THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Assistant Attorney General Kenneth A. Polite, Jr. Delivers Keynote at the ABA's 38th Annual National Institute on White Collar Crime

Miami, FL ~ Friday, March 3, 2023

Remarks as Prepared for Delivery

Friends and colleagues – it is always an honor to be at this esteemed event. Of course, last year we gathered in San Francisco. For many of us, it was our first large conference since the Covid pandemic upended our lives. So in many ways, we celebrated being able to reconvene as members of the white collar bar.

If you managed to walk outside the cozy confines of our hotel conference, you might have seen a much different world. You may have experienced a very different sense of community. Because in the middle of a city with some of the most expensive real estate sits a neighborhood where poverty – in its full humility and humanity – is readily apparent. During a short afternoon walk between the hotel and the U.S. Attorney's Office, we saw homelessness, and drug addiction, and food insecurity, and lack of hygiene, and violence.

Human suffering. We see it in every city where this conference gathers, be it the Tenderloin area of San Francisco, Liberty City here in Miami, or the Lower Ninth Ward in New Orleans. The same things could be found in nearly every town across this country. Across this globe.

Right outside. Right around us. Right around you, if you decide to open your eyes and accept a broader definition of community.

I bristle at being labeled a prosecutor. Not because I don't hold prosecutors in high esteem – indeed like many of you who have done the job, I see it as one of the most noble roles in our profession. But that moniker does not fully capture the breadth of our capabilities, or the depth of our human capacity. Instead, to borrow from our former AG Eric Holder, we are better described as community problem-solvers, able to marshal a variety of tools to creatively address the challenges before us.

One such tool is, of course, criminal prosecutions. And in that regard, the Criminal Division had a banner year in tackling white collar crime. Since the beginning of 2022, our prosecutors entered eight corporate resolutions as well as two corporate enforcement policy declinations. Our Money Laundering and Asset Recovery Section (MLARS) convicted more than two dozen culpable individuals. Our Fraud Section charged 280 individuals and convicted over 340.

But our successes can't be measured by just these statistics. Our ability to make change in the community requires that we bring righteous cases.

To that end, allow me to lift up the department's work right here in this District. The result of great collaboration between our FCPA unit and the U.S. Attorney's Office here in the Southern District of Florida, the successful prosecution of the former National Treasurer of Venezuela, Claudia Patricia Diaz Guillen, and her husband, is one of those righteous cases.

As you know, Venezuela has been suffering from acute crises, including rampant inflation and chronic fuel shortages. According to one study by researchers in Caracas, in 2019, 96% of Venezuelans lived in poverty.

But not all did. Diaz, together with her husband, accepted over $100 million in bribes from a Venezuelan billionaire businessman for access to purchase bonds from the Venezuela National Treasury at a favorable exchange rate. All the while, millions of Venezuelans had to confront daily economic crisis, rampant inflation, and unimaginable poverty and hunger.

Last December, after a three-week trial, a jury convicted both Diaz and her husband of money laundering offenses. They both now face lengthy prison terms. And we are seeking over $130 million in forfeiture.

A virtuous case that spanned the globe to hold multiple corrupt actors accountable and remove corrupt leadership – this prosecution exemplifies what our prosecutors can do.

And yes, I said "spanned the globe." To be truly effective community problem-solvers, we have to broaden our sense of community. Crime does not limit itself by country or region. Corruption's corrosive effects are global, with the world's poor often bearing the brunt. Bribery threatens our collective security by undermining the rule of law and providing a breeding ground for other crime and authoritarian rule.

Just as crime recognizes no borders, our efforts to combat it must be equally boundless. We need our partners – both domestic and international – to solve community problems. That is where the Criminal Division thrives.

For example, the Diaz case I just discussed involved cooperation from our various international partners in several aspects, including extradition. Likewise, the recent Glencore, ABB, Danske, and Stericycle corporate resolutions, among many others, underscore the successes that we've shared with our colleagues abroad.

This international cooperation has also been critical to MLARS's work on the Kleptocracy Asset Recovery Initiative, which has targeted and restrained more than $3.6 billion relating to foreign official corruption and associated money laundering affecting the U.S. financial system.

In fact, our MLARS Bank Integrity Unit (BIU) has long recognized the central role our financial system plays in the global community and the gatekeeping role that financial institutions serve. Sanctioned actors around the world seek to exploit the U.S. financial system, in some instances working with global financial institutions that facilitate their crimes.

But if you want to access the U.S. financial system – or you provide access to our system – you must play by the rules or else face the consequences. In fact, since 2010, the BIU – with just 12 attorneys – has imposed more than $13 billion in financial penalties in 10 corporate criminal resolutions with global financial institutions for sanctions violations.

I'm heartened by our Deputy Attorney General's announcement yesterday of additional resources for the BIU and her focus on the intersection of national security and corporate prosecution. I know our BIU prosecutors will build upon their outstanding track record while continuing to work shoulder to shoulder with our partners in the National Security Division to achieve our united mission.

But there's no better way to broaden community than to speak your partners' language – literally.

Starting over a decade ago, our FCPA Unit, together with our partners at the SEC, have released the FCPA Resource Guide to provide helpful information to the public, including practitioners and enterprises of all shapes and sizes. And I am pleased to announce that, thanks to our Fraud Section's work with the Criminal Division's Office of Prosecutorial Development, Assistance, and Training – or OPDAT – we will re-issue the FCPA Resource Guide in Spanish later this month.

This is a concrete example of how we stand with our partners in our collective fight against corruption.

With an expanded sense of community, problems can become tougher to solve. No matter how difficult though, we do not shy away from the challenge. Indeed, it is our duty and honor to run towards them. And tougher problems require creative solutions.

That is why our prosecutors do not just wait for cases to come to them. We detect wrongdoing through proactive and sophisticated methods of identifying criminal wrongdoing, including ground-breaking data analytics.

The Fraud Section's Health Care Fraud Unit has long led the way in this regard. From the inception of the first Health Care Fraud Strike Force right here in South Florida, the Strike Forces have used data to proactively identify, investigate, and prosecute the most egregious fraudsters.

And when the pandemic hit, the Health Care Fraud Unit convened an interagency working group of law enforcement and public health agencies – a broad community – to bring a whole-of-government approach to data analysis that delivered results. In one representative example, in the first COVID-19-related health care fraud and securities fraud case to go to trial, a Silicon Valley technology company president was convicted at trial on all counts – one of the record 38 trial convictions by the Health Care Fraud Unit last year.

Take also our Fraud Section's Market Integrity and Major Frauds Unit. We have worked with data analysts and scientists and others to develop algorithms that detect leads indicative of fraud and manipulation in the securities, commodities, and cryptocurrency markets.

By assessing trading data and SEC filings, our experts detected company insiders who greatly outperformed the market when trading pursuant to 10b5-1 plans, which allow insiders who are not in possession of material, non-public information to set up pre-planned stock transactions.

This proactive analysis and our subsequent investigation led to the arrest this week of Terren Peizer, the founder and CEO of Ontrak, a publicly traded company, for insider trading.

Peizer allegedly entered into two of these plans with inside information about a significant risk that Ontrak's then-largest customer was going to end its contract with Ontrak, or at least renegotiate it on worse terms. When this came to pass, Ontrak's stock lost more than 44% of its value. But because Peizer had previously entered into the 10b5-1 plans – when he had that inside information – he allegedly was able to sell more than 600,000 shares and avoid losses of more than $12.5 million.

This marks the department's first ever criminal insider trading charges based on activity conducted exclusively pursuant to a 10b5-1 plan. In some respects, this is a classic insider trading case. A high-level executive allegedly cheated the market by trading on inside information.

But this case is remarkable for what it says about our prosecutors' creative problem-solving. Over the last two years, through ingenuity and grit, our team identified the defendant who allegedly tried to use the cloak of a 10b5-1 plan as cover for his criminal conduct.

So take note. Because I expect other such cases will follow.

Our creative enforcement efforts also apply to those who abuse cryptocurrency and digital assets.

Last year, our Fraud Section and its partners charged nine defendants for cryptocurrency fraud-related offenses and spearheaded a Crypto Fraud Enforcement Action. And just last week, this team charged the founders of Forsage, a decentralized finance (or DeFi) cryptocurrency investment platform, for their roles in an alleged global Ponzi and pyramid scheme that raised approximately $340 million from victim-investors.

This work complements our National Cryptocurrency Enforcement Team, which in January announced its first public enforcement action along with our partners in the Eastern District of New York and abroad – the international, coordinated takedown of Bitzlato, a cryptocurrency exchange, including the arrest of its founder here in Miami for operating an unlawful money transmitting business.

But community problem-solving requires more than just prosecuting crime after it happens. To truly solve a problem is to prevent it from occurring, which is our ultimate goal in our fight against crime. That is why we continually refine our policies to incentivize ethical behavior, providing transparency for the public, the business community, and counsel as to what we expect, and what will happen when our expectations are not met.

In January, I announced the first substantial revisions to the Criminal Division's Corporate Enforcement Policy in five years. This policy provides certain incentives – including a presumption of a declination and, even if a company doesn't receive a declination, possible reduced financial penalties of up to 75% off of the Sentencing Guidelines fine range – for

companies that voluntarily self-disclose misconduct, fully cooperate with our investigations, and timely and appropriately remediate.

Companies that self-report their misconduct set the right tone for their employees and lead by example – showing them with actions that criminal conduct will not be tolerated and will be reported to the authorities. Those are the companies that "walk the walk" when it comes to culture and tone at the top.

Remember, the potential benefits under our CEP only flow from being a good corporate citizen. The consequences will be far more severe for those companies that sit back and wait for us to come knocking. There is an enormous gulf between the benefits associated with doing the right thing, and the punishment associated with not.

After a company enters a corporate resolution with us, the same rules apply. The resolution with Ericsson that we announced yesterday makes the point. As we have repeatedly messaged, entering a resolution is in many ways the start of a new path with a focus on cooperation and compliance. We are committed to the follow-through and to holding companies to the letter of our agreements.

Ericsson breached its 2019 deferred prosecution agreement (DPA) by repeatedly failing to live up to its obligations. The company failed to timely disclose requested, and highly relevant, documents, prejudicing the government's ability to charge certain individuals, and also failed to fully and timely disclose information related to extremely problematic conduct in Iraq.

As a result, the company has agreed to plead guilty to the two original charges filed in connection with the DPA. Ericsson also agreed to pay an additional $200 million in penalties – including the elimination of the reduction for cooperation originally provided under the CEP – and its monitor was extended for another year.

Our resolve is clear. A company's good behavior will be met with benefits. Failure to live up to your obligations will be met with severe consequences.

When we see criminality, we will not just ask what happened. We want to understand the root causes — *why* it happened, and whether it will happen again. That is what distinguishes a community problem-solver from someone who simply files criminal charges. And that is why the presence (or absence) of a functioning compliance program, at both the time of the misconduct and the time of resolution, is crucial to our decision-making in corporate matters.

To make expectations clear to the public and companies, our prosecutors apply the publicly available criteria set forth in Evaluation of Corporate Compliance Programs, or ECCP. Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, we do not use any one formula to assess the effectiveness of corporate compliance programs. We disavow any "box-checking" exercise. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation.

But there are some common questions we may ask to make an individualized determination. Today, following up on the Deputy Attorney General's direction in her Sept. 15, 2022, memorandum, I am announcing significant changes to the ECCP, including how we consider a corporation's approach to the use of personal devices as well as various communications platforms and messaging applications, including those offering ephemeral messaging.

In today's day and age, the use of these services is ubiquitous. Just as we expect corporations to adapt to the realities of modern life and update their policies and practices accordingly, so too does the department.

Under the revised ECCP, we will consider how policies governing these messaging applications should be tailored to the corporation's risk profile and specific business needs and ensure that, as appropriate, business-related electronic data and communications can be preserved and accessed. Our prosecutors will also consider how companies communicate the policies to employees, and whether they enforce them on a consistent basis.

We will ask about the electronic communication channels used by the business and their preservation and deletion settings. And we'll ask about any "bring your own device," or BYOD program, and associated preservation policies.

We won't stop there. During the investigation, if a company has not produced communications from these third-party messaging applications, our prosecutors will not accept that at face value. They'll ask about the company's ability to

access such communications, whether they are stored on corporate devices or servers, as well as applicable privacy and local laws, among other things.

A company's answers – or lack of answers – may very well affect the offer it receives to resolve criminal liability. So when crisis hits, let this be top of mind.

Still, we push for more. Because the highest priority we have – and one of the most pressing challenges we face — in investigating and prosecuting white collar cases is ensuring individual accountability.

As the Deputy Attorney General announced yesterday, the Criminal Division has updated its policies concerning corporate compensation systems.

Compensation structures that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance. At the same time, positive incentives, such as promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership, can drive compliance.

With these principles in mind, we have made two significant changes.

First, our prosecutors will consider more closely compensation structures and consequence management when evaluating compliance programs under the revised ECCP. They will consider numerous factors to determine how a company's compensation system contributes to the presence – or lack – of an effective compliance program.

Let me be clear. While we have made substantial revisions to the ECCP about clawbacks and the use of personal devices and other communication platforms, the Criminal Division has already been focused on these issues. These ECCP revisions serve to recognize their importance and provide additional transparency about how our prosecutors will consider them. But these are also only two facets of corporate compliance programs that we'll be assessing. We will continue to ask questions about, for instance, how companies follow up on hotline complaints and learn from the issues they encounter.

Second, in addition to these ECCP changes, the Criminal Division is launching a pilot program (1) to require, as part of a criminal resolution, that corporate compliance programs include compensation-related criteria; and (2) to offer fine reductions for companies that seek to clawback compensation in appropriate cases.

In requiring new compliance-related criteria, our prosecutors will use their discretion to craft appropriate requirements based on the particular facts and circumstances, including applicable law. Our goal is to ensure that the company uses compliance-related criteria to reward ethical behavior and punish and deter misconduct.

As to clawbacks: for companies that fully cooperate with our investigation and timely and appropriately remediate the misconduct, they may receive an additional fine reduction if the company has implemented a program to recoup compensation and uses that program. We expect companies that use these programs to address not only employees who engaged in wrongdoing in connection with the conduct under investigation, but also those who had supervisory authority over the employees or business area engaged in the misconduct, and knew of, or were willfully blind to, the misconduct.

If the company meets these factors and – in good faith – has initiated the process to recover such compensation at the time of resolution, our prosecutors will accord an additional fine reduction equal to the amount of any compensation that is recouped within the resolution term.

We recognize the difficulties companies may face when attempting to clawback compensation. That is why, if a company's good faith effort is unsuccessful by the time the resolution term ends, our prosecutors will have discretion to accord a fine reduction of up to 25% of the amount of compensation that has been sought.

The Criminal Division has previously recognized companies for taking appropriate action as to a culpable employee's compensation. In fact, in the December 2022 CEP declination issued to Safran S.A., we specifically noted that the company's timely and full remediation included the withholding of deferred compensation of a former employee involved in the misconduct.

We are not trying to incentivize waste. To the contrary, companies should make an assessment about the potential cost to shareholders and prospect of success of clawback litigation, given any applicable laws, and weigh it against the value of recoupment – and proceed in accordance with their stated corporate policies on executive compensation.

This Pilot Program will be in effect for three years, allowing us to gather data and assess its effectiveness and also aid other components and offices in considering this important issue.

For now, this is another example of the Criminal Division's ability to incentivize good corporate citizenship and encourage greater individual accountability – which remains our number one priority.

And we're still not done. As the Deputy Attorney General also announced yesterday, we have issued a revised memorandum on the selection of monitors in Criminal Division matters. Building off of the prior one authored by my good friend, former Assistant Attorney General Brian Benczkowski, today's memorandum makes clear – to the public, our prosecutors, defense counsel, and corporations – how we select monitors. It also articulates and clarifies the conflict of interest obligations associated with serving as a lead monitor, or even as part of a monitor team.

But let me lift up one of this memorandum's provisions, which shows the reach of our community, the reach of our efforts. Today's announcement makes explicit what has been the case the last several years – that any submission of a monitor candidate by the company and selection of a monitor candidate by the Criminal Division should be made in keeping with the department's commitment to diversity, equity, and inclusion.

We have required this commitment as part of our resolutions, and will continue to do so. Because to improve community, all of its members should be represented.

All of this work – past successes, recent enforcement actions, policy improvements, and more – helps solve problems in our community. There may be some who question why the department is announcing so much policy in this space. Does all of this have to happen now?

My response is that there is no better time than right now. Are we to shy away from the problems posed by the increased use of new ways to communicate in our personal and professional lives? Are we to ignore the problems posed by companies that fail to recognize the clear connection between compensation and compliance? Are we to run away from the problems posed by the glaring lack of diversity across our profession?

No, now is to the time for the department to step forward to solve these problems. Doing so right now may lead a company to start revising its compliance policies. It may empower a whistleblower to call the hotline and report alleged wrongdoing. It may give voice to a compliance professional to better advocate for critical resources. It may result in that individual employee making the right, rather than the wrong, ethical decision in the workplace.

That is what I urge you all to do as well. Not just fellow prosecutors, but defense counsel, in-house professionals – use your mission to solve problems you see. Act in a way that is meaningful, sets the right tone, and leads by example.

Craft and implement effective compliance programs that can detect misconduct. Push to create a culture of compliance. Empower ethical employees.

And beyond that, there is so much work to be done. You are not just the best of our practice, you are the best of our community. Imagine if only a fraction of this group, instead of focusing on the end results of criminality, engaged more at the root causes, and became more proactive to prevent it in the very first place. That is the task that cannot be accomplished from behind a desk or from within the cozy confines of a posh hotel.

No, it requires us all to step outside of our offices, our homes, embrace a broader sense of community, and engage our brothers and sisters on the challenges facing us all.

Let us solve our community's problems together.

That is our calling, today and every day.

Speaker:
Assistant Attorney General Kenneth A. Polite, Jr.

Attachment(s):
Download Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks
Download Evaluation of Corporate Compliance Programs
Download Memorandum on Selection of Monitors in Criminal Matters

Topic(s):
Coronavirus
Public Corruption
Cybercrime
Financial Fraud
Foreign Corruption
Health Care Fraud

Component(s):
Criminal Division
Criminal - Criminal Fraud Section
Criminal - Money Laundering and Asset Recovery Section

Updated March 3, 2023