JUSTICE NEWS

Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the Global Investigations Review Live New York

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Remarks as Prepared for Delivery

Good morning. I want to thank GIR for inviting me to speak today. I also want to thank Joe [Warin] and Bruce [Yannett] for hosting this event, which has become an important forum for discussing the latest trends in white collar enforcement.

It's an honor to be here in New York representing the Criminal Division of the Department of Justice.

I've now had the privilege of serving as Assistant Attorney General of the Criminal Division for nearly 15 months. I hope it is clear to the public, as well as practitioners, that corporate criminal enforcement remains a top priority for the Department.

Over the past two years, the Criminal Division has pursued white collar criminal prosecutions aggressively, and with some degree of success.

In fact, in 2018, our Fraud Section prosecuted significant numbers of white-collar cases in category after category:

- We charged 406 individuals – a 33 percent increase from the prior year -- and convicted 40 percent more individuals at trial.
- We brought 10 corporate enforcement actions.
- We recovered more than $1 billion in corporate U.S. criminal fines, penalties, restitution and forfeiture, as part of resolutions that returned $3 billion globally.
- And I am pleased to say that we are on track to surpass these benchmarks in 2019.

Our prosecutors and federal law enforcement partners have much to be proud of. As the numbers show, we are intensely focused on holding both culpable individuals and corporations accountable.

We bring to justice those who defraud and cheat, so that those among us who abide by the laws may compete on a level playing field.

But effective crime prevention requires more than simply holding criminals accountable. Our goal – as it should be – is to not just punish corporate crime, but to deter it as well.

The best way to deter white-collar crime is to provide the proper incentives for law-abiding businesses to prevent misconduct before it occurs and foster the types of ethical corporate behavior that benefits all of us.

To that end, over the past two years, the Criminal Division has instituted a variety of new policies and guidance geared towards enhancing transparency. We in the Criminal Division often talk of the importance of transparency – and I want to unpack this concept a bit further today.

Internally, at the Department of Justice, transparency helps define and refine the criteria prosecutors will apply to key decisions.

Prosecutors build cases around well-defined statutory elements and evidentiary rules. But they also make charging decisions based upon both mandatory and discretionary standards.

Having internal guidance that is both clear and clearly memorialized helps to ensure consistency and predictability in how those standards are applied within the Department.

Whether that be in deciding whether a monitor should be recommended as part of a resolution, evaluating the adequacy of a corporate compliance program, or determining whether a resolution is appropriate at all, consistency and predictability in these decisions ensures as much as possible that similar behavior in similar cases is treated consistently and fairly across the board.

Externally, it is equally important to convey to the bar and the business community the standards we as prosecutors will apply when making key decisions. Some might joke that this is akin to handing defense lawyers a toolkit they can use to make prosecutors' work that much more difficult.

But in fact, we want lawyers on the other side of the table to be well-prepared and base their advocacy on the very criteria that our prosecutors find relevant to their decisions. It makes the process that much more efficient and productive for both sides.

It makes you work a little harder, but it makes our trial attorneys work that much harder, too. And I think the result, at least I hope the result, will be outcomes that are fairer and more just.

Transparency about the types of corporate practices and programs that the Department of Justice values has the additional benefit of reinforcing real-world outcomes that we desire as an institution.

By demystifying the considerations commonly confronted by white-collar prosecutors, our hope is that companies will have the information and security they need to invest fully in compliance on the front end, and to make good decisions in the face of misconduct on the back end.

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Over the past few months, we have taken a hard look at areas of white-collar criminal enforcement where we can bring, and benefit from, greater transparency.

One such area is the criteria by which prosecutors evaluate "inability to pay" claims. As you know, companies sometimes claim that they are unable to pay a proposed criminal fine or monetary penalty.

And although the U.S. Sentencing Guidelines and the sentencing provisions of Title 18 address this issue in certain respects, they do not provide specific guidance for how such claims are considered.

To that end, I am pleased to announce that today I am issuing a memorandum to all Criminal Division prosecutors that will provide greater guidance in how they will evaluate and address inability to pay claims.

The memorandum and its accompanying questionnaire – which will be published today on the Department's website – provide an analytical framework for evaluating assertions by a business organization that it cannot pay a criminal fine or monetary penalty that it would otherwise concede is appropriate based on the law and the facts.

As the memo makes clear, where legitimate questions exist regarding a company's inability to pay, the government will consider a range of factors.

The factors include the company's ability to raise capital, the circumstances giving rise to the organization's current financial condition, the significant and likely collateral consequences of the fine or penalty to the company, and whether the proposed fine or penalty will impair the ability to pay restitution to victims.

The memo further clarifies that where a company is in fact unable to pay the appropriate fine or penalty, Criminal Division attorneys should recommend an adjustment to that amount. But the amount should be adjusted only to the extent necessary to avoid threatening the organization's viability or impairing its ability to make restitution to victims.

Meanwhile, the accompanying questionnaire helps flesh out the company's full financial picture – requiring information about recent cash flow projections and operating budgets to acquisition or divestiture plans and encumbered assets.

Responses to those questions and supporting documentation from companies will be used by prosecutors and the government's accounting experts to determine the company's current assets and liabilities, as well as to compare current and anticipated cash flows against working capital needs, all with a view towards making a fully-informed, rational, and fair decision about a company's ability to pay.

At bottom, these materials promote transparency – both inside and outside the Department. They help ensure that prosecutors stick to a more uniform set of considerations, and also that companies looking to resolve matters have greater insight into how prosecutors think.

We want you to know what we consider to be a legitimate inability to pay argument, but also the facts and arguments that won't be given credence.

This inability-to-pay guidance comes on the heels of the Criminal Division's April 2019 guidance on how to evaluate corporate compliance programs. That guidance underscores the importance we have long placed on companies employing risk-based, fit-for-purpose compliance programs. And it spells out in more rigorous detail the factors we use to evaluate the adequacy of compliance programs.

To harmonize the guidance with other Department policies, the relevant considerations have been reorganized around three questions that go to the heart of every compliance matter:

First, is the compliance program well designed? Second, is the program being implemented effectively and in good faith? And third, does the compliance program work in practice?

The guidance thus describes the hallmarks of a *well-designed* compliance program – from the requisite company policies and procedures to training and communications.

It details the features of *effective implementation* – from commitment by senior and middle management to incentives and disciplinary measures. And it lays out the metrics to be used in determining whether a program is in fact operating effectively *in practice* – from periodic testing to the investigation and remediation of misconduct.

By publishing this guidance for all to see, the Criminal Division again sought to promote transparency.

And as a retooling of a prior iteration of the guidance from 2017, it also makes clear that our transparency initiative is ongoing. Just as compliance programs must evolve over time, so too should our policies and practices in order to remain clear, comprehensive, and current.

That brings us to the Criminal Division memorandum on corporate monitorships that we issued last October. Like many of you, I had seen the numbers and knew that monitors are plainly the exception, not the rule.

That basic principle was the premise of our new policy, which supplemented prior guidance: that monitors should be approved only in cases where there is a demonstrable need for one, with clear benefits to be derived. Monitorships should never be punitive.

And those benefits must always be weighed against the projected costs and burdens that a monitor will impose on a business's operations.

The new policy clarifies that, in deciding whether to impose monitors, Criminal Division attorneys should consider pragmatic factors, including the type of misconduct, the pervasiveness of the conduct, and whether it involved senior management.

They are also to look at any investments and improvements a company has made to its corporate compliance program and internal control systems, and whether the misconduct took place in an inadequate compliance environment that no longer exists.

And the new policy further clarifies that demonstrable changes to a compliance program and culture can suffice to protect against future misconduct, and eliminate the need for a monitor.

All of these initiatives – on inability to pay, compliance, and monitorships – are part and parcel of our broader mission at the Criminal Division to establish more predictable guideposts by which companies can gauge expectations, conform their conduct, and act as responsible corporate citizens.

Our aim is for companies to work diligently to deter criminal wrongdoing before it ever needs the attention of the Department of Justice, but also to make wise decisions about how to approach us when things do go wrong.

That is, after all, the vision behind the FCPA Corporate Enforcement Policy, which lays out concrete incentives for companies to voluntarily self-disclose, fully cooperate, and engage in timely and appropriate remediation.

And it is the same vision that lies behind the Criminal Division's recent practice of publishing declination letters on our website, which help further convey to the private sector the specific actions that were favorably credited or penalized.

These are all different threads of a singular collective push: to incentivize companies to prevent on the front end the very problems we would have to prosecute on the back end.

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In keeping with the theme of transparency, the Criminal Division has also been busy examining our own structures to ensure that our prosecutors are as focused as possible on our defined missions. We fully recognize that our message to the public has to match our mission.

For many years, the Securities and Financial Fraud Unit within the Fraud Section has investigated and prosecuted some of the largest and most complex criminal fraud cases in the Department.

For example, in a 2017 case, Takata Corporation, one of the world's largest suppliers of automotive safety-related equipment, pleaded guilty to one count of wire fraud and was sentenced to pay a total of $1 billion in criminal penalties, stemming from the company's conduct regarding sales of defective airbag inflators.

But as Takata highlights, many of the Unit's cases were neither securities fraud, nor financial fraud cases. The Unit's mission has expanded beyond its stated message and moniker.

So we rethought the structure of that Unit, and I am excited to announce that going forward, the Unit will be renamed the Market Integrity and Major Frauds Unit, to capture the broad range of fraud enforcement work that its prosecutors actually perform.

The new name, of course, is only part of the story. More importantly, the Unit will also reorganize internally to hone in on five well-defined missions, each with dedicated teams: 1) Securities Fraud, 2) Commodities Fraud, 3) Government Procurement Fraud, 4) Fraud on Financial Institutions, and, finally, 5) Consumer Fraud, Regulatory Deceit, and Investor Schemes.

Each of these types of fraud are identified and investigated differently. Securities and commodities fraud often can be identified using data analytics, whereas procurement fraud typically is identified and investigated by our law enforcement partners in the inspector general community.

Each of these types of fraud, moreover, involve different types of victims. We believe the increased specialization and mission-driven focus of this reorganization will put us on better footing to pursue cases and vindicate the interests of those particular victims.

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As we move forward, the Criminal Division will continue to look for additional ways to promote clarity about what our prosecutors do, how they do it, and why. The interests of prosecutors and businesses are inextricably aligned when it comes to rooting out corporate crime.

We want to assist responsible companies in instituting effective and ethical practices. And we want them to trust that, if they respond appropriately to misconduct, they can be assured of fair and evenhanded treatment by the Department of Justice.

It has been the honor of my professional career to lead the Criminal Division, and the amazing men and women who have chosen careers dedicated to the cause of justice.

Whether it's addressing the opioid epidemic, reducing violent crime by dismantling regional and national street gangs, battling transnational criminal organizations, or those who use the internet to harm children or victimize other vulnerable populations, or pursuing the best white collar policies that lead to fair and effective outcomes, I remain humbled every day by the depth and the breadth of the work, and the professionalism displayed by the team in the Criminal Division.

You have my commitment that I will work every day to support this mission, but also to listen. At bottom, the transparency I've discussed here today only matters if it fosters productive dialogue between the bar, the corporate community, and the Division about what is working, what is not, and what is fair, and what is not, in any individual case.

I look forward to continuing that discussion during the course of my tenure.

Thank you very much, and I hope that you enjoy the remainder of the conference.

Speaker:
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Attachment(s):
Download AAG Benczkowski Memo

Topic(s):
Financial Fraud
Securities, Commodities, & Investment Fraud

Component(s):
Criminal Division

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