Keynote by Deputy Assistant Attorney General Sung-Hee Suh
at the ABA-CJS Global White Collar Crime Institute 2015

Thursday, November 19, 2015, Shanghai, China

Thank you, Gary [Grindler], for that kind introduction. I'm delighted to be here in Shanghai to join you all for the ABA Criminal Justice Section's inaugural Global White Collar Crime Institute. I also want to thank the KoGuan Law School of the Shanghai Jiao Tong University for partnering with the ABA Criminal Justice Section on this important conference.

Professor Dervan and the other organizers of this Shanghai Institute have lined up a terrific program on current trends and challenges in white-collar criminal and regulatory enforcement in China, the United States and globally. I appreciate the opportunity to talk to you today about the U.S. Department of Justice's continued efforts to investigate and prosecute white-collar crime. I'd like to focus on three of those efforts – specifically, the Department-wide enhanced efforts to pursue individual accountability in cases of corporate wrongdoing; the Criminal Division's continued efforts to provide greater transparency regarding our corporate resolutions, especially in Foreign Corrupt Practices Act cases, in conjunction with the Justice Department's increased resources devoted to fighting international corruption; and the Criminal Division's recent retention of an experienced compliance counsel.

But, first, I'd like to provide a brief overview of the Criminal Division, for those of you who aren't already familiar with the structure and workings of the U.S. Department of Justice. The Criminal Division is one of many divisions in the Department; other divisions that also investigate and pursue cases targeting corporate wrongdoing include, for example, the Civil Division, the Tax Division, the Antitrust Division, and the Environmental and Natural Resources

Division. In addition, the Department includes 93 U.S. Attorney's Offices around the country that also investigate and pursue both criminal and civil cases involving corporate misconduct. While the U.S. Attorney's Offices generally focus on investigating and prosecuting wrongdoing in their respective districts, the Criminal Division – often in partnership with U.S. Attorneys' Offices – focuses on issues that are national or international in scope.

Within the Criminal Division, the Fraud Section is the largest section and has principal responsibility for investigating and prosecuting complex economic crimes. The Fraud Section currently has 110 prosecutors and three litigating units. The Securities and Financial Fraud Unit focuses on complex and sophisticated securities fraud, commodities fraud, and other financial fraud schemes. The Healthcare Fraud Unit targets individuals and corporations engaged in Medicare fraud and other types of health care fraud. And last but not least, the Foreign Corrupt Practices Act (FCPA) Unit is devoted entirely to combatting international corruption and has exclusive authority to prosecute criminal violations of the FCPA.

Many of the cases that the Fraud Section handles involve extensive coordination with regulators and other law enforcement agencies around the world. The Criminal Division currently has people stationed in more than 45 countries, and our Office of International Affairs obtains foreign evidence needed in U.S. investigations, seeks extradition of people wanted for prosecution in the United States and responds to extradition and mutual legal assistance requests from foreign governments. To successfully investigate and prosecute cases involving global entities, we work closely with our foreign law enforcement counterparts and foreign regulators, thereby strengthening our collective ability to bring transnational criminals to justice – both corporations and individuals alike.

INDIVIDUAL ACCOUNTABILITY

Turning to the first of the three topics I would like to discuss today, the prosecution of individuals for corporate wrongdoing has been and continues to be a high priority for the Criminal Division and for the Justice Department as a whole.

In a memo issued two months ago, which was referenced in both of this morning's sessions, Deputy Attorney General Sally Yates provided new policy guidance that applies to all Justice Department lawyers handling corporate matters. The goal was to improve upon and maximize the Department's ability to identify and pursue the individuals responsible for corporate wrongdoing. There are six steps outlined in what is now being referred to as the "Yates Memo," some of which are new and others of which are practices that were already being employed by the Criminal Division as well as a number of prosecutors around the country - but had not been formal policy or Department-wide practice. As I mentioned at the outset, the U.S. Justice Department is a very large and multifaceted government agency, so what the Yates Memo sought to do was identify best practices, formalize those best practices, and make them apply Department-wide, to foster uniformity and consistency among all federal prosecutors across the United States. And just this past Monday, Deputy Attorney General Yates announced that the Justice Department's Principles of Prosecution of Business Organizations, which are more commonly known as the "Filip Factors" and which have governed the Department's prosecution decisions regarding corporate criminal conduct for two decades, are getting an update to reflect the renewed focus on individual accountability.

One of the steps in the Yates Memo that has caught everyone's interest – the requirement that companies provide facts about individuals in order to obtain cooperation

credit – builds upon what the Department has stated repeatedly. Because corporations can act only through individuals, the Department has long been committed to identifying and prosecuting, where appropriate, the persons within a company, including senior-level decision makers, who are responsible for corporate misconduct.

A big focus of Assistant Attorney General Leslie Caldwell, ever since she took the helm of the Criminal Division in May of last year, has been emphasizing to our prosecutors doing white-collar cases how important it is to hold individuals accountable for wrongdoing. We have also been making clear to companies and their outside counsel that, when a company chooses to cooperate with the government's investigation and, on the basis of that cooperation, seeks leniency from the Department for criminal misconduct, it must identify the individuals involved in the misconduct, and provide us with all relevant facts about those individuals. In other words, cooperation that is limited to information sufficient only to resolving the criminal case with the corporate entity is simply not enough for companies to receive full cooperation credit.

In her memo, Deputy Attorney General Yates announced a policy change designed to further enhance the likelihood that individuals who are responsible for corporate crime will be held accountable. The existing policy stated that, in deciding whether to give a company credit for cooperation, a criminal prosecutor "may" consider a number of factors – including the company's willingness to give information about individuals. The new policy means that the "may" has now become a "must." In other words, in deciding whether to give a company credit for cooperation, a prosecutor now "must" consider the company's willingness to give information about individuals. And a company that does not provide this information will not be eligible for ***any*** cooperation credit. Previously, companies could receive varying degrees of

credit for varying degrees of cooperation. Now, a company will receive no credit for cooperation unless, at minimum, it does what it can to identify individuals involved in the conduct, whatever their level of seniority or importance within the company.

A number of concerns have been raised. Let me address a few of the most commonly voiced concerns.

First, a company will not be required to devote even more time and resources to conducting internal investigations than before. Until last year, I worked for 15 years in private practice representing companies – often in the context of criminal or regulatory investigations. I believe I have a good sense of the challenges that companies and their counsel face in determining the appropriate scope of an internal investigation. But some of those challenges appear to stem from a misperception that the longer and more expensive and more resource-intensive the company's internal investigation, the more favorably the government will view the company's cooperation. But broad, aimless investigations by a company – just as by the government – are counter-productive. As we in the Criminal Division have long emphasized, and continue to stress today, an investigation should be narrowly focused on getting to the bottom of what happened, identifying who within the company was involved, and – if the company seeks cooperation credit -- providing that information to us on a timely basis.

Second, this new policy will not invade the attorney-client privilege. Nothing has changed about the Department's policy or expectations about waiver; we are not going to be asking companies to waive privilege.

Yet another concern is that companies will be less likely to voluntarily self-report instances of wrongdoing because they are not sure that they will be able to deliver a

prosecutable case against individuals. But we are not asking for prosecutable cases -- what we are asking for are facts, including facts about individuals.

Moreover, a company that does not have access to all the facts, despite its best efforts to do a thorough and timely investigation, will not be at a disadvantage. Our presumption is that the corporate entity will have access to the evidence, but if there are instances where it does not, or is legally prohibited from handing it over, the company needs to explain that to us. And, rest assured, we will test the accuracy of any such assertions.

We, of course, recognize that we sometimes can obtain evidence that a company cannot. We often can obtain from third parties evidence that is not available to the company. Also, we know that a company may not be able to interview former employees who refuse to cooperate in a company investigation. Those same employees may provide information to us, whether voluntarily or through compulsory process. Likewise, there are times when, for strategic reasons, we may ask that the company stand down from pursuing a particular line of inquiry. In these circumstances, the company of course will not be penalized for failing to identify facts subsequently discovered by government investigators.

INCREASED TRANSPARENCY

Speaking of cooperation credit, we understand that it has not always been clear why the Department required a corporate entity to plead guilty to resolve a criminal case, as opposed to a deferred or non-prosecution agreement, or why we declined to pursue a criminal resolution altogether with another corporate entity that engaged in similar misconduct. I have also heard companies and their counsel say that they have no idea how the government's monetary resolutions were arrived at – that it sometimes appears as if the government just picks these

numbers out of thin air. Also notable has been the trend among companies over the last several years against voluntary self-reporting, including – and perhaps especially – in the FCPA space, in part due to what is perceived, as noted during this morning's sessions, that there is little or no benefit to self-reporting. Some lawyers have advised their clients that it's simply more rational to wait to see if the government comes knocking and then cooperate if and when that happens.

We in the Criminal Division have been working towards greater transparency for several years, to make plain not only the benefits of full cooperation, but also the benefits of voluntary self-reporting and remediation. Transparency also enables companies to assess the risks of deciding not to undertake these mitigation efforts.

To that end, in the anti-corruption context, we have long included FCPA opinions on the Fraud Section's website. And, in 2012, the Criminal Division and the Securities and Exchange Commission issued "A Resource Guide to the U.S. Foreign Corrupt Practices Act," which included an explanation of our guiding principles of enforcement and a comprehensive review of what we look for in anti-corruption compliance programs. We also provided anonymized case studies and hypothetical scenarios to provide more clarity and direction for companies.

And we've continued to look for ways to illustrate how and why we arrived at certain deferred or non-prosecution resolutions, by spelling out in the relevant public documents – to the extent possible – the specific factors that we took into consideration.

Continuing in our efforts to be more transparent, just two days ago, AAG Caldwell spelled out in further detail how we in the Criminal Division evaluate mitigation credit for what I'll call the trifecta of corporate mitigation factors – voluntary self-disclosure, full cooperation

and remediation. These three factors are often conflated, often under the general umbrella of "cooperation," but – as the updated Filip Factors now make even clearer – they are distinct, separate concepts.

When a company voluntarily self-discloses, fully cooperates and remediates, it is eligible for the full range of consideration with respect to both charging and penalty determinations. And the more aggravating the scope or seriousness of the criminal activity, or the worse the company's history, the more important it is for a company seeking leniency to present the strongest possible mitigation. Companies that fail to self-disclose but nonetheless cooperate and remediate receive some credit. But that credit for cooperation and remediation is measurably less than it would have been had the company also self-reported.

Of course, the Justice Department does not require a company to self-disclose, fully cooperate or remediate, and failure to do those things, or to do them to the standards that we in the Criminal Division have described, in and of itself, does not mean that charges will be filed against a company any more than it would with respect to an individual. But when it comes to serious, readily-provable offenses, companies seeking a more lenient disposition on the basis that they took steps to mitigate the offense after it was discovered are on notice of what the Criminal Division looks for when we consider these mitigating factors.

Finally, to those companies that are disinclined to self-report in the belief that the government will never know – I say, think again. In the anti-corruption space, the Fraud Section and the Federal Bureau of Investigation are deploying significantly more resources to detect and prosecute companies that choose not to self-disclose in FCPA cases. We're hiring an

additional 10 prosecutors in the FCPA Unit, an increase of over 50%, and the FBI has established three new squads devoted to international corruption investigations and prosecutions.

COMPLIANCE COUNSEL

Self-disclosure, cooperation and remediation are all steps that a company can take after the fact, but the Justice Department is just as committed to preventing corporate wrongdoing from occurring in the first place. To that end, the Department has long placed great emphasis on the importance of an effective corporate compliance program. In the U.S., there is no affirmative defense based on the company's corporate compliance program, but the Filip Factors have long provided that in conducting an investigation of a corporation, determining whether to bring charges, or in negotiating plea or other agreements, prosecutors should consider, among other factors, "the existence and effectiveness of the corporation's pre-existing compliance program."

Fundamentally we ask, is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? And does the corporation's compliance program generally work? This is common sense in broad strokes. But prosecutors are no experts in the nuances of corporate compliance programs. Indeed, over the past twenty years in particular, the role of compliance has been evolving, becoming more sophisticated, more industry-specific and more metrics-oriented. Many companies have rightly tailored compliance programs to make sense for their business lines, their risk factors, their geographic regions and the nature of their work force, to name a few. But many have not.

The Fraud Section has therefore retained an experienced compliance counsel. She started only two weeks ago, so it's still too early to talk about specifics. But I can tell you

generally that we wanted to get the benefit of someone with proven compliance expertise, so as to probe compliance programs in terms of both industry best practices and real-world efficacy. This compliance counsel will help us assess a company's claims about its program, in particular, whether the compliance program is thoughtfully designed and sufficiently resourced to address the company's compliance risks, or is – at bottom – largely window dressing.

No compliance program is foolproof. We understand that. We also appreciate that the challenges of implementing an effective compliance program are compounded by the ever-increasing cross-border nature of business and of criminal activity. Many companies' businesses are all over the world. They are creating products and delivering services not only here in China but overseas and are operating across many different legal regimes and cultures. We also recognize that a smaller company doesn't have the same compliance resources as a Fortune-50 company. Finally, we know that a compliance program can seem like "state of the art" at a company's U.S. headquarters, but may not be all that effective in the field, especially in far-flung reaches of the globe.

The Fraud Section's compliance counsel – who, notably, has worked as a compliance officer here in China, as well as in the U.S. and the U.K. – has the concrete experience and expertise to examine a compliance program on both a more global and a more granular level. More so than ever, it is critical that companies have vigorous compliance programs to deter and detect misconduct. Our compliance counsel will give our prosecutors more tools to intelligently assess them.

CONCLUSION

In closing, I'd like to thank you for your attention, and to thank the American Bar Association Criminal Justice Section for hosting this great program and for giving me this opportunity to discuss some of the U.S. Justice Department's new policies and personnel that support our core mission: to deter and detect crime, to enhance accountability, and to promote fairness while seeking justice.