U.S. Department of Justice

United States Attorney
Eastern District of Texas

January 15, 2021

To: Criminal Division and Civil Division, EDTX

From: Stephen J. Cox, United States Attorney

Re: *Memorandum on Corporate and White Collar Enforcement for the Eastern District of Texas*

The Department of Justice (the "Department") is tasked with enforcing the law and defending the interests of the United States in a manner that is fair and impartial for all Americans. Consistent with this mission, over the past several years, the Department has strived to promote justice in areas of corporate and white-collar enforcement by introducing and formalizing policies intended to increase transparency and ensure fairness, while continuing to protect the public through aggressive pursuit of wrongdoers. The Eastern District of Texas' mission is no different. These fairly recent policies, summarized below, touch upon a broad spectrum of enforcement priorities, ranging from cooperation, ability-to-pay, monitors, and ensuring settlement payments are not made to entities other than the government or victims. Criminal and Civil Assistant United States Attorneys in the Eastern District of Texas should review these policies and continue to apply them to any current or future investigations and litigations.

- Prohibition on Settlement Payments to Third Parties (June 5, 2017) – The goals of a settlement agreement between the Department and a private party are to compensate victims, redress harm, and/or punish and deter unlawful conduct. Accordingly, with three limited exceptions relating to remediation, professional service fees, or payments authorized by statute, a settlement agreement shall not require payment to non-governmental, third-party organizations who are not victims or parties to the lawsuit. The Prohibition on Settlement Payments to Third Parties Memorandum has been codified as Section 1-17.000 of the Justice Manual.

- FCPA Corporate Enforcement Policy (March 2019) – The Department's FCPA Corporate Enforcement Policy strengthens incentives for companies to self-report potential FCPA violations by easing the requirements for non-prosecution and clarifying the benefits of self-disclosure. When a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a rebuttable presumption that the Department will resolve the company's case through a declination. If, however, a criminal resolution is warranted, the Department will recommend a 50% reduction off the

low end of the Sentencing Guidelines fine range. Criminal recidivists may not be eligible for such credit. Even if the company did not voluntarily disclose misconduct, but later fully cooperates and timely remediates, the Department will recommend to a sentencing court, up to a 25% reduction off the low end of the Sentencing Guideline fine range. This Corporate Enforcement Policy has been codified in several sections of Title 9 of the Justice Manual, and the Criminal Division uses the principles of the policy not only in FCPA matters, but other white-collar enforcement matters such as financial and healthcare fraud cases.

- Factors For Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A), the "Granston Memorandum" (January 10, 2018) – Partially in light of the record increase in *qui tam* actions filed pursuant to the False Claims Act, 31 U.S.C. § 3730, *et seq*., the Department issued the Granston Memorandum to all FCA litigators within the Department. The Memo directed attorneys evaluating a recommendation to decline intervention in a *qui tam* action to also consider whether, in addition, the government's interests would be served, by seeking dismissal of an action pursuant 31 U.S.C. § 3730(c)(2)(A). The Memo surveyed existing case law and provided a non-exhaustive list of factors the Department should consider as a basis for dismissal. Although the Memo recognizes that it is important to be judicious when seeking dismissal pursuant to this section, it nevertheless remains an important tool in advancing the government's interests, preserving limited resources, and avoiding bad precedent. The Granston Memorandum has been codified as Section 4-4.111 of the Justice Manual.

- Limiting the Use of Agency Guidance Documents in Affirmative Civil Enforcement ("ACE") Cases, the "Brand Memorandum" (January 25, 2018) – At its core, the Brand Memorandum addressed the proper use of guidance documents in ACE cases. A "guidance document" is defined in the Memo to mean any agency statement of general applicability and future effect, whether styled as "guidance" or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations. The Memo prohibited the Department from using its enforcement authority to effectively convert agency guidance documents into binding rules. It similarly prohibited the Department from using noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases. However, the Brand Memorandum reaffirms the Department's ability to use agency guidance documents for proper purposes, such as establishing the mental state required to establish a violation of existing law. The Brand Memorandum was expanded to cover criminal enforcement matters in addition to ACE cases and has been codified as Section 1-20.100 *et seq*. of the Justice Manual. The principles are also codified in the Department's internal regulations, 28 C.F.R. § 50.27(b).

- Policy on Coordination of Corporate Resolution Penalties, the "Anti-Piling On Policy" (May 9, 2018) – In parallel investigations involving multiple Justice Department components and other law enforcement authorities, attorneys should not unfairly use criminal enforcement authority to extract additional civil or administrative monetary payments. In cases involving multiple investigations into a company for the same misconduct, attorneys should also coordinate with other Department components to avoid the unnecessary imposition of duplicative fines, penalties, and forfeiture against the

company. Attorneys should consider the amount of fines, penalties, and forfeiture against the company paid to other Department components and law enforcement authorities and coordinate, as appropriate, with those entities to achieve an equitable result. Attorneys should consider the following factors in determining whether coordination and apportionment allows for an equitable result: the egregiousness of the company's misconduct, statutory mandates, potential for delay of resolution, and adequacy and timeliness of the company's disclosure and cooperation with the Department.

Prosecutors should consider whether civil or regulatory enforcement action are appropriate alternatives to criminal prosecution for corporations that have engaged in wrongful conduct. Prosecutors should consider: (1) the sanctions available under civil or regulatory authorities, (2) the likelihood that an effective sanction will be imposed, and (3) the effect of the civil or regulatory alternatives. The Anti-Piling On Policy has been codified as Section 1-12.000 of the Justice Manual.

- Selection of Monitors in Criminal Division Matters, the "Benczkowski Memorandum" (October 11, 2018) –The Benczkowski Memorandum establishes standards, policies, and procedures for the selection and use of monitors by Criminal Division attorneys. The Benczkowski Memorandum supplements guidance issued in 2008 by then-Acting DAG Craig S. Morford, which was primarily concerned with conflicts of interest in the appointment of monitors, and supersedes the guidance contained in the in 2009 AAG Lanny Breuer Memorandum, which provided for the creation of a standing committee on the selection of monitors. Expanding on a principle derived from the Morford Memorandum, the Benczkowski Memorandum explains that the requirement of a corporate monitor should not be punitive and "should occur only as necessary to ensure compliance with the terms of a corporate resolution and to prevent future misconduct." Accordingly, the 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." The Benczkowski Memorandum directs Criminal Division attorneys to consider the potential benefits of a monitor and sets forth a number of factors that should be considered as part of this inquiry.

- Evaluation of Corporate Compliance Programs (Updated June 2020) – The Evaluation of Corporate Compliance Programs memorandums, versions of which were updated by the Criminal Division in June 2020 and by the Antitrust Division even earlier in July 2019, are meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations). Due to the fact-intensive nature of this evaluation, the policy directs the Criminal Division and Antitrust Division to make a reasonable, individualized determination in each case that considers factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors,

both internal and external to the company's operations, that might impact its compliance program. This analysis should also be viewed through the lens of three fundamental questions a prosecutor should ask: (1) Is the corporation's compliance program well designed?; (2) Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?; and (3) Does the corporation's compliance program work in practice? The policy regarding Evaluation of Corporate Compliance Programs has been codified as Section 9-28.800 of the Justice Manual.

- Guidelines For Taking Disclosure, Cooperation, and Remediation Into Account In False Claims Act Matters (May 2019) - The cooperation policy is a discretionary guideline that allows for a reduction in liability that a person or entity might otherwise face under the False Claims Act based on consideration of that party's cooperation with the Department's ongoing investigation, settlement, or enforcement of the law. It is meant to promote judicial economy by encouraging claims resolution without litigation, promote fairness and just outcomes, and strengthen relations between the government and the public, while deterring fraud. The policy identifies various forms of cooperation: voluntary and timely self-disclosure of misconduct, cooperation with an ongoing government investigation by identifying or producing for examination persons involved in or responsible for the misconduct, identification of unknown opportunities to obtain evidence, non-compelled production of relevant information and documents not already required by law, and admission or acceptance of one's responsibility for the wrongful conduct. Cooperation credit may come in the form of a reduction in damage and penalty multipliers, informing the relevant agency so the agency can consider such factors in evaluating administrative options, public acknowledgement, or the Department's assistance with resolving the individual or entity's *qui tam* lawsuit. A non-exhaustive list of factors the government will consider include timeliness, voluntariness, truthfulness, completeness, reliability, nature and extent of assistance, the significance and usefulness of the voluntary disclosure, and whether any appropriate remedial action has been taken in response to the FCA violation; also considered, however, are nature and seriousness of the violation, scope of the violation, extent of any damages, history of recidivism, whether the United States' interests will be adequately serve by a compromise, ability to satisfy the judgment, and litigation risks. The policy also allows the Department to take into account the prior existence of a compliance program in evaluating a defendant's liability under the FCA. For example, the Department may consider the nature and effectiveness of such a compliance program in evaluating whether any violation of law was committed knowingly. For such evaluations, FCA litigators must use the criteria set forth in the aforementioned Evaluation of Corporate Compliance Programs policy. The FCA policy has been codified as Section 4-4.112 of the Justice Manual.

- Inter-Agency Coordination of Civil Actions Under the False Claims Act (December 19, 2019) – In any FCA matter, Department attorneys must confer with the relevant agency during the investigative, litigation, and settlement phases of the matter. The Department's attorneys will solicit the agency's views on the FCA matter, including, for example, on the falsity and materiality aspects of any alleged violations of the relevant agency requirements, in order to assist the Department in determining whether the elements of the

FCA can be established. In a *qui tam* action, if the agency does not support the whistleblower's pursuit of the matter, the agency may recommend that the Department seek dismissal of the case. *See* Department of Justice Manual, § 4-4.111. While the decision whether to seek dismissal remains the exclusive authority of the Department, the Department will consult with the relevant agency in making such a decision. These principles apply to all FCA matters, but as of the date of this writing, two agencies have special mechanisms in place for FCA matters relevant to their programs. In the context of FCA enforcement pertaining to Federal Housing Administration (FHA) single-family mortgage insurance programs, the Department of Justice and the Department of Housing and Urban Development have a Memorandum of Understanding dated October 21, 2019, that reflects the coordination principles above, but also contains significant administrative provisions specific to FHA programs. And on December 4, 2020, the Department of Health and Human Services (HHS) established an FCA Working Group to aid Department FCA litigators by providing HHS's views on the intricate legal frameworks of HHS's numerous healthcare programs.

- Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty (October 8, 2019) and Assessing an Entity's Assertion of Inability to Pay (September 4, 2020) – The Criminal Division and Civil Division allow Department attorneys to consider an entity's inability to pay a fine or monetary penalty or its potential civil liability respectively. In both the criminal and civil context, the entity bears the burden of establishing an inability to pay. These memoranda set forth a number of considerations Department attorneys should consider when analyzing whether the entity has met its burden. In both the civil and criminal context Department attorneys should consider: (1) background on the entity's current financial condition; (2) alternative sources of capital available; and (3) collateral consequences of imposing a fine, penalty, or civil judgment larger than the entity's ability to pay. The Criminal Division is also directed to consider whether the proposed fine could affect the entity's ability to make restitution to victims. Civil Division attorneys must also consider whether the entity could afford to make payment over time, whether the payments would be tax deductible, contingency arrangements for potential future income or assets, and whether third parties may share some of the liability.

The Eastern District of Texas shares the Department's commitment to pursuing corporate and white-collar enforcement in a fair and transparent manner consistent with these policies. Accordingly, these policies are hereby adopted and will apply to all civil and criminal cases investigated and litigated in the Eastern District of Texas. Criminal and Civil Assistant United States Attorneys in the Eastern District of Texas should review these policies and apply them to any current or future investigations and litigations. The Civil Chief of the Eastern District of Texas and Deputy Criminal Chief for Complex Fraud & Public Corruption have been directed to develop training on these policies. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.