JUSTICE NEWS

Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act

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Remarks as Prepared for Delivery

Good morning, and thank you, Rachel for that kind introduction.

It is an honor and privilege to address this year's ACI Conference on the Foreign Corrupt Practices Act. Although there are many excellent legal conferences throughout the year, this one always stands out because of the quality of the speakers and the deep substantive focus on foreign bribery investigations and prosecutions.

I am particularly pleased to be here at this time, given that the Criminal Division has seen remarkable prosecution activity and case developments in the FCPA space over the past year.

So far in 2019, the Criminal Division's FCPA Unit has publicly announced more charges against individuals [34] than in any other year in history. It has also publicly announced more guilty pleas by individuals [30] than ever before.

This number of individual prosecutions in 2019 is not an outlier or a statistical anomaly. Rather, it is part of the Department's continued dedication to holding individual wrongdoers accountable across the board.

Indeed, this year's record number of individual FCPA charges and guilty pleas builds on 2017 and 2018, which were previously the two biggest years for those categories of cases.

Building cases against individuals takes time and resources, even more so when those individuals assert their trial rights.

And yet, these overall individual prosecution numbers (charges and pleas) have been generated in a year in which our prosecutors also have been very busy at trial.

So far in 2019, the FCPA Unit has equaled its annual high-water mark for trials ending in conviction.

Yet, our work prosecuting individual wrongdoers has not impacted our efforts to police corporate FCPA cases. By the end of this week, the FCPA Unit will have resolved seven corporate cases with criminal resolutions in 2019, as well as two additional cases that were resolved via declinations with disgorgement under the FCPA Corporate Enforcement Policy.

These corporate resolutions – including one to be announced later this week – collectively represent the largest amount ever recovered by the DOJ in FCPA cases in a single year ($1.6B versus the previous high in 2016 of $1.3B), and a total of $2.8 billion recovered globally through coordinated resolutions.

In addition to its efforts under the FCPA, the Criminal Division also pursues foreign corruption through money laundering enforcement and asset forfeiture. The Division's Kleptocracy Asset Recovery Initiative is a prime example of that enforcement.

Administered through our Money Laundering and Asset Recovery Section (MLARS), prosecutors, analysts and agents investigate and prosecute acts of high-level foreign corruption – such as embezzlement and money laundering – that affect the U.S. financial system.

The Section also brings asset recovery actions to seize and forfeit the proceeds of foreign official corruption in which, as appropriate, the proceeds are returned for the benefit of the foreign citizens that were victimized by that greed.

The success of the Kleptocracy Initiative was on full display in 2019, as it reached a historic settlement of its civil forfeiture cases against assets acquired by Low Taek Jho, known to all as Jho Low.

Jho Low allegedly used funds misappropriated from 1MDB, Malaysia's investment development fund, and laundered them through financial institutions in several jurisdictions, including the United States, Switzerland, Singapore and Luxembourg.

Low then allegedly engaged in extravagant spending sprees, acquiring valuable artwork, real estate, airplanes, yachts, and sports cars, all while gambling freely at casinos, and enjoying what any observer would call a lavish lifestyle.

The terms of this settlement are striking, especially when considered alongside the Division's prior disposition of related forfeiture cases. In all, the United States will have recovered or assisted in the recovery of more than $1 billion in assets associated with the IMDB scheme.

That remarkable sum represents not only the largest recovery to date under the Kleptocracy Initiative, but also the largest civil forfeiture ever concluded by the Justice Department. And we did so by working closely with our able counterparts in the United States Attorney's Office in Los Angeles, who also contributed extensively to this effort.

These prosecution numbers and case achievements in foreign corruption matters are in line with the overall trend of white collar enforcement in the Criminal Division.

So far this year, the Fraud Section has brought charges against more than 440 individuals, which is an all-time high that will only increase through the close of the year.

And by the end of this week, the Section will have reached 16 corporate criminal resolutions this year.

With these numbers in mind, it is fair to say that reports of the death of white collar enforcement at the Department are grossly exaggerated.

In citing the achievements of the past year, I would be remiss if I didn't give credit where the credit is truly due – to the career prosecutors, law enforcement agents, and supervisors who have worked tirelessly over the past months and years to build and prosecute these cases.

I also want to recognize a changing of the guard that happened over the last year. The former head of the FCPA Unit, Dan Kahn, was promoted to Senior Deputy Chief of the Fraud Section.

Over the last decade, Dan moved up steadily within the FCPA Unit, starting as a line Trial Attorney, then becoming an Assistant Unit Chief, and finally being promoted to head the FCPA Unit three years ago.

Under Dan's leadership, the Unit has prosecuted a record number of individuals, recovered billions of dollars in monetary penalties, and launched groundbreaking policy reforms. I am very grateful that Dan was willing to bring his well-honed legal skills, keen judgement, and even-keeled temperament to Fraud's front office, where his talents will be brought to bear to benefit the entire Section, not just our FCPA program.

Dan leaves behind big shoes to fill. The new head of the FCPA Unit is Chris Cestaro, a longtime veteran prosecutor and supervisor within the Unit. Chris is a thoughtful leader and dedicated public servant.

He has worked alongside Dan for many years, and I am confident that the FCPA Unit will continue to thrive under his excellent leadership.

For many years, conferences like this one have taken on outsized importance because there was so little case law that developed around the FCPA.

Companies typically resolved matters through negotiation, and individuals were historically not prosecuted as vigorously as they are today. And the Department was less transparent about how it reached the results it did.

As I've noted, the Department's focus on individual accountability has led to more individual prosecutions. Correspondingly, those prosecutions are now yielding jury trials and actual FCPA case law.

At the rate we are going, in another ten years, the FCPA section in white collar crime textbooks will be chock full of judicial opinions with which to challenge law students via the Socratic method.

I want to highlight one such case, the prosecution and recent trial victory against Lawrence Hoskins. As many of you likely recall, the Hoskins case earlier involved a consequential appeal and decision by the Second Circuit.

I won't go through that decision here – it has been fully debated and, indeed, I am told there was a mock oral argument about the case on this stage just two years ago.

Instead, I want to talk about a different aspect of our case that has received a significant amount of attention. Namely the Department's use of agency liability to prosecute Mr. Hoskins for violating the FCPA.

Before getting into that discussion, let me provide a very brief summary of the Hoskins case for the small handful of you here who might be unfamiliar with it. In doing so, I realize this is a very specialized conference and deeply knowledgeable audience, so this is a bit like summarizing Hamlet at a Shakespeare convention.

Lawrence Hoskins is a U.K. national, who was employed at a European subsidiary of Alstom S.A., and served as a senior vice president of the International Network division of the company.

He was convicted last month of helping to carry out a massive bribery scheme to obtain a $118 million contract from a state-owned utility in Indonesia.

And this is the part that matters in particular for my remarks today on agency: He participated in this bribery scheme to secure the contract for Alstom's U.S. subsidiary, Alstom Power, Inc., as well as another partner on the project.

Another important detail is that Hoskins never personally took any of his actions related to the bribery conduct within the United States.

The government's prosecution theory, which resulted in the conviction, was that Hoskins violated the anti-bribery provisions of the FCPA through his actions as an agent of Alstom Power, Inc., a U.S. domestic concern.

Some observers have raised concerns about how the Department might pursue agency-based FCPA cases after Hoskins. I hope to dispel some of those concerns today.

First, it is important to keep in mind that each of the FCPA's three jurisdictional components reach conduct by "any officer, director, employee, or agent" of entities covered by those provisions. This has been black letter statutory law for more than two decades.

Accordingly, the use of agency principles in FCPA prosecutions is far from controversial, whether applied to the Act's issuer provisions (15 U.S.C. § 78dd-1), domestic concern provisions (15 U.S.C. § 78dd-2), or U.S. territorial conduct provisions (15 U.S.C. § 78dd-3). Indeed, in its decision last year, the Second Circuit wrote that the government's agency theory of prosecution was "squarely within the terms of the statute." That is something with which I wholeheartedly I agree.

With that said, some of the concerns that have been voiced are not lost on me. Not too long ago, I was a lawyer in private practice. I know that the hardest questions to answer aren't the ones that fall "squarely within the terms of the statute[,]" but those at the outer edges.

I want to be clear today that the Department is not looking to stretch the bounds of agency principles beyond recognition, or even push the FCPA statute towards its outer edges.

For example, the Criminal Division will not suddenly be taking the position that every subsidiary, joint venture, or affiliate is an "agent" of the parent company simply by virtue of ownership status. Conversely, we will also not be taking the position that every parent company should automatically be held liable for the acts of its subsidiaries, joint ventures, or affiliates based on an agency theory. Simply put, the law requires more.

Each case and application of agency liability will need to be evaluated on its own and be based on a provable facts that align with agency principles.

In this regard, the district court's jury instruction in Hoskins is, well, instructive. There, the jury was called upon to evaluate Hoskins' conduct to look for proof of an agency relationship and control by the principal.

Additionally, the court made clear that a person or entity may be an agent for some business purposes and not for others. This meant that the government needed to prove that Hoskins was an agent of a domestic concern in connection with the specific events related to the project at issue.

Before pursuing an FCPA case based on an agency theory, whether as to an individual or a company, the Department will need to measure the facts against the legal standard articulated by the court. And our prosecutors will need to be confident that their evidence will be able to carry the government's burden of proof at trial. These are no small things.

Aside from the law, the Department and its prosecutors must always exercise appropriate prosecutorial discretion.

Where the evidence supports a finding of agency between a parent and a subsidiary, or for an individual, we will assess whether it is appropriate to exercise our discretion to apply the principle in that case.

In exercising that discretion, our prosecutors will look to the factors they consider in every case under the Department's Principles of Federal Prosecution of Business Organizations, as well as under the FCPA Corporate Enforcement Policy.

Those factors are ones that are familiar to everyone in this room – the nature and seriousness of the offense, the pervasiveness and involvement of high-level executives in the misconduct, and whether the company voluntarily disclosed the misconduct, fully cooperated, and took timely and appropriately remedial actions.

That said, I want to be very clear on one important point: if the Department were to find evidence of the use of corporate structures to shield a parent from criminal liability, or the use of agents to shield a high-level individual executive from accountability, the Department likely would strongly favor prosecution in those instances.

My remarks today regarding agency are intended to provide a window into the Department's thinking and approach to cases. Although many aspects of prosecutors' work must be kept confidential, there is no need for there to be a black box around the principles and policies that guide our decisions.

I actually believe a black box approach can stand in the way of the Department's goals and mission.

For example, it is not in the Criminal Division's interest to be opaque about the factors we want our prosecutors to consider when evaluating corporate compliance programs. We want the corporate community to invest heavily in compliance, and do so efficiently and effectively.

Strong corporate compliance programs and cultures not only detect misconduct, but they can also have a strong deterrent effect on those who might be tempted to violate laws or corporate policies. These by-products of strong compliance align with the Criminal Division's goals and mission.

Nonetheless, you can imagine a company that is considering an investment in improved control systems to augment other aspects of its compliance program. The new controls may flag misconduct that has previously gone undetected, giving rise to a greater sense of legal exposure – or at least known legal exposure.

This sense of increased risk may then create resistance to the project from within the company. An important compliance program improvement is then never undertaken, and certain misconduct then goes unchecked, unless and until the Department happens upon it. That is not the outcome we want.

Our policies need to be designed and communicated in a way that helps companies trust they are making the right investments. It has been my goal since I arrived to foster and increase that trust, and I think the Department and the Criminal Division have made great strides in that regard.

In publishing the Criminal Division's compliance evaluation guidance earlier this year, we sought to convey to the bar and the corporate community that we place a significant value on compliance program investment and improvement, and that we will approach compliance program evaluation in a thoughtful way that is guided by much more than 20/20 hindsight.

We reinforced the guidance through enhanced compliance training for our prosecutors, giving them a more sophisticated understanding of compliance program design and the challenges to effective implementation. And that training will continue.

Through our monitorship selection policy, we have encouraged companies to make strong remedial investments in their compliance programs after misconduct is discovered by signaling through the policy that such investments will weigh against the imposition of a monitor.

And the Department's improved voluntary self-disclosure guidance and policy against piling-on speak to the risk that an improved compliance program may ferret out otherwise unseen misconduct. The FCPA Corporate Enforcement Policy lets companies know that, if a problem is discovered, there is a means for self-disclosing it in a way that mitigates risk in concrete ways.

The piling-on policy seeks to contain risk in other ways, helping to foster greater trust that companies will be treated fairly, if a problem is detected.

In speaking about our policies, I use the word "trust" for a reason. Whether our policies are designed to incentivize or deter certain behaviors, or to pull back the veil to demystify processes or clear away confusion, they can only be effective if they are trusted.

For that reason, the Criminal Division will continue to demonstrate our adherence to and application of our policies by our actions, including in press statements, public resolution documents, and program-related declinations. After all, in law as in life, actions speak louder than words.

As we all know, policies can be changed at the drop of a hat by successive Department leaders and successive Administrations. But good policies tend to survive beyond the tenures of those who helped make them, and they can serve as building blocks for further refinement.

I hope that is what we have been doing in this space for the last few years – making worthwhile refinements to existing policies and developing our own building blocks for the future.

Time will tell whether this work will endure, and conferences like this exist in large measure for experts like you to help us understand whether we are going in the right direction.

Thank you for your time and attention this morning, and I look forward to further dialogue on these important issues, including in the Q and A that will follow.

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