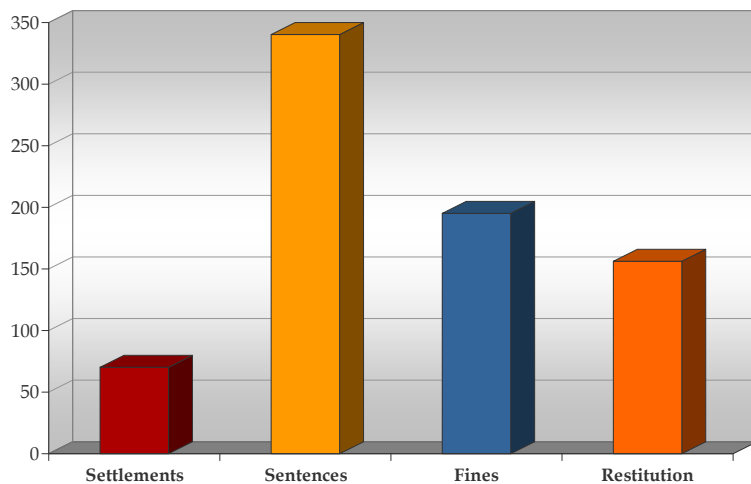
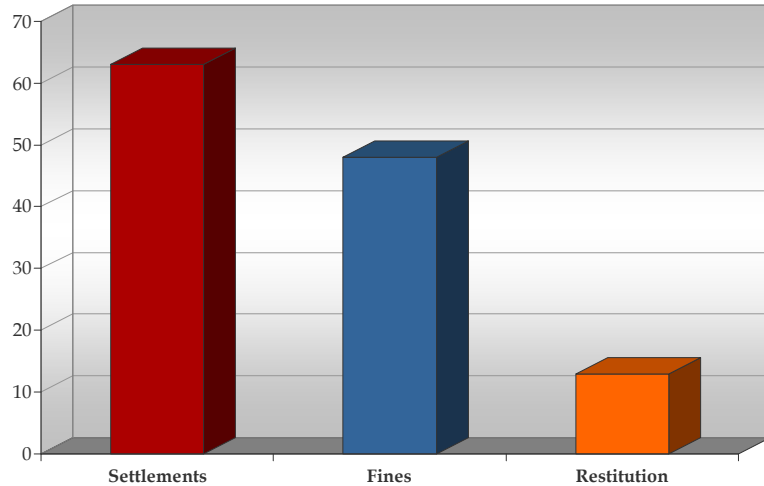


Chart 7

Corporate Penalties

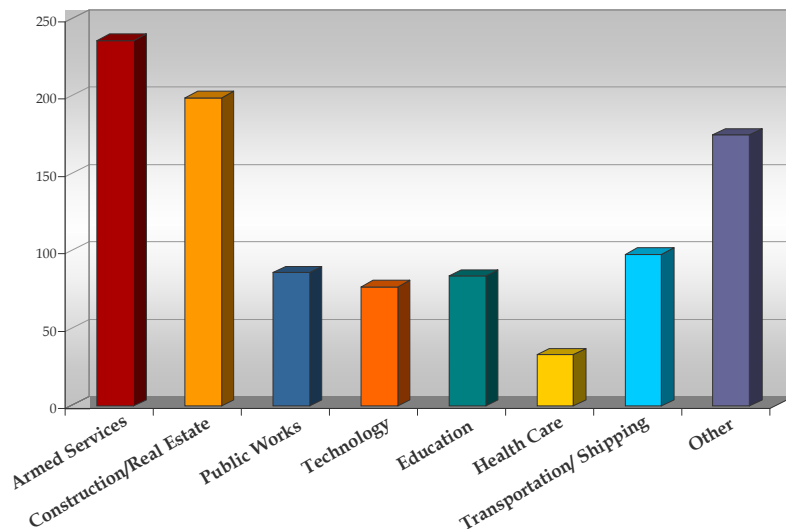


Industries. The Task Force investigated defendants in a variety of industries, with the top five industries appearing in approximately 80 percent of the cases. These industries were armed services, construction/real estate, transportation/shipping, public works and education.¹⁰ Other noteworthy industries included technology and healthcare. Given that the United States has significant war

and reconstruction operations in Iraq and Afghanistan, it is unsurprising that the armed services industry alone surfaced in approximately 25 percent of all cases — but these cases were not limited to the defense area. Other industries we catalogued included banking, communications, engineering and architecture, environmental, food, import/export, insurance and oil. See *Chart 8*.

Chart 8

Industries Appearing in Task Force Cases



Locations. The conduct the Task Force targeted occurred just in the United States in over 80 percent of the cases, covering approximately 46 US states and territories. In the United States, the leading state for Task Force investigations was New Jersey, followed by California, Texas and New York. Approximately 150 cases involved international conduct, totaling approximately 17 percent of all cases. Within these international cases, over two-thirds involved conduct that occurred in the Middle East. Such "War

Theater" cases frequently involved multiple countries, with the most commonly involved being Afghanistan, Iraq, and Kuwait. Over 90 percent of these cases involved the armed services industry, with noticeable presence also of the construction/real estate and oil industries. Approximately 94 percent of these cases were criminal or joint cases, and approximately 6 percent were civil. Beyond this focal point, the Task Force investigated conduct in over 40 countries. *See Charts 9 & 10.*

Chart 9
Locations of Defendants' Conduct - US vs. International

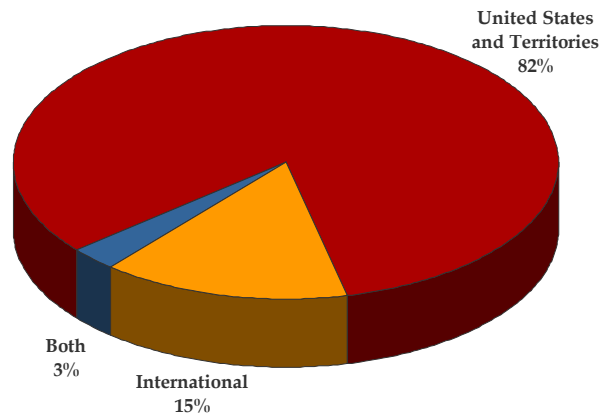
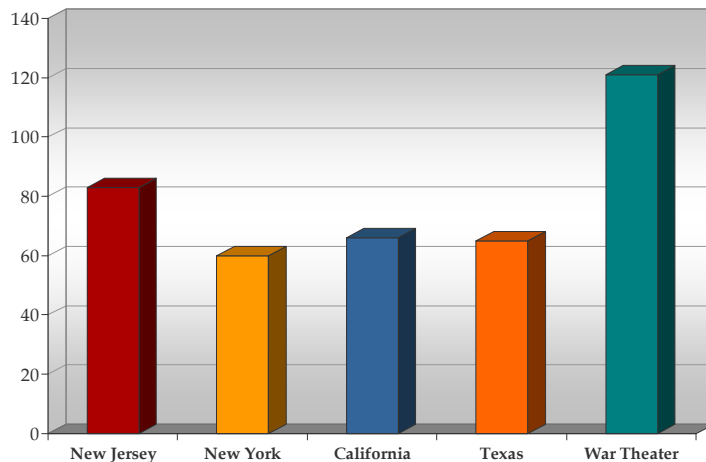


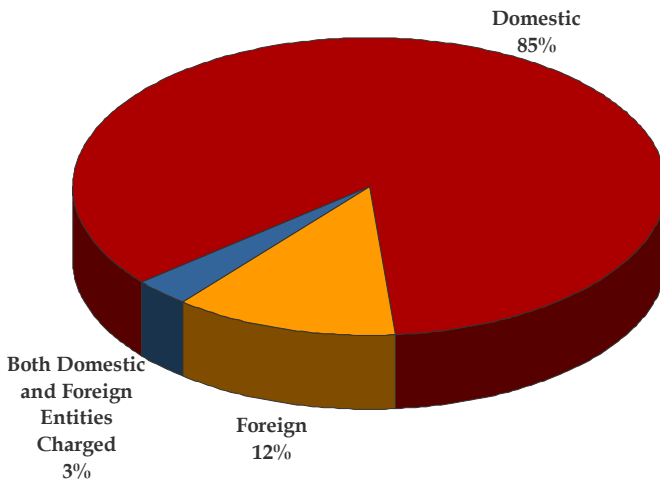
Chart 10
Top Locations of Defendants' Conduct



The majority of companies charged were US entities. Among the cases involving corporate entities, over 80 percent involved a US company (or companies)

and about 15 percent involved a foreign company (or companies). Approximately 3 percent involved both US and foreign entities pursued together. See *Chart 11*.

Chart 11 US vs. Non-US Entities Charged



Investigative Methods. As the press releases display, the Task Force draws on the prosecutorial resources of several parts of the DOJ, including the Fraud Sections of the Criminal and Civil Divisions, the Public Integrity Section, and the Asset Forfeiture and Money Laundering Section of the Criminal Division and US Attorneys' Offices throughout the country — as well as the investigative resources of the Federal Bureau of Investigation (FBI) and special agents of Offices of Inspector General (OIGs), who have the authority to serve subpoenas and make arrests. The Task Force employed a variety of traditional investigative techniques, including wiretaps, search warrants and informants to carry out its nearly 900 cases. However, the data do not contain any cases mentioning the full breadth of criminal tools — such as any cases stemming from the Federal Acquisition

Regulation's (FAR) mandatory disclosure requirements imposed in 2008.

Looking to the Future

In accordance with its expanded mission to tackle fraud with the FFETF, the NPFTF will likely prioritize fraud involving the Troubled Asset Relief Program (TARP) bailout funds. The amendments to the civil FCA in 2009 (through the Fraud Enforcement and Recovery Act) and in the Patient Protection and Affordable Care Act in 2010,¹¹ and additional whistleblower protections in the Dodd-Frank Wall Street Reform and Consumer Protection Act, may facilitate efforts to pursue TARP fraud and other fraud arising under the release of federal government recovery funds — because they broadened some tools available to both whistleblowers and the government.¹²

In a practical sense, neither task force displaces the longstanding efforts to combat corporate fraud by the US Attorneys' Offices and the Department of Justice, which will continue vigorously. The DOJ recovered \$2.4 billion from FCA cases in fiscal year 2009,¹³ and these recoveries are likely only to increase. However, with finite resources at its disposal and the Task Force's lack of experience pursuing cases involving the Recovery Act and TARP, it remains to be seen whether the Task Force's new agenda will be fulfilled without strain or diminishing its investigative and prosecutorial abilities in the procurement and grant fraud areas.

Despite the uncertainty remaining regarding how the Task Force will now proceed, the government contracting, and other corporate, communities should continue take steps to protect themselves from unwanted scrutiny. Taking proactive measures to prevent, detect and remedy any potential fraud-related issues may prevent a prolonged and costly investigation down the line.

Such measures include implementing an effective internal compliance program, appointing an adept and active compliance officer, training employees and proactively and quickly investigating high-risk and vulnerable areas within the company — in order to meaningfully prepare for government investigations and organically institute a culture of compliance within the organization. With the recent amendments to the Federal Sentencing Guidelines, having in place a comprehensive and up-to-date compliance program has become even more critical.¹⁴ These amendments provide expanded “compliance credit” for companies that have implemented and maintained an effective compliance and ethics program and provide guidance on the remediation steps suggested to receive such credit if wrongdoing is identified — such as providing restitution to identifiable

victims.¹⁵ While each company must tailor best practices to fit its needs, management's awareness of the inherent risks in failing to investigate problem areas is an important step in the compliance process.

Endnotes

- ¹ Pub. L. 111-5, 50 Stat. 664, *et al.*
- ² Press Release, Deputy Attorney General Paul J. McNulty Announces Formation of National Procurement Fraud Task Force (Oct. 10, 2006), available at http://www.justice.gov/opa/pr/2006/October/06_odag_688.html.
- ³ *Id.*
- ⁴ Press Release, President Obama Establishes Interagency Financial Fraud Enforcement Task Force (Nov. 17, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-opa-1243.html>.
- ⁵ The team reviewed and catalogued the Press Releases on the NPFTF website from October 2, 2006 (when the group posts its first press release) through April 2, 2010. See DOJ, NPFTF Press Releases, available at <http://www.justice.gov/criminal/npftf/pr/newstatement.html> (formerly http://www.justice.gov/criminal/npftf/pr/press_releases/). We defined a distinct “case” as a series of events or a related set of facts leading to a Task Force investigation. Accordingly, if a single press release reported on multiple investigations involving different facts, each investigation was classified as a separate case. In addition, when we gathered additional data on certain defendants (when a subsequent press release indicated that they had been sentenced, whereas another defendant in the case remained at another stage, for example), this sometimes created separate cases. Because the source of our data is the DOJ's self-reporting, we encountered some limitations where the Department's press releases failed to detail characteristics of a case — and, again, our data set covers only press releases distributed through the NPFTF website. Those characteristics for which we did not have data are noted as “unknowns” in our data set. For the other categories we exercised our best judgment to label the press releases according to the information that they contained.
- ⁶ For an earlier discussion of this data, see also Alice S. Fisher, Donald M. Remy, Barry M. Sabin, Elizabeth G. Wright, Maria A. Fehretdinov, Amy L. Liskow, and Adam M. Pergament, “Analyzing the Past and Future of the National

Procurement Fraud Task Force in Light of Its Expanded 2010 Mission,” BNA Insights, *Federal Contract Report* (June 22, 2010). That article also describes legislative efforts that the Task Force has pursued in addition to its enforcement efforts, and other related issues.

⁷ “Fraud” includes mail and wire fraud, along with any other general fraud charges and honest services fraud. See 18 U.S.C. §§ 201-227 (Bribery); 18 U.S.C. § 1341 (Mail Fraud); 18 USC. § 1343 (Wire Fraud); 18 U.S.C. § 1001 (False Statements);

⁸ We use “conspiracy to rig bids” in our data set to include Task Force Press Releases that involved antitrust conspiracy claims, notably Sherman Act bid rigging and price fixing. See, e.g., 18 U.S.C. § 371; 18 U.S.C. § 1956(h); 18 U.S.C. § 286; 41 U.S.C. § 51 (Anti-Kickback Act); 15 U.S.C. §§ 1-7 (Sherman Act).

⁹ See 31 U.S.C. §§ 3729-3733.

¹⁰ The Department of Justice pursued many health care cases that the NPFTF’s press releases do not show, such as through the Civil Fraud Section in the Civil Division, Commercial Litigation Branch.

¹¹ Pub. L. 111–148, 124 Stat. 119, § 10104(j)(2).

¹² For discussion of the Fraud Enforcement and Recovery Act (FERA) amendments, see, for example, Latham & Watkins LLP *Client Alert* No. 891, *Government Contracting Scrutiny: A Commission’s Report and FERA Significantly Increase the Potential Exposure of Government Contractors to Enforcement Action*, available at http://www.lw.com/upload/pubContent/_pdf/pub2709_1.pdf; Latham & Watkins LLP *Client Alert* No. 877, *Significant False Claims Act Amendments Enacted as Part of the Fraud Enforcement and Recovery Act of 2009*, available at http://www.lw.com/upload/pubContent/_pdf/pub2672_1.pdf.

¹³ Press Release, DOJ, *Justice Department Recovers \$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \$24 Billion Since 1986* (Nov. 19, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html>.

¹⁴ The amendments will become effective November 1, 2010 in the absence of action by Congress.

¹⁵ Proposed US Sentencing Guidelines Manual §§ 8C2.5(f)(3), 8B2.1, Application Note 6. US Sentencing Commission, Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary 17-18, 20 (Apr. 30, 2010), available at <http://www.ussc.gov/2010guid/finalamend10.pdf> (eliminating the automatic bar to compliance credit when “high level personnel” are involved in wrongdoing, and outlining appropriate remediation steps).

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