USAM Insert

9-47.120 – FCPA Corporate Enforcement Policy

1. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters

Due to the unique issues presented in FCPA matters, including their inherently international character and other factors, the FCPA Corporate Enforcement Policy is aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct. When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and

- generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.

2. Limited Credit for Full Cooperation and Timely and Appropriate Remediation in FCPA Matters Without Voluntary Self-Disclosure

If a company did not voluntarily disclose its misconduct to the Department of Justice (the Department) in accordance with the standards set forth above, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth above, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.

3. Definitions

a. Voluntary Self-Disclosure in FCPA Matters

In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing:

- The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation";

- The company discloses the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and

- The company discloses all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.

b. Full Cooperation in FCPA Matters

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations, *see* USAM 9-28.000, the following items will be required for a company to receive credit for full cooperation for purposes of USAM 9-47-120(1) (beyond the credit available under the U.S.S.G.):

- As set forth in USAM § 9-28.720, disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);

- Proactive cooperation, rather than reactive; that is, the company must timely disclose facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession and not otherwise known to the Department, it must identify those opportunities to the Department;

- Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;

    - Note: Where a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents;

- Where requested, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation; and

- Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

c. Timely and Appropriate Remediation in FCPA Matters

The following items will be required for a company to receive full credit for timely and appropriate remediation for purposes of USAM 9-47-120(1) (beyond the credit available under the U.S.S.G.):

- Demonstration of thorough analysis of causes of underlying conduct (*i.e.*, a root cause analysis) and, where appropriate, remediation to address the root causes;

- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but may include:

    - The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;

    - The resources the company has dedicated to compliance;

- The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;

- The authority and independence of the compliance function and the availability of compliance expertise to the board;

- The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;

- The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;

- The auditing of the compliance program to assure its effectiveness; and

- The reporting structure of any compliance personnel employed or contracted by the company.

- Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;

- Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications; and

- Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

4. Comment

Cooperation Credit: Cooperation comes in many forms. Once the threshold requirements set out at USAM § 9-28.700 have been met, the Department will assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company's cooperation under the FCPA Corporate Enforcement Policy.

"De-confliction" is one factor that the Department may consider in determining the credit that a company will receive for cooperation. The Department's requests to

defer investigative steps, such as the interview of company employees or third parties, will be made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose (*e.g.*, to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.

Where a company asserts that its financial condition impairs its ability to cooperate more fully, the company will bear the burden to provide factual support for such an assertion. The Department will closely evaluate the validity of any such claim and will take the impediment into consideration in assessing whether the company has fully cooperated.

As set forth in USAM 9-28.720, eligibility for full cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver. Nothing herein alters that policy, which remains in full force and effect. Furthermore, not all companies will satisfy all the components of full cooperation for purposes of USAM 9-47.120(2) and (3)(b), either because they decide to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies will be eligible for some cooperation credit if they meet the criteria of USAM § 9-28.700, but the credit generally will be markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.

Remediation: In order for a company to receive full credit for remediation and avail itself of the benefits of the FCPA Corporate Enforcement Policy, the company must have effectively remediated at the time of the resolution.

The requirement that a company pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue may be satisfied by a parallel resolution with a relevant regulator (*e.g.*, the United States Securities and Exchange Commission).

Public Release: A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy. Declinations awarded under the FCPA Corporate Enforcement Policy will be made public.

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 9, 2018

TO: Heads of Department Components
United States Attorneys

CC: DOJ Working Group on Corporate Enforcement & Accountability

FROM: Rod J. Rosenstein
Deputy Attorney General

SUBJECT: **Policy on Coordination of Corporate Resolution Penalties**

Corporate enforcement, like other criminal and civil enforcement, must be guided by the rule of law. In reaching corporate resolutions, the Department should consider the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result.

Attached for your attention are new provisions to be incorporated in the U.S. Attorneys' Manual. These provisions recognize the Department's commitment to fairness, as well as the strength of our partnerships with law enforcement agencies and regulators in the United States and abroad.

We are committed to rooting out and punishing corporate offenders, including through coordinated investigations and resolutions that fully vindicate the public interest. The Department also recognizes the value of corporate voluntary disclosures of misconduct and cooperation by responsible corporate actors. In appropriate cases, coordination and balancing of corporate resolution penalties furthers those aims.

Thank you for sharing your helpful suggestions on this matter, and for your dedicated work to serve the American people.

New Section in USAM Title 1

1-12.100 - Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct

In parallel and/or joint corporate investigations and proceedings involving multiple Department components and/or other federal, state, or local enforcement authorities, Department attorneys should remain mindful of their ethical obligation not to use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments.

In addition, in resolving a case with a company that multiple Department components are investigating for the same misconduct, Department attorneys should coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture against the company. Specifically, Department attorneys from each component should consider the amount and apportionment of fines, penalties, and/or forfeiture paid to the other components that are or will be resolving with the company for the same misconduct, with the goal of achieving an equitable result.

The Department should also endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.

The Department should consider all relevant factors in determining whether coordination and apportionment between Department components and with other enforcement authorities allows the interests of justice to be fully vindicated. Relevant factors may include, for instance, the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities.

This provision does not prevent Department attorneys from considering additional remedies in appropriate circumstances, such as where those remedies are designed to recover the government's money lost due to the misconduct or to provide restitution to victims.

New Cross-Reference in USAM Title 9 [indicated in gray]

9-28.1200 - Civil or Regulatory Alternatives

A. General Principle: Prosecutors should consider whether non-criminal alternatives would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution—*e.g.*, civil or regulatory enforcement actions—the prosecutor should consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect of non-criminal disposition on federal law enforcement interests.

See also USAM 1-12.100 - Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct.

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, July 25, 2018

Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets

Good morning and thank you Marc Nichols for that gracious introduction, and thanks to both you and Jeannine D'Amico Lemker for co-hosting this important event.

It is truly a pleasure to be here with all of you as part of the ACI's 9th Global Forum on Anti-Corruption Compliance in High Risk Markets.

I've always admired ACI's mission and programs. Just last year, while still in private practice, I participated in the ACI's 34th International Conference on the Foreign Corrupt Practices Act (FCPA). While I wear a different hat today, it is wonderful to be back.

In fact, today is particularly meaningful for me, as this marks my first time at an event like this since joining the Department of Justice as a Deputy Assistant Attorney General in the Criminal Division.

In my current role, I am tasked with overseeing both the Fraud Section, which houses the FCPA Unit, as well as the Appellate Section.

And, of course, we recently marked a particularly important milestone for the Criminal Division, as our newest Assistant Attorney General (AAG), Brian Benczkowski, was confirmed and took the reins of our Division just a few short days ago.

Under Brian's leadership, we will continue the Division's commitment to the rule of law, along with our efforts to ensure fairness and consistency in our investigations and resolutions, particularly as it relates to corporate enforcement and compliance.

Before I move on to my substantive remarks, let me say a word about Principal Deputy Assistant Attorney General John Cronan, who did an amazing job managing the Division as our Acting AAG since last year, overseeing many key developments, including the largest healthcare fraud takedown in the Department's long history.

Today, I plan to focus on our efforts to investigate and stamp out global corruption, with a particular focus on implications for mergers and acquisitions.

As I think we can all agree, corruption is a virus that saps scarce resources and undermines public trust.

Corruption also harms law-abiding companies by tilting the playing field in favor of companies who are willing to break the rules to get ahead.

As our Attorney General and Deputy Attorney General have both made abundantly clear, fighting corruption and ensuring a level playing field for law-abiding companies remains a significant priority for the Department.

At the same time, we are striving to make sure that our robust approach to fighting corruption, and corporate enforcement generally, is done in a way that is also fair and just.

We at the Department fully recognize that even within otherwise good companies, ones with robust compliance programs and strong cultures of compliance, there can exist one or a few bad apples. Similarly, we understand that through acquisitions, otherwise law-abiding companies can sometimes inherit problems that are not of their own making.

These are some of the reasons why we continue to hold individual wrongdoers responsible for corporate criminal conduct, demonstrating our continued focus on individual accountability.

In this regard, we've announced guilty pleas by 10 individuals in foreign bribery cases so far this year.

In the sprawling and ever-growing investigation and prosecution of corruption at Venezuela's state-owned oil company, PDVSA, we have announced charges against five additional former foreign officials this year, and we announced the 12th guilty plea in the case just two weeks ago.

Moreover, criminal prosecutions of corporations continue where misconduct was particularly serious or pervasive, but at the same time, we are working to avoid imposing excessive corporate penalties that harm innocent shareholders, employees, and other stakeholders.

On the FCPA corporate front, we've resolved five corporate FCPA cases this year, resulting in $512 million in corporate U.S. criminal fines, penalties, and forfeiture.

Among these resolutions was the matter involving Societe Generale, the first ever coordinated resolution with French authorities. This case marks a continuation of our efforts to work more closely with our foreign counterparts, both in terms of investigations and as it relates to our resolutions.

And we are striving to give credit where credit is due.

For example, in the FCPA resolution with TLI, the U.S. nuclear transportation company, the company received more lenient treatment due to its significant cooperation and remediation.

On the individual prosecutions front, the Department has secured guilty pleas by the company's former co-President and the foreign official who received the bribes, and has indicted the other co-President.

While resolutions like these are important, we have also been making great strides in the way we are approaching FCPA and other corporate enforcement matters.

As you all know, last year we revised the Department's guidelines with regard to FCPA enforcement by making what was previously the FCPA self-disclosure pilot program permanent.

This change enshrines our approach to FCPA enforcement in the U.S. Attorneys Manual as the FCPA Corporate Enforcement Policy.

Since its roll out, Department leadership has spoken extensively on the Policy, so I'm not going to spend much time on it, except to point out how the Policy furthers our commitment to rewarding companies that try to do the right thing.

This means companies that promptly report misconduct, fully cooperate with the Department, and enact effective remedial measures after misconduct is detected will be presumed eligible for a declination of prosecution, subject to disgorgement of ill-gotten gains.

The Policy also includes incentives for companies that fail to promptly self-disclose, but otherwise meet the Policy's cooperation and remediation terms.

While it is still early to gauge the full effectiveness of the Policy, we were pleased to reach the first corporate declination under the FCPA Policy earlier this year in declining prosecution against Dunn & Bradstreet.

In that case, the company engaged in responsible corporate conduct after discovering misconduct in connection with hiring practices by its acquired subsidiaries in China. Because the company satisfied the rigorous requirements of the Policy, the company received a declination and the Department gave the company credit for its disgorgement as part of a $9 million payment in a related SEC administrative proceeding.

Credit for disgorgement to the SEC points to another recent policy change under this Administration – this one involving a perceived practice of "piling on" by the various enforcement agencies in corporate settlements by imposing duplicative fines and other financial penalties.

Importantly, this new policy for greater coordination and to avoid "piling on" is now enshrined in the U.S. Attorneys Manual, and applies across the Department.

A perfect example of putting the anti-piling on policy into practice is the resolution I mentioned involving Societe Generale.

In that case, the Department credited 50 percent of the fine to French authorities in connection with the FCPA portion of the resolution.

Moreover, to better inform the public, companies and compliance professionals, we are making declination letters public for cases that are resolved under the FCPA Corporate Enforcement Policy, as we did in connection with the pilot program.

In the case of Dunn & Bradstreet, some of the factors that led to the declination include:

- the fact that the company identified the misconduct and promptly and voluntary self-disclosed the conduct to the Department;
- the thorough internal investigation undertaken by the company;
- its full cooperation in the matter, including identifying all individuals involved in or responsible for the misconduct, providing the Department all facts relating to that misconduct, making current and former employees available for

interviews, and translating foreign language documents to English;
- enhancements to its compliance program and its internal accounting controls;
- full remediation, including terminating the employment of 11 individuals involved in the misconduct in China, including an officer of the China subsidiary and other senior employees of one subsidiary, and disciplining other employees by reducing bonuses, reducing salaries, lowering performance reviews, and formally reprimanding them;
- and disgorgement to the SEC.

As a result, the company avoided criminal sanctions.

From my experience as a defense attorney, I think it is fair to say this is a just resolution for the company.

I know firsthand the difficult decisions that management must make when they uncover misconduct.

Senior management and boards of directors have to weigh many factors when deciding how to respond to misconduct, and whether to self-report.

In the past, many of these decisions were made in a relative vacuum in the sense that no one could predict in any concrete way how the Department would respond. While the facts of every case will be different, and will be the primary drivers as to the outcome, we are doing what we can to give clarity in terms of how companies will be treated.

Because companies are rational actors, driven by market and financial factors, it was often an impediment to decision-making not to know what consequences a company might face if it chose to self-report and cooperate with the government.

The Department's new policies and revised approach to FCPA and corporate enforcement are purposely designed to speak to well-functioning, good corporate actors and inspire rationale decision-making in favor of greater reporting and cooperation. We hope to incentivize companies to invest in effective compliance programs and robust control systems to prevent misconduct and, in the event of a detected violation, to take full advantage of our enforcement approach.

By fostering a climate in which companies are fairly and predictably treated when they report misconduct, we hope to increase self-reporting and individual accountability — an outcome that is beneficial both for companies and the Department.

While we have made great strides in the past year and a half relating to the Department's approach to corporate enforcement, and the FCPA in particular, one area where we would like to do better is with regard to mergers and acquisitions, particularly when such activity relates to high-risk industries and market.

Currently, the DoJ/SEC Resource Guide to the FCPA, which was released in 2012, provides some guidance on this. In particular, the Guide recognizes that in the past the Department and SEC have declined to take action where companies voluntarily disclosed and remediated, and cooperated with the government.

The Guide also notes that "a successor company's voluntary disclosure, appropriate due diligence, and implementation of an effective compliance program may also decrease the likelihood of an enforcement action regarding an acquired company's post-acquisition conduct when pre-acquisition due diligence is not possible."

Furthermore, after laying out several M&A best practices, the Guide states that the "DOJ . . . will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ . . . may consequently decline to bring enforcement actions."

While these policies are sound, I know from experience that "may" decline is a significant sticking point for corporate management when deciding whether and how to proceed with a potential merger or acquisition. There is a big difference between a theoretical outcome and one that is concrete and presumptively available.

At the Department, we know that there are many benefits when law-abiding companies with robust compliance programs are the ones to enter high-risk markets or, in appropriate cases, take over otherwise problematic companies.

Not only can the acquiring company help to uncover wrongdoing, but more importantly the acquiring company is in a position to right the ship by applying strong compliance practices to the acquired company.

We want to encourage this sort of activity. We certainly don't want the specter of enforcement to be a risk factor that impedes such activity by good actors, and instead cedes the field to non-compliant companies. At bottom, it makes good economic sense and helps stamp out corruption when the Department adopts policies that foster greater corporate compliance.

When an acquiring company conducts robust due diligence that unearths wrongdoing, reports that conduct to the Department, and engages in remedial measures, including extending already robust compliance to the acquired company, it frees up resources for the Department that may have otherwise been expended investigating the acquired company.

These resources can then be directed to other cases, not only in the FCPA context, but also to other areas such as opioid enforcement, human trafficking, and crimes impacting vulnerable victims, like children and the elderly.

For these reasons, I want to make clear that we intend to apply the principles contained in the FCPA Corporate Enforcement Policy to successor companies that uncover wrongdoing in connection with mergers and acquisitions and thereafter disclose that wrongdoing and provide cooperation, consistent with the terms of the Policy.

We believe this approach provides companies and their advisors greater certainty when deciding whether to go forward with a foreign acquisition or merger, as well as in determining how to approach wrongdoing discovered subsequent to a deal.

We are fully cognizant that in some instances an acquiring company has limited access to a target company's data and records, perhaps even more so when the target company is in a high risk jurisdiction.

In those instances, if an acquiring company unearths wrongdoing subsequent to the acquisition, we want to encourage its leadership to take the steps outlined in the FCPA Policy, and when they do, we want to reward them, accordingly for stepping up, being transparent, and reporting and remediating the problems they inherited.

Similarly, when an acquiring company encounters corruption issues during the due diligence process, we would encourage it to come to the Department for guidance through our FCPA Opinion Procedures before moving forward with an acquisition. Although it may take a little more time – and we can, to a degree, expedite our analysis based on timing needs – it sometimes makes sense to slow down to assess risks. In particular with high risk mergers and acquisitions, let me repeat the famous line from the English playwright, William Congreve: "Married in haste, we can repent at leisure."

On the Fraud Section's FCPA website, we currently post Opinion Procedure Releases going back to 1993. But not enough companies are taking advantage of this process. I've recently reviewed the list, and the most recent incident of use is from 2014. That shouldn't be the case. But for purposes of today, that release is illustrative of the value of engaging in the opinion process.

In that case, a multinational company headquartered in the U.S. sought an opinion on whether the Department would bring an enforcement action against it if it acquired a foreign consumer products company. The acquiring company conducted pre-acquisition due diligence on the target and uncovered evidence of apparent improper payments. The acquirer took pre-closing steps to remediate the target's anti-corruption issues, and anticipated fully integrating the target into its compliance and reporting structure within one year of closing.

While the opinion recognized that there was no U.S. nexus to the conduct, which would have precluded prosecution, in any event, the opinion also pointed to the fact that no contracts or assets acquired through bribery would remain in operation post-acquisition, and that no financial benefit would be derived from such contracts. Based on these facts, the opinion concluded that the Department would not take any action against the acquiring company.

In our view, the opinion process is a tremendous resource and we want to encourage greater use of it going forward.

Moreover, when a company relies on this procedure on the front end, but later uncovers wrongdoing post-acquisition, we want management and the company's advisors to feel comfortable disclosing it to the Department, knowing that they will be treated fairly under the principles of the FCPA Corporate Enforcement Policy.

This is not to say that wrongdoers will be getting a pass for corrupt behavior that occurred in the past in an acquired entity. Far from it. The Department continues to focus on individual accountability, and those responsible for past wrongdoing or the concealment of wrongdoing will continue to be investigated and prosecuted.

As advisors and compliance professionals, you are on the front lines of detecting and preventing corruption and other misconduct.

You are at tasked with advising your companies and your clients to ensure that businesses operate in compliance with the law. As such, you are often put in the position of evaluating risk in time-sensitive transactions.

In that role, one thing I hope you will take away from my comments and those of my colleagues is that the Department of Justice should be viewed as a partner, not just an adversary.

When business and industry work with the Department, rather than against it, our public institutions and our country are stronger for it.

With that, I am happy to take a few questions, as time allows.

Topic(s):
Foreign Corruption

Component(s):
Criminal Division

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 11, 2018

TO: All Criminal Division Personnel

FROM: Brian A. Benczkowski
Assistant Attorney General

SUBJECT: Selection of Monitors in Criminal Division Matters

The purpose of this memorandum is to establish standards, policy, and procedures for the selection of monitors in matters being handled by Criminal Division attorneys.[1] This memorandum supplements the guidance provided by the memorandum entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," issued by then-Acting Deputy Attorney General, Craig S. Morford (hereinafter referred to as the "Morford Memorandum" or "Memorandum").[2] The standards, policy, and procedures contained in this memorandum shall apply to all Criminal Division determinations regarding whether a monitor is appropriate in specific cases and to any deferred prosecution agreement ("DPA"), non-prosecution agreement ("NPA"), or plea agreement[3] between the Criminal Division and a business organization which requires the retention of a monitor.

A. Principles for Determining Whether a Monitor is Needed in Individual Cases

Independent corporate monitors can be a helpful resource and beneficial means of assessing a business organization's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement. Monitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution.

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[1] The contents of this memorandum provide internal guidance to Criminal Division attorneys on legal issues. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties. This memorandum supersedes the June 24, 2009 Criminal Division memorandum on monitor selection.

[2] The Morford Memorandum requires each Department component to "create a standing or ad hoc committee…of prosecutors to consider the selection or veto, as appropriate, of monitor candidates." The memorandum also requires that the Committee include an ethics advisor, the Section Chief of the involved Department component, and one other experienced prosecutor.

[3] Although the Morford Memorandum applies only to DPAs and NPAs, this memorandum makes clear that the Criminal Division shall apply the same principles to plea agreements that impose a monitor so long as the court approves the agreement.

Despite these benefits, the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor. The Morford Memorandum explained that, "[a] monitor should only be used where appropriate given the facts and circumstances of a particular matter[,]" and set forth the two broad considerations that should guide prosecutors when assessing the need and propriety of a monitor: "(1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation." The Memorandum also made clear that a monitor should never be imposed for punitive purposes.

This memorandum elaborates on those considerations. In evaluating the "potential benefits" of a monitor, Criminal Division attorneys should consider, among other factors: (a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

Where misconduct occurred under different corporate leadership or within a compliance environment that no longer exists within a company, Criminal Division attorneys should consider whether the changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct. Criminal Division attorneys should also consider whether adequate remedial measures were taken to address problem behavior by employees, management, or third-party agents, including, where appropriate, the termination of business relationships and practices that contributed to the misconduct. In assessing the adequacy of a business organization's remediation efforts and the effectiveness and resources of its compliance program, Criminal Division attorneys should consider the unique risks and compliance challenges the company faces, including the particular region(s) and industry in which the company operates and the nature of the company's clientele.

In weighing the benefit of a contemplated monitorship against the potential costs, Criminal Division attorneys should consider not only the projected monetary costs to the business organization, but also whether the proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the business's operations.

In general, the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary.

B. Approval, Consultation, and Concurrence Requirement for Monitorship Agreements

Before agreeing to the imposition of a monitor in any case, the Criminal Division attorneys handling the matter must first receive approval from their supervisors, including the Chief of the

relevant Section, as well as the concurrence of the Assistant Attorney General ("AAG") for the Criminal Division or his/her designee, who in most cases will be the Deputy Assistant Attorney General ("DAAG") with supervisory responsibility for the relevant Section.

C. Terms of Criminal Division Monitorship Agreements

As a preliminary matter, any DPA, NPA, or plea agreement between the Criminal Division and a business organization which requires the retention of a monitor (hereinafter referred to as the "Agreement"), should contain the following:

1. A description of the monitor's required qualifications;

2. A description of the monitor selection process;

3. A description of the process for replacing the monitor during the term of the monitorship, should it be necessary;

4. A statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement;

5. An explanation of the responsibilities of the monitor and the monitorship's scope; and

6. The length of the monitorship.

D. Standing Committee on the Selection of Monitors

The Criminal Division shall create a Standing Committee on the Selection of Monitors (the "Standing Committee").

1. Composition of the Standing Committee:

The Standing Committee shall comprise: (1) the DAAG with supervisory responsibility for the Fraud Section, or his/her designee;[4] (2) the Chief of the Fraud Section (or other relevant Section, if not the Fraud Section), or his/her designee;[5] and (3) the Deputy Designated Agency Ethics Official for the Criminal Division.[6] Should further replacements not contemplated by this paragraph be necessary for a particular case, the DAAG with supervisory responsibility for the Fraud Section will appoint any temporary, additional member of the Standing Committee for the particular case.

[4] Should the DAAG be recused from a particular case, the Assistant Attorney General will appoint a representative to fill the DAAG's position on the Standing Committee.

[5] Should the Chief of the Section be recused from a particular case, he/she will be replaced by the Principal Deputy Chief or Deputy Chief with supervisory responsibility over the matter.

[6] Should the Deputy Designated Agency Ethics Official for the Criminal Division be recused from a particular case, he/she will be replaced by the Alternate Deputy Designated Agency Ethics Official for the Criminal Division or his/her designee.

The DAAG with supervisory authority over the Fraud Section, or his/her designee, shall be the Chair of the Standing Committee, and shall be responsible for ensuring that the Standing Committee discharges its responsibilities.

All Criminal Division employees involved in the selection process, including Standing Committee Members, should be mindful of their obligations to comply with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635 (financial interest), and 28 C.F.R. Part 45.2 (personal or political relationship), and shall provide written certification of such compliance to the Deputy Designated Agency Ethics Official for the Criminal Division as soon as practicable, but no later than the time of the submission of the Monitor Recommendation Memorandum to the Assistant Attorney General for the Criminal Division ("the AAG").

2. Convening the Standing Committee:

The Chief of the relevant Section entering into the Agreement should notify the Chair of the Standing Committee as soon as practicable that the Standing Committee will need to convene. Notice should be provided as soon as an agreement in principle has been reached between the government and the business organization that is the subject of the Agreement (hereinafter referred to as the "Company"), but not later than the date the Agreement is executed. The Chair will arrange to convene the Standing Committee meeting as soon as practicable after receiving the Monitor Recommendation Memorandum described below, identify the Standing Committee participants for that case, and ensure that there are no conflicts among the Standing Committee Members.

E. The Selection Process

As set forth in the Morford Memorandum, a monitor must be selected based on the unique facts and circumstances of each matter and the merits of the individual candidate. Accordingly, the selection process should: (i) instill public confidence in the process; and (ii) result in the selection of a highly qualified person or entity, free of any actual or potential conflict of interest or appearance of a potential or actual conflict of interest, and suitable for the assignment at hand. To meet those objectives, the Criminal Division shall employ the following procedure[7] in selecting a monitor, absent authorization from the Standing Committee to deviate from this process as described in Section F below:

1. Nomination of Monitor Candidates:

At the outset of the monitor selection process, counsel for the Company should be advised by the Criminal Division attorneys handling the matter to recommend a pool of three qualified monitor candidates.[8] Within at least (20) business days after the execution of the Agreement, the Company should submit a written proposal identifying the monitor candidates, and, at a minimum, providing the following:

[7] The selection process outlined in this Memorandum applies both to the selection of a monitor at the initiation of a monitorship and to the selection of a replacement monitor, where necessary.

[8] Any submission or selection of a monitor candidate by either the Company or the Criminal Division should be made without unlawful discrimination against any person or class of persons.

a. a description of each candidate's qualifications and credentials in support of the evaluative considerations and factors listed below;

b. a written certification by the Company that it will not employ or be affiliated with the monitor for a period of not less than two years from the date of the termination of the monitorship;

c. a written certification by each of the candidates that he/she is not a current or recent (*i.e.,* within the prior two years) employee, agent, or representative of the Company and holds no interest in, and has no relationship with, the Company, its subsidiaries, affiliates or related entities, or its employees, officers, or directors;

d. a written certification by each of the candidates that he/she has notified any clients that the candidate represents in a matter involving the Criminal Division Section (or any other Department component) handling the monitor selection process, and that the candidate has either obtained a waiver from those clients or has withdrawn as counsel in the other matter(s); and

e. A statement identifying the monitor candidate that is the Company's first choice to serve as the monitor.

2. Initial Review of Monitor Candidates:

The Criminal Division attorneys handling the matter, along with supervisors from the Section, should promptly interview each monitor candidate to assess his/her qualifications, credentials and suitability for the assignment and, in conducting a review, should consider the following factors:

a. each monitor candidate's general background, education and training, professional experience, professional commendations and honors, licensing, reputation in the relevant professional community, and past experience as a monitor;

b. each monitor candidate's experience and expertise with the particular area(s) at issue in the case under consideration, and experience and expertise in applying the particular area(s) at issue in an organizational setting;

c. each monitor candidate's degree of objectivity and independence from the Company so as to ensure effective and impartial performance of the monitor's duties;

d. the adequacy and sufficiency of each monitor candidate's resources to discharge the monitor's responsibilities effectively; and

e. any other factor determined by the Criminal Division attorneys, based on the circumstances, to relate to the qualifications and competency of each monitor candidate as they may relate to the tasks required by the monitor agreement and nature of the business organization to be monitored.

If the attorneys handling the matter and their supervisors decide that any or all of the three candidates lack the requisite qualifications, they should notify the Company and request that counsel for the Company propose another candidate or candidates within twenty (20) business days.[9] Once the attorneys handling the matter conclude that the Company has provided a slate of three qualified candidates, they should conduct a review of those candidates and confer with their supervisors to determine which of the monitor candidates should be recommended to the Standing Committee.[10]

3. Preparation of a Monitor Recommendation Memorandum:

Once the attorneys handling the matter and their supervisors recommend a candidate, the selection process should be referred to the Standing Committee. The attorneys handling the matter should prepare a written memorandum to the Standing Committee, in the format attached hereto. The memorandum should contain the following information:

a. a brief statement of the underlying case;

b. a description of the proposed disposition of the case, including the charges filed (if any);

c. an explanation as to why a monitor is required in the case, based on the considerations set forth in this memorandum;

d. a summary of the responsibilities of the monitor, and his/her term;

e. a description of the process used to select the candidate;

f. a description of the selected candidate's qualifications, and why the selected candidate is being recommended;

g. a description of countervailing considerations, if any, in selecting the candidate;

h. a description of the other candidates put forward for consideration by the Company; and

i. a signed certification, on the form attached hereto, by each of the Criminal Division attorneys involved in the monitor selection process that he/she has complied with the conflicts-of-interest guidelines set forth in 18 U.S.C Section 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45 in the selection of the candidate.

[9] A Company may be granted a reasonable extension of time to propose an additional candidate or candidates if circumstances warrant an extension. The attorneys handling the matter should advise the Standing Committee of any such extension.

[10] If the Criminal Division attorneys handling the matter, along with their supervisors, determine that the Company has not proposed and appears unwilling or unable to propose acceptable candidates, consistent with the guidance provided herein, and that the Company's delay in proposing candidates is negatively impacting the Agreement or the prospective monitorship, then the attorneys may evaluate alternative candidates that they identify in consultation with the Standing Committee and provide a list of such candidates to the Company for consideration.

Copies of the Agreement and any other relevant documents reflecting the disposition of the matter must be attached to the Monitor Recommendation Memorandum and provided to the Standing Committee.

4. Standing Committee Review of a Monitor Candidate:

The Standing Committee shall review the recommendation set forth in the Monitor Recommendation Memorandum and vote whether or not to accept the recommendation. In the course of making its decision, the Standing Committee may, in its discretion, interview one or more of the candidates put forward for consideration by the Company.

If the Standing Committee accepts the recommended candidate, it should note its acceptance of the recommendation in writing on the Monitor Recommendation Memorandum and forward the memorandum to the AAG for ultimate submission to the Office of the Deputy Attorney General ("ODAG"). In addition to noting its acceptance of the recommendation, the Standing Committee may also, where appropriate, revise the Memorandum. The Standing Committee's recommendation should also include a written certification by the Deputy Designated Agency Ethics Official for the Criminal Division that the recommended candidate meets the ethical requirements for selection as a monitor, that the selection process utilized in approving the candidate was proper, and that the Government attorneys involved in the process acted in compliance with the conflict-of-interest guidelines set forth in 18 U.S.C. Section 208, 5 C.F.R. Part 2635, and 28 C.F.R. Part 45.

If the Standing Committee rejects the recommended candidate, it should so inform the Criminal Division attorneys handling the matter and their supervisors of the rejection decision. In this instance, the Criminal Division attorneys handling the matter, along with their supervisors, may either recommend an alternate candidate from the two remaining candidates proposed by the Company or, if necessary, obtain from the Company the names of additional qualified monitor candidates, as provided by Section E.1 above. If the Standing Committee rejects the recommended candidate, or the pool of remaining candidates, the Criminal Division attorneys and their supervisors should notify the Company. The Standing Committee also should return the Monitor Recommendation Memorandum and all attachments to the attorneys handling the matter.

If the Standing Committee is unable to reach a majority decision regarding the proposed monitor candidate, the Standing Committee should so indicate on the Monitor Recommendation Memorandum and forward the Memorandum and all attachments to the Assistant Attorney General for the Criminal Division.

5. Review by the Assistant Attorney General:

Consistent with the terms of the Morford Memo, the AAG may not unilaterally make, accept, or veto the selection of a monitor candidate. Rather, the AAG must review and consider the recommendation of the Standing Committee set forth in the Monitor Recommendation Memorandum. In the course of doing so, the AAG may, in his/her discretion, request additional information from the Standing Committee and/or the Criminal Division attorneys handling the matter and their supervisors. Additionally, the AAG may, in his/her discretion interview the candidate recommended by the Standing Committee. The AAG should note his/her concurrence

or disagreement with the proposed candidate on the Monitor Recommendation Memorandum, or revise the memorandum to reflect this position, and forward the Monitor Recommendation Memorandum to the Office of the Deputy Attorney General ("ODAG").

6. Approval of the Office of the Deputy Attorney General:

All monitor candidates selected pursuant to DPAs, NPAs, and plea agreements must be approved by the ODAG.

If the ODAG does not approve the proposed monitor, the attorneys handling the matter should notify the Company and request that the Company propose a new candidate or slate of candidates as provided by Section E.1 above. If the ODAG approves the proposed monitor, the attorneys handling the matter should notify the Company, which shall notify the three candidates of the decision, and the monitorship shall be executed according to the terms of the Agreement.

F. Retention of Records Regarding Monitor Selection

It should be the responsibility of the attorneys handling the matter to ensure that a copy of the Monitor Recommendation Memorandum, including attachments and documents reflecting the approval or disapproval of a candidate, is retained in the case file for the matter and that a second copy is provided to the Chair of the Standing Committee.

The Chair of the Standing Committee should obtain and maintain an electronic copy of every Agreement which provides for a monitor.

G. Departure from Policy and Procedure

Given the fact that each case presents unique facts and circumstances, the monitor selection process must be practical and flexible. When the Criminal Division attorneys handling the case at issue conclude that the monitor selection process should be different from the process described herein, including when the Criminal Division attorneys propose using the process of a U.S. Attorney's Office with which the Criminal Division is working on the case, the departure should be discussed and approved by the Standing Committee. The Standing Committee can request additional information and/or a written request for a departure.[11]

[11] Where appropriate, a court may also modify the monitor selection process in cases where the Agreement is filed with the court.

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ATTORNEY GENERAL JEFF SESSION'S CHINA INITIATIVE FACT SHEET

Background

The Attorney General's Initiative reflects the Department's strategic priority of countering Chinese national security threats and reinforces the President's overall national security strategy. The Initiative is launched against the background of previous findings by the Administration concerning China's practices. In March 2018, the Office of the U.S. Trade Representative announced the results of a months' long investigation of China's trade practices under Section 301 of the Trade Act of 1974. It concluded, among other things, that a combination of China's practices are unreasonable, including its outbound investment policies and sponsorship of unauthorized computer intrusions, and that "[a] range of tools may be appropriate to address these serious matters."

In June 2018, the White House Office of Trade and Manufacturing Policy issued a report on "How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World," documenting "the two major strategies and various acts, policies, and practices Chinese industrial policy uses in seeking to acquire the intellectual property and technologies of the world and to capture the emerging high-technology industries that will drive future economic growth."

The National Security Division (NSD) is responsible for countering nation state threats to the country's critical infrastructure and private sector. In addition to identifying and prosecuting those engaged in trade secret theft, hacking and economic espionage, the initiative will increase efforts to protect our critical infrastructure against external threats including foreign direct investment, supply chain threats and the foreign agents seeking to influence the American public and policymakers without proper registration.

Statements

Attorney General Jeff Sessions

Chinese economic espionage against the United States has been increasing—and it has been increasing rapidly. Enough is enough. We're not going to take it anymore. I have ordered the creation of a China Initiative led by Assistant Attorney General John Demers and composed of a senior FBI Executive, five United States Attorneys including Alex, and several other Department of Justice leaders and officials, including Assistant Attorney General Benczkowski. This Initiative will identify priority Chinese trade theft cases, ensure that we have enough resources dedicated to them, and make sure that we bring them to an appropriate conclusion quickly and effectively.

Assistant Attorney for National Security John C. Demers

"China wants the fruits of America's brainpower to harvest the seeds of its planned economic dominance. Preventing this from happening will take all of us, here at the Justice Department,

across the U.S. government, and within the private sector. With the Attorney General's initiative, we will confront China's malign behaviors and encourage them to conduct themselves as they aspire to be: one of the world's leading nations."

Assistant Attorney General Brian Benczkowski

"To counter the threat of Chinese malign economic aggression, prosecutors in the Criminal Division are redoubling our efforts to aggressively investigate Chinese companies and individuals for theft of trade secrets," said Assistant Attorney General Brian Benczkowski. "We will work hard to do our part, in partnership with other Department components, to assure fairness in the global economic system."

FBI Director Christopher Wray

"No country presents a broader, more severe threat to our ideas, our innovation, and our economic security than China," said FBI Director Christopher Wray. "The Chinese government is determined to acquire American technology, and they're willing use a variety of means to do that – from foreign investments, corporate acquisitions, and cyber intrusions to obtaining the services of current or former company employees to get inside information. If China acquires an American company's most important technology – the very technology that makes it the leader in a field – that company will suffer severe losses, and our national security could even be impacted. We are committed to continuing to work closely with our federal, state, local, and private sector partners to counter this threat from China."

US Attorneys in Working Group

- Andrew E. Lelling (District of Massachusetts)
- Jay E. Town (Northern District of Alabama)
- Alex G. Tse (Northern District of California)
- Richard P. Donoghue (Eastern District of New York)
- Erin Nealy Cox (Northern District of Texas)

Components of Initiative

The Attorney General has set the following goals for the Initiative:

— Identify priority trade secret theft cases, ensure that investigations are adequately resourced; and work to bring them to fruition in a timely manner and according to the facts and applicable law;

— Develop an enforcement strategy concerning non-traditional collectors (e.g., researchers in labs, universities, and the defense industrial base) that are being coopted into transferring technology contrary to U.S. interests;

— Educate colleges and universities about potential threats to academic freedom and open discourse from influence efforts on campus;

— Apply the Foreign Agents Registration Act to unregistered agents seeking to advance China's political agenda, bringing enforcement actions when appropriate;

—Equip the nation's U.S. Attorneys with intelligence and materials they can use to raise awareness of these threats within their Districts and support their outreach efforts;

-- Implement the Foreign Investment Risk Review Modernization Act (FIRMA) for DOJ (including by working with Treasury to develop regulations under the statute and prepare for increased workflow);

— Identify opportunities to better address supply chain threats, especially ones impacting the telecommunications sector, prior to the transition to 5G networks;

— Identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses;

—Increase efforts to improve Chinese responses to requests under the Mutual Legal Assistance Agreement (MLAA) with the United States; and

— Evaluate whether additional legislative and administrative authorities are required to protect our national assets from foreign economic aggression.

To launch the initiative, Assistant Attorney General Demers will convene a meeting of the above-mentioned U.S. Attorneys, senior FBI officials, and his counterpart in the Criminal Division, Assistant Attorney General Brian Benczkowski.

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18-1436

Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act

Oxon Hill, MD ~ Thursday, November 29, 2018

Remarks as prepared for delivery

Thank you, Sandra [Moser]. I appreciate your exceptional work for the Department of Justice. As the chief of the Criminal Division's Fraud Section, Sandra leads our efforts to enforce the Foreign Corrupt Practices Act. And she has helped to develop and implement many policy improvements.

It is nice to be in a room with so many friendly lawyers. As you know, the legal profession prizes collegiality. Once upon a time, there was a small town with just one lawyer who suffered from a lack of business. Then another lawyer moved to town, and they both prospered. So you see, lawyers benefit from collegiality.

I know that many of you have served in the Department of Justice, so you understand our work. In some respects, you serve a law enforcement function even today: you counsel clients about how to comply with the law so that they will not wind up on the wrong side of Sandra and her colleagues.

Prosecuting crime is our tool, but our goal is deterring crime. We want less business. Our Department's 115,000 employees work every day to uphold the rule of law, fulfilling the mission articulated in our name: Justice.

A few months after the creation of our federal government in 1789, President George Washington started the tradition of issuing a Thanksgiving Proclamation. He expressed thanks "for the peaceable and rational manner, in which we have been enabled to establish constitutions of government for our safety and happiness." President Washington prayed that the national government would be "a blessing to all the people, by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed."

Almost a century later, in 1863, President Abraham Lincoln issued a Thanksgiving proclamation. In the midst of the Civil War, Lincoln expressed gratitude that the rule of law continued to be observed in most of the country. Outside of the battlefields, "order ha[d] been maintained, the laws ha[d] been respected and obeyed, and harmony ha[d] prevailed." Not even a civil war could extinguish America's commitment to the rule of law.

Another hundred years later, in 1987, President Ronald Reagan celebrated the bicentennial of the Constitution. His Thanksgiving Proclamation declared that "[t]he cause for which we give thanks, for which so many of our citizens through the years have given their lives, has endured 200 years – a blessing to us and a light to all mankind."

The cause continues. Earlier this year, President Donald Trump issued a proclamation explaining that "we govern ourselves in accordance with the rule of law rather [than] … the whims of an elite few or the dictates of collective will. Through law, we have ensured liberty."

As President Trump recognized, law provides the framework for free people to conduct their lives. At its best, law reflects moral choices; principled decisions that promote the best interests of society, and protect the fundamental rights of citizens.

The term "rule of law" describes the government's obligation to follow neutral principles and fair processes. The ideal dates at least to the time of Greek philosopher Aristotle, who wrote, "It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the law."

The rule of law is indispensable to a thriving and vibrant society. It shields citizens from government overreach. It allows businesses to invest with confidence. It gives innovators protection for their discoveries. It keeps people safe from dangerous criminals. And it allows us to resolve differences peacefully through reason and logic.

When we follow the rule of law, it does not always yield the outcome we prefer. In fact, one indicator that we are following the law is when we respect a result that we do not agree with. We respect it because it is required by an objective analysis of the facts and a rational application of the rules.

The rule of law is not simply about words written on paper. The culture of a society and the character of the people who enforce the law determine whether the rule of law endures.

One of the ways that we uphold the rule of law is to fight bribery and corruption. Until a few decades ago, paying bribes was viewed as a necessary part of doing business abroad. Some American companies were unapologetic about corrupt payments.

In 1976, the U.S. Senate Banking Committee revealed that hundreds of U.S. companies had bribed foreign officials, with payments that totaled hundreds of millions of dollars. The Committee concluded that there was a need for anti-bribery

legislation. It reasoned that "[c]orporate bribery is bad business" and "fundamentally destructive" in a free market society. That was the basis for the Foreign Corrupt Practices Act.

I visited the nation of Armenia in 1994, just as it was emerging from seven decades of Soviet domination. I gave a talk about public corruption at the University of Yerevan. After I finished, a student raised his hand. He asked me, "If you cannot pay bribes in America, how do you get electricity?"

It was a pragmatic question that illustrated how that young man had learned to think about his society. Corruption may start small, but it tends to spread like an infection. It stifles innovation, fuels inefficiency, and inculcates distrust of government.

We aim to prevent corruption. Your agenda includes a presentation by Sandra Moser and FCPA Unit Chief Dan Kahn. They will describe our prosecutors' efforts to enforce the FCPA, fight bribery around the world, and protect markets and governments from the debilitating effects of corruption.

Over the past year, our FCPA Unit reached eight corporate resolutions, four of which were coordinated with foreign authorities. The cases involved a total of almost one billion dollars in corporate criminal fines, penalties, and forfeitures.

Many of our cases require extensive coordination with domestic and foreign law enforcement partners. Three recent corporate resolutions involved collaboration with the Securities and Exchange Commission.

Those settlements resulted from coordinated dispositions consistent with the policy against "piling on" that we announced in May. Under that new policy, Department components work jointly with other enforcement agencies with overlapping jurisdiction. Our goal is to enhance relationships with law enforcement partners in the United States and abroad, and avoid duplicative penalties.

It is important to punish wrongdoers. But we should discourage the sort of disproportionate and inefficient enforcement that can result if multiple authorities repeatedly pursue the same violator for the same misconduct.

We recently announced our first coordinated FCPA resolution with French authorities. We also worked with authorities in the United Kingdom, Singapore, and Brazil. Anyone who considers committing fraud with the hope of hiding their misconduct in foreign jurisdictions, should know that the arm of American law enforcement is long. We work every day with partners around the globe to root out and punish misconduct that distorts markets and corrupts political systems.

The success of our FCPA program is part of a broader effort to combat corporate and white-collar crime. The Department announced last month that white collar prosecutions increased in 2018, to more than 6,500 defendants.

Fighting white collar crime is a top priority for the Department, and we increased prosecutions in every priority area last year. Thanks to a series of initiatives and policy enhancements, we are making white collar enforcement more effective and more efficient.

President Trump issued an executive order instructing us to strengthen our efforts to investigate and prosecute fraud, and we are following through on that mandate. Leaders of the Securities and Exchange Commission, the Federal Trade Commission, and the Bureau of Consumer Financial Protection joined the Department of Justice in July to announce a new Task Force on Market Integrity and Consumer Fraud.

The Task Force established working groups to focus on financial fraud, health care fraud, consumer fraud, and fraud against the government. Department officials and leaders of other relevant agencies co-chair the working groups.

The Task Force created a new web site to explain its goals and track its accomplishments. You can find it at www.justice.gov/fraudtaskforce. The site contains links to useful resources on fraud detection and prevention.

The Task Force will promote inter-agency cooperation, consider policy changes, and implement enforcement initiatives.

We welcome your input about how best to deter fraud and foster increased cooperation so our investigations will be both expeditious and effective. If you have any suggestions, I encourage you to contact the task force executive director, Associate Deputy Attorney General Matt Baughman.

Focusing on individual wrongdoers is an important aspect of the Department's FCPA program. Over the past year, we announced charges against more than 30 individual defendants, and convictions of 19 individuals.

Last year, we initiated a review of our Department's policy concerning individual accountability in corporate cases, to consider suggestions by our own employees and outside stakeholders about opportunities for improvements that will promote efficient enforcement and reduce fraud.

Today, we are announcing changes that reflect valuable input from the Department's criminal and civil lawyers, law enforcement agents, and private sector stakeholders.

Under our revised policy, pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation.

It is important to impose penalties on corporations that engage in misconduct. Cases against corporate entities allow us to recover fraudulent proceeds, reimburse victims, and deter future wrongdoing. Corporate-level resolutions also allow us to reward effective compliance programs and penalize companies that condone or ignore wrongdoing.

But the deterrent impact on the individual people responsible for wrongdoing is sometimes attenuated in corporate prosecutions. Corporate cases often penalize innocent employees and shareholders without effectively punishing the human beings responsible for making corrupt decisions.

The most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes. So we revised our policy to make clear that absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability.

Our revised policy also makes clear that any company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct.

In response to concerns raised about the inefficiency of requiring companies to identify every employee involved regardless of relative culpability, however, we now make clear that investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted.

We want to focus on the individuals who play significant roles in setting a company on a course of criminal conduct. We want to know who authorized the misconduct, and what they knew about it.

The notion that companies should be required to locate and report to the government every person involved in alleged misconduct in any way, regardless of their role, may sound reasonable. In fact, my own initial reaction was that it seemed like a great idea. But consider cases in which the government alleges that routine activities of many employees of a large corporation were part of an illegal scheme.

When the government alleges violations that involved activities throughout the company over a long period of time, it is not practical to require the company to identify every employee who played any role in the conduct. That is particularly challenging when the company and the government want to resolve the matter even though they disagree about the scope of the misconduct. In fact, we learned that the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources. Our policies need to work in the real world of limited investigative resources.

Companies that want to cooperate in exchange for credit are encouraged to have full and frank discussions with prosecutors about how to gather the relevant facts. If we find that a company is not operating in good faith to identify individuals who were substantially involved in or responsible for wrongdoing, we will not award any cooperation credit.

Civil cases are different. The primary goal of affirmative civil enforcement cases is to recover money, and we have a responsibility to use the resources entrusted to us efficiently. Based on the experience of our civil lawyers over the past three years, the “all or nothing” approach to cooperation introduced a few years ago was counterproductive in civil cases. When criminal liability is not at issue, our attorneys need flexibility to accept settlements that remedy the harm and deter future violations, so they can move on to other important cases.

The idea that a company that engaged in a pattern of wrongdoing should always be required to admit the civil liability of every individual employee as well as the company is attractive in theory, but it proved to be inefficient and pointless in practice. Our civil litigators simply cannot take the time to pursue civil cases against every individual employee who may be liable for misconduct, and we cannot afford to delay corporate resolutions because a bureaucratic rule suggests that companies need to continue investigating until they identify all involved employees and reach an agreement with the government about their roles.

Therefore, we are revising the policy to restore some of the discretion that civil attorneys traditionally exercised – with supervisory review.

The most important aspect of our policy is that a company must identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it wants to earn any credit for cooperating in a civil case.

If a corporation wants to earn maximum credit, it must identify every individual person who was substantially involved in or responsible for the misconduct.

When a company honestly did meaningfully assist the government’s investigation, our civil attorneys now have discretion to offer some credit even if the company does not qualify for maximum credit. When we allow only a binary choice –full credit or no credit – experience demonstrates that it delays the resolution of some cases while providing little or no benefit.

In a civil False Claims Act case, for example, a company might make a voluntary disclosure and provide valuable assistance that justifies some credit even if the company is either unwilling to stipulate about which non-managerial employees are culpable, or eager to resolve the case without conducting a costly investigation to identify every individual who might face civil liability in theory, but in reality would not be sued personally.

So our attorneys may reward cooperation that meaningfully assisted the government's civil investigation, without the need to agree about every employee with potential individual liability.

As with the "all or nothing" criminal policy, we understand that the civil policy was not strictly enforced in many cases. I prefer realistic internal guidance that allows our employees to reach just results while following the policy in good faith.

I want to emphasize that our policy does not allow corporations to conceal wrongdoing by senior officials. To the contrary, it prohibits our attorneys from awarding any credit whatsoever to any corporation that conceals misconduct by members of senior management or the board of directors, or otherwise demonstrates a lack of good faith in its representations. Companies caught hiding misconduct by senior leaders or failing to act in good faith will not be eligible for any credit.

Other policy changes return discretion to our civil lawyers to resolve each case consistent with relevant facts and circumstances. Department attorneys are permitted to negotiate civil releases for individuals who do not warrant additional investigation in corporate civil settlement agreements, again with appropriate supervisory approval.

And our attorneys once again are permitted to consider an individual's ability to pay in deciding whether to pursue a civil judgment. We generally do not want attorneys to spend time pursuing civil litigation that is unlikely to yield any benefit; not while other worthy cases are competing for our attention.

These commonsense reforms restore to our attorneys some of the discretion they previously exercised in civil cases; the same discretion routinely exercised by private lawyers and clients and by government agencies responsible for using their resources most efficiently to achieve their enforcement mission.

Returning discretion to Department attorneys is consistent with our commitment to hold individuals accountable in every appropriate case, using both our civil and criminal enforcement authorities. The Department will vigorously and diligently pursue enforcement actions against individuals in every case where it is justified by the facts. If it is not justified, we will move on.

Let me conclude by acknowledging that most companies want to do the right thing. Companies that self-report, cooperate, and remediate the harm they caused will be rewarded. Companies that condone or ignore misconduct will pay the price.

These policy changes reflect a lot of deliberation and analysis by experienced government and private sector lawyers who understand the practical implications of our policies and how they sometimes help – but sometimes inhibit – efforts to achieve our goals.

In summary, our corporate enforcement policies should encourage companies to implement improved compliance programs, to cooperate in our investigations, to resolve cases expeditiously, and to assist in identifying culpable individuals so that they also can be held accountable when appropriate. It is not always possible to achieve all of those goals, but the new policies strike a reasonable balance.

We will monitor the results, and we will revisit policies if warranted. As someone once remarked, "In God we trust; all others must bring data."

Thank you very much.

NOTE: The links to the aforementioned changes can be found below:

https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings#1-12.000

https://www.justice.gov/jm/jm-4-3000-compromising-and-closing#4-3.100

https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.210

https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300

https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700

Speaker:
Deputy Attorney General Rod J. Rosenstein

Topic(s):