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JUSTICE NEWS

Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law

NEW YORK CITY, NY ~ Wednesday, September 17, 2014

Thank you, Professor [Jennifer] Arlen, for those kind words – and thank you all for being here. It's a privilege to be at New York University this afternoon. And it's an honor to stand with so many judges, U.S. Attorneys, and prominent leaders in the field of corporate compliance and enforcement – as well as the law students, faculty members, administrators, staff and alumni who make this institution such a remarkable place.

I'd like to thank Dean [Trevor] Morrison, Executive Director Serina Vash and her colleagues from the Program on Corporate Crime and Enforcement – along with the Milbank Tweed Forum – for hosting today's event. It's great to be with such a distinguished group. And it's a pleasure, as always, to be back home in New York City.

Like many of you, I grew up not far from here. I know that, as this city's oldest law school, NYU has long provided a unique forum – and an essential training ground – where current and future leaders come together to exchange ideas, to challenge accepted wisdom, and to discuss some of the most complex issues facing members of our profession. Today, as we turn our attention to just such a challenge, I believe it's fitting that we do so in the heart of this great city – just a few short miles from the epicenter of what began, in 2008, as a financial tremor, but quickly grew to become a nearly unprecedented global meltdown.

It was six years ago this week that the storied investment bank Lehman Brothers filed for bankruptcy after more than a century and a half in business – marking the culmination of a period of deregulation, excessive risk-taking, questionable lending practices, and defective underwriting that heralded the worst financial crisis since the Great Depression. Since that time, thanks to President Obama's leadership – and the hard work and resilience of the American people – our economy has recovered faster than that of almost any other nation. We've seen 54 straight months of job growth – the longest streak on record – during which the private sector has added 10 million jobs. And we've taken a range of other significant steps forward.

As President Obama explained this summer, over the past six years, financial firms have returned to profitability. Thanks to measures like the Dodd-Frank Act – designed to restore stability to the system as a whole and rebuild the kind of commonsense regulatory environment that was gradually eroded by special interests over the course of the last few decades – these companies are now required to maintain more robust capital reserves that decrease the risk that each institution poses to the broader economy.

Yet – even now – the scars of the Great Recession, its lingering impacts, and its echoes throughout our financial system are not hard to find. More remains to be done when it comes to creating jobs, growing the middle class, and helping the long-term unemployed get back on their feet. And as the President also noted, despite the progress we've seen and the safeguards we've implemented, we are *already* witnessing a troubling return to some of the very same profit-driven risk-taking that contributed to the 2008 collapse.

As this conduct begins to reemerge on Wall Street, it raises questions anew about the extent to which these activities may involve criminality – and may be prosecutable as fraud. Or, if these activities do not constitute illegal conduct, whether they *should*. That's why – today – I believe we're faced with an important opportunity: to leverage the insights, the experience, and the lessons learned from investigating the *last* crisis to the potential cases unfolding before us today. To work alongside congressional leaders to secure the added legal tools necessary to police illegal financial activities in real-time. And to obtain the resources, and foster the expertise, that law enforcement needs to keep pace with evolving challenges – so we can prevent the next financial bubble from spiraling into the next full-blown economic crisis.

For my colleagues and me – at every level of the Department of Justice – instilling in others an expectation that there will be tough enforcement of *all* applicable laws is an essential ingredient to ensuring that corporate actors weigh their incentives properly – and do not ignore massive risks in blind pursuit of profit. All business enterprises naturally involve a degree of risk-taking. That's both



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necessary and healthy. But when companies place exceedingly risky bets relying on federally-insured capital – and when they reap massive financial benefits *regardless* of whether those bets pay off – *all* Americans should be concerned. When those outsized returns rely on false representations to investors or counterparties, it may well entail fraud. And both regulators and law enforcement authorities should take appropriate notice.

For the Justice Department, this means standing vigilant against financial fraud wherever it is uncovered – and never hesitating to prosecute criminal conduct to the fullest extent of the law. Over the past six years, my colleagues and I have been aggressive in bringing cases whenever they are warranted – and where we have enough evidence to bring charges. In doing so, different outcomes have been appropriate in different circumstances.

In situations where fraud has been uncovered within a company, we have often sought to hold the corporation itself responsible. Because we understand that where institutions themselves have failed – or where pervasive cultures of illegality and irresponsibility have taken hold – it's necessary to pursue institutional accountability to bring about fundamental changes.

This sometimes has taken the form of civil settlements. With Citi, JPMorgan Chase and Bank of America, we achieved three of the largest settlements in the nation's history for conduct related to the mortgage crisis. And in addition to imposing significant penalties, we took steps to both ensure accountability and provide relief to many consumers who continue to struggle in the housing market. We insisted that the financial institutions agree to clear, public statements about the misconduct that gave rise to the resolutions. The impact of the cases we bring extends beyond those whose wrongdoing is at issue – because we want others to understand what the defendants did, why it was unlawful, and how the conduct affected the American public. And additional matters remain pending.

In other circumstances, we have pursued criminal charges against corporate actors. From both Credit Suisse and BNP, we secured criminal guilty pleas to go along with multi-billion-dollar penalties. After years of speculation that some firms might be considered too systemically important to face criminal charges, the cases against Credit Suisse and BNP proved that *no* institution is too large to prosecute. We have put that myth to rest once and for all. We demonstrated in those cases that prosecutors are capable of collaborating with financial regulators to hold banks criminally to account. And going forward, we must harmonize our domestic regulatory scheme with its global counterparts. This will enable us to pursue even more criminal cases against other bad-actor institutions in the future – no matter their size.

In total, the Justice Department has brought over 60 cases against financial institutions since 2009, resulting in recoveries totaling over \$85 billion. Alongside attorneys from the Criminal and Civil Divisions, our U.S. Attorneys have provided critical leadership in this regard – including three of our best – Preet Bharara, of the Southern District of New York; Loretta Lynch, of the Eastern District of New York; and Paul Fishman, of the District of New Jersey – all of whom we're fortunate to have with us this afternoon.

But whenever we have resolved these cases – whether they were civil or criminal in nature – we have almost always reserved the right to continue our civil and criminal investigations into individual executives at the respective firms. This is because, when it comes to financial fraud, the department recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them. We believe that doing so is both important – and appropriate – for several reasons:

First, it enhances accountability. Despite the growing jurisprudence that seeks to equate corporations with people, corporate misconduct must necessarily be committed by flesh-and-blood human beings. So wherever misconduct occurs within a company, it is essential that we seek to identify the decision-makers at the company who ought to be held responsible.

Second, it promotes fairness – because, when misconduct is the work of a known bad actor, or a handful of known bad actors, it's not right for punishment to be borne *exclusively* by the company, its employees, and its innocent shareholders.

And finally, it has a powerful deterrent effect. All other things being equal, few things discourage criminal activity at a firm – or incentivize changes in corporate behavior – like the prospect of individual decision-makers being held accountable. A corporation may enter a guilty plea and still see its stock price rise the next day. But an individual who is found guilty of a serious fraud crime is most likely going to prison.

Our record demonstrates that when the evidence and the law support it, we do not hesitate to bring charges against *anyone*. Between 2009 and 2013, the Justice Department charged more white-collar defendants than during any previous five-year period going back to at least 1994. Many of these prosecutions – which concerned a variety of individual conduct, including insider trading – were brought in the midst of a department-wide hiring freeze and other serious resource constraints. Yet these defendants have included CEOs, board members, and other executives of Wall Street firms, hedge funds, banks and other corporations – both within the United States and abroad – including former executives at UBS and Goldman Sachs; from Bank of America to Credit Suisse.

And with respect to mortgage fraud – which was at the heart of the financial crisis – the Justice Department has also taken aggressive action, nearly doubling the number of mortgage fraud



indictments *and* criminal convictions between 2009 and 2010, then increasing them even further the following year. These statistics reflect a rapid mobilization of department resources during a critical period in the aftermath of the mortgage meltdown. And, for each of these years, the rate of conviction we achieved in mortgage fraud cases was approximately 93 percent.

Now, in many of these cases, the department was able to bring charges because our investigators uncovered clear evidence of defendants making false statements or filing fraudulent documents, enabling us to establish an intent to deceive and meet the high legal standard necessary to prove a fraud charge.

But when it comes to more complex transactions that involve more sophisticated traders – as opposed to run-of-the-mill “liar loan” cases or out-and-out Ponzi schemes – a criminal prosecution of an individual can be difficult, more complicated, to mount. This is true for any number of reasons – from possible advice-of-counsel defenses; to the adequacy or inadequacy of written disclosures; to the difficulty to establish materiality and intent. And in some instances, it is simply not possible to establish knowledge of a particular scheme on the part of a high-ranking executive who is far removed from a firm’s day-to-day operations.

This has been a source of frustration for the public for a long time. I understand and share that frustration. But despite the commitment and tireless work of our prosecutors, we cannot bring cases unless, based upon the facts and the law, we believe that we are likely to succeed in court. That is consistent with the department’s long-standing principles of federal prosecution.

We must look deeper at these questions and several thoughts come to mind.

First, in an age when corporations are structured to blur lines of authority and prevent responsibility for individual business decisions from residing with a single person, we ought to consider whether the law provides an adequate means to hold the decision-makers at these firms properly accountable.

The Dodd-Frank Act took important steps to restore transparency and accountability in the banking industry; to curtail abusive practices targeting consumers; and to limit systemic risks posed by individual companies.

But it remains true that, at some institutions that engaged in inappropriate conduct before, and may yet again, the buck still stops nowhere. Responsibility remains so diffuse, and top executives so insulated, that any misconduct could again be considered more a symptom of the institution’s culture than a result of the willful actions of any single individual. This is a problem that the British government sought to address with a financial reform law it passed last year. For the first time, this measure required financial companies to designate an officer who would be accountable for misconduct at the firm.

This is the same principle behind the Sarbanes-Oxley requirement that a designated company executive must sign its accounting forms and bear liability for misrepresentations. Similarly, the Food, Drug and Cosmetic Act provides for the Congressionally-sanctioned “responsible corporate officer doctrine,” which – in the event that illegal activity is uncovered – allows for a criminal charge against the people in charge who were in a position to do something about it.

All of these approaches get at the same core concept: that the buck needs to stop *somewhere* where corporate misconduct is concerned. We ought to consider this further and modify our laws where appropriate. It would be going too far to suggest reversing the presumption of innocence for any executive, even one atop the most poorly-run institution. But we need not tolerate a system that permits top executives to enjoy all of the rewards of excessively-risky activity while bearing none of the responsibility.

Second – since no financial fraud case is prosecutable unless we have sufficient evidence of intent – we should seek to better equip investigators to obtain this often-elusive evidence. This means, among other things, thinking creatively about ways to incentivize witness cooperation and encourage whistleblowers at financial firms to come forward.

As I indicated a moment ago, where the Justice Department’s prosecutions against individuals have been successful, we’ve been able to uncover sufficient evidence to prove intent to deceive on the part of a responsible person. But this evidence is often extremely difficult to come by. Many financial criminals are savvy enough to avoid using email, which may leave a trail for investigators to follow. And intent may only be evidenced sometimes in the form of verbal instructions – evidence that can provide the sort of “smoking gun” that is needed to secure a conviction, but that can *only* be attained from a cooperating witness.

For example, in a 2011 insider trading case brought by U.S. Attorney Bharara and his colleagues, two defendants saw media reports suggesting that federal authorities were closing in. In response, they destroyed evidence – deleting files, shredding documents, and even ripping apart a flash drive and scattering pieces into garbage trucks across New York City. It was only because the government had a cooperating witness inside the company – a witness who had agreed to wear a wire – that the department was able to record a verbal account of these actions, to illuminate other obstruction, and to uncover illegal conduct that otherwise might never have come to light.

Similarly, in our full-court press to investigate and prosecute the ongoing LIBOR matter – which is

being led by the Criminal and Antitrust Divisions, and involved a wide-ranging scheme to rig one of the world's benchmark interest rates – witnesses from inside some of the world's leading financial firms have played important roles. They have strengthened our ability to follow leads; to obtain guilty pleas from subsidiaries of major banks like UBS and RBS; and to pursue individual charges against nine former traders and managers at these institutions. Our ongoing investigation into the manipulation of foreign exchange rates has relied on similar investigative techniques involving undercover cooperators, as well.

Under an important law known as the False Claims Act, or FCA, the Justice Department has recovered more than \$22 billion – since 2009 – from people who have defrauded the government. Many of these recoveries resulted from a strong whistleblower amendment – authored more than 25 years ago by Senator Charles Grassley – which allows citizens who provide evidence of fraud to receive, in some cases, up to about a third of the funds recovered by the government. Thanks to this robust provision, the FCA has also sometimes led to criminal charges against company executives.

These cases – and other investigations that are currently pending – illustrate the unique ability of cooperating witnesses to help federal authorities uncover sufficient evidence to meet a high burden of proof. But the FCA only applies to fraud on government-funded programs. Financial fraud, by contrast, typically also affects other banks, shareholders, or consumers.

To pursue these types of fraud cases, the Justice Department has come to rely on a statute known as the Financial Institutions Reform, Recovery, and Enforcement Act – or FIRREA – a little-used law passed after the savings and loan crisis of the 1980s. Over the last few years, the Residential Mortgage-Backed Securities Working Group – a part of the President's Financial Fraud Enforcement Task Force – has been aggressive in using this law to develop the types of cases that have resulted in major settlements with JPMorgan, Citigroup and Bank of America, among many others. Our use of this measure – to accuse financial institutions of committing fraud against themselves – was recently upheld in U.S. District Court here in the Southern District of New York, by Judge Jed Rakoff, among others.

Like the False Claims Act, FIRREA includes a whistleblower provision. But *unlike* the FCA, the amount an individual can receive in exchange for coming forward is capped at just \$1.6 million – a paltry sum in an industry in which, last year, the collective bonus pool rose above \$26 billion, and median executive pay was \$15 million and rising.

In this unique environment, what would – by any normal standard – be considered a windfall of \$1.6 million is unlikely to induce an employee to risk his or her lucrative career in the financial sector. That's why we should think about modifying the FIRREA whistleblower provision – perhaps to False Claims Act levels – to increase its incentives for individual cooperation. This could significantly improve the Justice Department's ability to gather evidence of wrongdoing while complex financial crimes are still in progress – making it easier to complete investigations and to stop misconduct before it becomes so widespread that it foments the next crisis.

The value of conducting investigations in real time cannot be understated. As any U.S. Attorney can tell you, investigating these cases after the fact is incredibly resource-intensive, often requiring large teams of investigators and prosecutors to sift through millions of documents or terabytes of data – sometimes in foreign languages – over multiple years. In some cases, when the institutions being investigated are based outside the United States, we are unable to compel the production of certain documents or the testimony of certain witnesses. And most critically – as we saw in 2008 – while backward-looking investigations can rigorously hold people and institutions accountable for their actions, they come too late to prevent harm to consumers, the American public, and the economy at large.

Yet investigating financial crimes in real-time requires knowing where to look – which is exceedingly difficult at a time when financial innovation is occurring so quickly and constantly. Understanding the nature of what took place during the mortgage crisis is easy by the time Michael Lewis writes a book about it, but it is a lot harder to identify and grasp fast-emerging industry trends, and the opportunities for abuse they create, in the moment.

Realistically, staying ahead of these developments requires incentivizing individuals from within the industry to come forward and cooperate with ongoing investigations. And this brings me to my third point: because it also requires agents and investigators sophisticated enough to know what questions to ask and what to look for when those witnesses do come forward.

This, in turn, means we must ensure that the FBI has the necessary resources to conduct white-collar investigations; to foster expertise in specialties like forensic accounting; and to help us usher in a new era of aggressive enforcement that keeps pace with a rapidly-changing industry. While white-collar investigations were for years a bread-and-butter specialty of the FBI, since the terrorist attacks of September 11, 2001, the Bureau's ranks of white-collar agents, experts, and analysts have not kept pace with our counterterrorism resources.

After 9/11, the FBI undertook a historic transformation – becoming an agile, threat-focused agency devoted to detecting, investigating, and preventing attacks, while holding would-be terrorists accountable. This was a laudable, logical shift that has led to tremendously effective counterterrorism work – and it is not going to be reversed anytime soon, given the current threat environment we face. So, while we justifiably continue to devote valuable resources to the fight against terrorism, we will also need to support the FBI with resources and personnel that can be brought to bear in our work to

investigate financial crimes – and ensure that the Bureau can sustain a real-time, threat-focused mindset in the world of financial fraud.

After all, at its core, our ongoing fight against financial fraud isn't *just* about good law enforcement. It's about ensuring fairness for everyone who participates in our economy – from homeowners and private investors to major business leaders. It's about preserving opportunities – and providing a level playing field – for people to innovate, to enrich themselves and our nation, and to fuel continued growth. And it's about bringing accountability to both individuals and companies who take advantage of others, who violate the public trust, and who threaten the stability of our economy for financial gain.

Make no mistake: the Justice Department will continue to be relentless in our pursuit of anyone, anywhere, who violates the law. We have investigations open right now that are focused on the conduct of individuals at specific financial institutions. We are making good progress in these cases, which involve conduct that has undermined the integrity of our markets, and we expect to bring charges in the coming months. No company, executive, or employee is above reproach – no matter who they are, where they work, or how much they make. And my colleagues and I will never rest in our effort to catch these criminals – and to see that they are prosecuted to the fullest extent of the law.

This afternoon, as we look toward the future of this work – informed by our past experience and mindful of emerging challenges – I would like to feel confident in our ability, as a legal community and as a nation, to bring about the positive changes we seek. I implore Congress to consider the proposals I've outlined, and others, to strengthen our fraud-fighting tools; to advance equality, opportunity, and justice; and to encourage continued growth by laying out clear and consistent rules of the road. As I look around this crowd of friends, colleagues, and future leaders – of heirs to the storied legacy, and the unique history, of NYU Law – I am optimistic about your capacity to overcome the obstacles ahead. I'm proud to count you as colleagues in the pursuit of justice. And I look forward to where our collaborative efforts will take us – and where a new generation will lead us – in the months and years to come.

Thank you, once again, for inviting me to discuss these important issues with you today.

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