JUSTICE NEWS

Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance

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Good afternoon and thank you for that gracious introduction. I want to start by thanking the New York University School of Law for hosting us today.

I also want to recognize Faculty Director Jennifer Arlen and Executive Director Allison Caffarone, along with everyone involved in the Program on Corporate Compliance and Enforcement (PCCE), for organizing this event.

It is a privilege to join you today in my role as Assistant Attorney General for the Criminal Division, where I have the honor of overseeing more than 600 prosecutors across 17 sections and offices. It has been almost a decade since I last served at the Department of Justice, and a lot has changed in that time. Yet, one constant is the dedication of our career employees who work day in and day out protecting the public and upholding the rule of law in cases across the country.

Today, I am pleased to follow in a long line of current and former Department officials who have participated in NYU and PCCE events like this one. It is often said that the goal of a legal education is to teach future lawyers how to think – I used to refer to law school as something akin to "mental boot camp." But practical knowledge and skills also are essential attributes to becoming a successful practicing lawyer. And the need to provide that practical knowledge and training continues well after passing the bar exam.

I commend NYU Law and this Program for your dedication to training both practitioners and the next generation of lawyers on the causes of corporate misconduct and the nature of effective enforcement and compliance. Our laws, economy, and industry are becoming increasingly complex with each passing day, so specialized training like what is being presented in today's Program is needed now more than ever.

Consistent with the themes of this event, and the Department's ongoing work to update, refine and clarify our corporate enforcement policies, I intend to focus my remarks today on the Criminal Division's approach to corporate compliance and monitorships.

I have been fortunate to have a legal career which has permitted me to work for many years in both public service and private practice. During that time, I have been lucky to work closely with some incredibly talented attorneys, industry leaders and mentors. As a result, I have come to appreciate the importance of the Department's principles of corporate enforcement to those who run, advise and represent companies, as well as for those of us who are tasked with corporate enforcement.

During my last tour at the Department, I was privileged to work closely with then-Deputy Attorney General Mark Filip as we drafted the Department's Principles of Federal Prosecution of Business Organizations, which many practitioners colloquially refer to as the "Filip Factors." When we were drafting the Principles a decade ago, we made a conscious decision to break from the prior practice of issuing policy by memorandum and instead placed the Principles in what was until recently called the United States Attorney's Manual. That guidance has endured, and continues to define the primary factors applied to corporate enforcement cases across the Department.

After leaving the Department, I was fortunate to work in private practice for more than eight years at a well-known global law firm. There, I represented clients in corporate enforcement matters before the Department, and often advised companies on their compliance programs and how best to navigate operations while under the oversight of corporate monitors. My experiences on both sides of corporate enforcement formed the root of my understanding and perspective of the complex compliance issues that companies must navigate each and every day.

Now that I have returned to the Department, I have the duty to oversee some of the most significant corporate enforcement cases across the country.

Among the sections within the Criminal Division that handle these cases are the Fraud Section, headed by Acting Chief Sandra Moser, and the Money Laundering and Asset Recovery Section (MLARS), headed by Chief Deb Connor.

Just to give you a sense of the corporate enforcement work in these sections, the Fraud Section's FCPA Unit, headed by Dan Kahn, who spoke on a panel earlier today, reached eight corporate resolutions this past fiscal year, four of which were coordinated with foreign authorities. In the aggregate, these cases involved close to one billion dollars in total corporate U.S. criminal fines, penalties and forfeiture.

The Fraud Section's Securities and Financial Fraud Unit, currently headed by Brian Kidd, obtained two significant corporate resolutions during the past fiscal year, which included LIBOR manipulation conduct in the resolution involving Société Générale, and front-running conduct by certain executives of HSBC Holdings plc.

The Fraud Section's Health Care Fraud Unit, led by Joe Beemsterboer, this year achieved a $260 million global criminal and civil resolution involving HMA, what was once a major U.S. hospital chain.

Our Money Laundering and Asset Recovery Section secured a guilty plea by Rabobank NA for conduct involving Bank Secrecy Act and anti-money laundering failures that the company attempted to conceal from its regulators. This conduct resulted in the processing of over $360 million in illicit funds.

These results from the past fiscal year are not anomalies. In the prior 2017 fiscal year, there were 11 corporate FCPA criminal enforcement actions involving approximately $1.15 billion in total U.S. fines, penalties and forfeiture; and MLARS announced two important corporate resolutions involving Western Union and Banamex USA. On average, the attorneys across these two sections are resolving approximately one corporate enforcement matter per month, which of course does not take into account all of the cases that are closed with no action or that result in a declination.

While these cases involve many different industries and fact patterns, one constant is that every case will at some stage require a deep look into the sufficiency and proper functioning of the subject company's compliance program. As companies continue to grow in size, scope and complexity, and as international business becomes the norm rather than the exception, compliance is of ever greater importance in ensuring that companies operate efficiently and within the bounds of the law.

As many of our corporate enforcement policies make abundantly clear, from the 2008 Principles of Federal Prosecution of Business Organizations to the recent FCPA Corporate Enforcement Policy, compliance is an important factor we take into consideration in every corporate enforcement matter we review. In these cases, our prosecutors assess the compliance function both at the time of the conduct and at the time of resolution in order to reach a fair and appropriate resolution in cases involving corporate wrongdoing. As a result, our prosecutors and supervisors must have a strong foundational understanding of what constitutes an effective approach to compliance.

Previously, the Criminal Division attempted to address the need for this expertise by hiring a single compliance counsel who was housed in the Fraud Section. While this approach had its benefits, there are inherent limitations in having the locus of our compliance expertise consolidated in a single person in a single litigating section.

Even when fully briefed on a matter, a single compliance professional who has not been involved in a case throughout an investigation is not likely to have the same depth of factual knowledge as the attorneys who make up the case team. Nor can any one person be a true compliance expert in every industry we encounter. An effective, state of the art compliance program in the banking industry, for example, is going to look very different from one in the health care, energy, or casino industries.

Relying on a single person as the repository of all of our compliance expertise also is shortsighted from a management perspective. Anyone who holds such a job will inevitably and quickly feel a strong pull to the private sector. Their expertise is simply too valuable in this day and age. If and when that person departed, we would have to start from scratch and find a replacement. And that process undoubtedly would repeat itself every few years, with little long-term benefit to the Criminal Division. That is the position we find ourselves in right now.

Now, to be clear, I'm not suggesting that all or even most of our trial attorneys and supervisors lack compliance knowledge and experience. Indeed, it is just the opposite.

Our last compliance counsel spent considerable time training our attorneys and developing in-house knowledge and expertise among attorneys in the Division. That work was very beneficial.

Going forward, I intend to build upon this capacity and knowledge across every section in the Division that requires it, starting with Fraud and MLARS, where the bulk of our corporate enforcement activity takes place. We will accomplish this through a combination of diverse hiring and the development of targeted training programs.

When hiring in the Criminal Division, we will focus on building a team of attorneys who offer diverse skillsets. That means not just attorneys with experience as prosecutors and in the courtroom, but also those who bring compliance experience to the table.

In the context of corporate enforcement, having a trial attorney with experience litigating corporate cases paired with an attorney who has experience developing and testing corporate compliance programs allows us to leverage our talent, which should lead to better and more just outcomes.

Consistent with the Principles of Federal Prosecution of Business Organizations, our trial attorneys and supervisors must address a number of factors in each and every case as they weigh an appropriate resolution. It only makes sense to have the same attorneys evaluating all of those factors together.

I believe our prosecutors should consider the adequacy of a compliance program at the same time they are considering, for example, a company's remedial actions or the timeliness of any voluntary self-disclosure. It makes little practical sense to outsource a separate review of the compliance program when considering the merits of a corporate matter. Instead, all of the Filip Factors should be weighed by the entire case team as part of a single, comprehensive review and determination of the right outcome.

As we move towards a workforce better steeped in compliance issues across the board, we also will need to increase training in this area.

The Department has been training attorneys how to investigate and try cases for decades. We do so for attorneys who are right out of law school and entering our Honors program, for attorneys coming off clerkships, and for attorneys that have spent the bulk of their careers in private practice. This training is accomplished in a variety of ways.

We send new hires to our National Advocacy Center for intensive trial advocacy training. And we assign new attorneys as junior members of trial teams to build experience in the courtroom. In our United States Attorney's Offices (USAOs), new prosecutors often start their careers carrying a busy misdemeanor docket or working less complex felony cases. In the Criminal Division, we often detail new attorneys to USAOs to gain this same experience. And we offer a broad array of both voluntary and mandatory training to all of our attorneys across the Department.

This in many ways tracks my experience in private practice.

When law firms bring in new associates or more senior attorneys who lack significant experience in certain areas, firms often provide extensive training programs and pair these attorneys with more experienced practitioners from whom they can learn. In some instances, firms second young attorneys to clients to gain this valuable experience.

Our expectation is that the Division will develop a training program that addresses compliance programs generally, as well as issues specific to each section and unit. As a result, more of our health care fraud attorneys who work on corporate cases will become experts in health care industry compliance; attorneys working on securities and commodities cases will become experts in compliance relating to securities laws and trading. We will take this same approach for attorneys who work on FCPA cases, or MLARS attorneys who do cases involving the banking industry. Ultimately, our goals are to ensure a balance of experience across the Division and to enhance the expertise of our trial attorney workforce.

We want to ensure that we build and maintain the capacity we need not just for today or next year, but for ten years down the road. And it will lessen the impact when people inevitably leave the Department to retire or follow other career paths.

Our renewed approach to compliance training makes good management sense, but also should be a plus for companies and defense attorneys that find themselves across the table from us. When negotiating a corporate resolution, we want to ensure that our attorneys can successfully navigate the difficult compliance and other issues that arise during these discussions, including whether the facts and circumstances of a particular case warrant the imposition of a corporate monitor.

I know from personal experience that the issue of whether a monitor will be required is one of the most significant aspects of any corporate resolution. When the Criminal Division decides to impose a monitor, I believe we have an obligation to ensure that we have done so for the right reasons. We also have a continuing obligation to interact with the monitor and address any problems that may arise during the course of the monitorship.

Let me be clear, I think our attorneys have performed quite admirably in this area. But I also recognize that there is always room for improvement in our policies and procedures to ensure we are acting responsibly when we impose this significant, but often times necessary burden on a corporation.

Last year, Deputy Attorney General Rosenstein spoke at another PCCE event and proclaimed that the Department would be actively reviewing a wide range of existing corporate enforcement policies. Consistent with this directive, we have been reviewing our monitorship policies and procedures since my arrival.

As a result of that review, I'm pleased to announce that yesterday I issued new guidance relating to the imposition and selection of corporate monitors in Criminal Division matters. The new policy memorandum, as well as my prepared remarks for today, will be made available on the Criminal Division's website.

The goal of the new guidance is to further refine the factors that go into the determination of whether a monitor is needed, as well as clarify and refine the monitor selection process.

Importantly, the new policy supersedes the guidance contained in the 2009 Breuer Memorandum regarding the selection of corporate monitors, but it does not replace prior guidance contained in the memorandum issued in 2008 by then Acting Deputy Attorney General Morford. Rather, the new policy supplements the Morford Memo.

As an initial matter, while the Morford Memorandum applied by its terms only to deferred prosecution and non-prosecution agreements, our new memorandum makes clear that the Criminal Division also will apply the same principles to court-approved plea agreements that impose a monitor.

Our approach to the new policy began with the foundational principle that the imposition of a corporate monitor is never meant to be punitive. It should occur only as necessary to ensure compliance with the terms of a corporate resolution and to prevent future misconduct. That approach is consistent with our longstanding practice of imposing corporate monitors as the exception, not the rule.

I recently reviewed statistics for the Fraud Section, and over the past five years or so, approximately one in three corporate resolutions involved the imposition of a corporate monitor. So, the overwhelming majority of our resolutions do not involve a monitor.

Our new policy explicitly recognizes that, "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."

In making their determination, Criminal Division attorneys must consider a number factors, including the type of misconduct – such as whether it involved the manipulation of books and records or the exploitation of inadequate internal controls and compliance programs. Attorneys also will assess the pervasiveness of the conduct and whether it involved senior management.

Other factors consider any investments and improvements a company has made to its corporate compliance program and internal control systems, and whether remedial measures have been tested for the ability to prevent or detect similar misconduct in the future. Similarly, the policy takes into consideration whether the misconduct took place in an inadequate compliance environment that no longer exists.

Notably, the new policy also considers whether misconduct took place under different corporate leadership, and recognizes the unique risks and compliance challenges of the particular region and industry in which a company operates.

Finally, in terms of whether a monitor is necessary, the policy directs Criminal Division attorneys to also consider both the financial costs to a company, as well as unnecessary burdens to the business's operations.

We believe this pragmatic approach to monitorships will ensure that we continue to carefully evaluate each case, based on specific facts and after a careful assessment of a company's corporate compliance program at the time of resolution. This means not only determining whether the program is adequate on its face, but also how its effectiveness has and will continue to be tested.

The policy also addresses the selection process for corporate monitors.

I'm not going to get into all the details, but our goal here is to ensure that the process is fair, ensures the selection of the best candidate, and avoids even the perception of any conflicts of interest. For this reason, the Division's monitor selection committee will continue to include an ethics official from the Criminal Division. We want to ensure that businesses and the public are confident in the selection process, avoiding any suggestion that monitors are chosen for inappropriate reasons, including personal relationships or past employment in the Department.

Finally, the policy recognizes that there may be unique circumstances that require a departure from the procedures contained in the policy. This may occur when working a case jointly with a USAO that may have different policies and procedures, in which case the policy provides for some flexibility, with any departures from the policy subject to certain approvals by Criminal Division leadership.

Ultimately, a monitor should benefit the company, its employees, shareholders, and the public by effectively furthering the goal of preventing and detecting future misconduct.

As I wrap up, I'd like to take a few moments to address the Department's obligations after imposing a monitor.

I want to make very clear that once a monitor is selected and installed, our work at the Department is far from over. We take seriously our burden of ensuring that monitorships are being carried out properly and effectively. In particular, it is incumbent on our prosecutors to ensure that monitors are operating within the appropriate scope of their mandate. Monitorships should never be expanded or extended for any illegitimate reason.

While the contractual agreement is ultimately between a monitor and the company, we are here to act as a referee of sorts where needed, consistent with the governing agreement. If a company that is subject to a monitor encounters problems, they should feel comfortable approaching the Department. While we do not want to encourage frivolous claims, we absolutely want to know of any legitimate concerns regarding the authorized scope of the monitorship, cost or team size. If a company wants to raise its hand with an issue, we are here to listen.

We also are committed to meeting regularly to assess the appropriateness of a monitor's recommendations, including whether the company appears on track to complete the implementation of recommendations.

Finally, I want to return to a point I made at the outset – just how impressed I am with the incredible dedication of all of our prosecutors.

Take for instance the prosecutors in our Fraud Section, which as I noted brought around a dozen corporate cases to resolution over the past fiscal year.

Over that same time period, prosecutors in that section brought public charges against over 400 individuals, up by almost 100 from the prior fiscal year. Over the past year, these same prosecutors secured public convictions involving almost 250 defendants.

Most of these cases never make headlines, but they are no less important to our prosecutors and the untold victims whose rights they strive to uphold.

Every day, prosecutors from the Criminal Division are spread out in offices and courtrooms in Washington, D.C. and across the country, prosecuting some of our country's most violent gang members and drug organizations.

They work tirelessly in our fight against the opioid epidemic.

They are protecting vulnerable victims such as children and the elderly.

They work complex computer crime and intellectual property cases with great success and little fanfare.

I could not be prouder of the Criminal Division's accomplishments, and to serve alongside such dedicated professionals as we execute our mission on behalf of all Americans.

Thank you for your time and I hope you enjoy the remainder of the program.

Speaker:
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Attachment(s):
Download Selection of Monitors in Criminal Division Matters Memo

Topic(s):
Financial Fraud

Component(s):
Criminal Division

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