Remarks for Andrew Weissmann
ACI FCPA Keynote
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Introduction

Good morning, and thank you, for that warm welcome. I want to thank ACI for the opportunity to address this 17th conference addressing the FCPA, an important statute that serves to deter public corruption across the world. It is an honor to speak before so many familiar and distinguished practitioners.

It has been a privilege to return to the government, heading up the Fraud Section, with its dedicated prosecutors, law clerks, analysts, paralegals and staff. Every day, our teams investigate crimes, bring criminal cases against individuals and corporations, develop the criminal law and sentencing policies, and promote the rule of law and law enforcement cooperation throughout the world. The Fraud Section – often with our partners in various United States Attorney's Offices – frequently prosecutes cases that have national and often global significance. That is true in all three of our units: Health Care, Securities Fraud, and no more so than in the unit I will speak about in more detail, the FCPA unit.

Today, I want to address three particular metrics (which tie into the so-called Fillip factors) that we use at the Fraud Section to evaluate corporations that have become involved in FCPA crimes — although this discussion applies to other types of corporate criminality as well. These three metrics are largely in the control of a company and thus are worth particular note to companies and their in-house and outside counsel.

- voluntary self disclosure
- full cooperation
- remediation

All three buckets can effect three key decisions made by the Department regarding: the type of disposition (from declination to parent

level guilty plea, at the two extremes), fine level, and appointment of a monitor.

One of the things we have tried to do and will continue to do is provide increasing clarity as to what we mean by these terms, and what credit a corporation can expect if it chooses to do any of those three things. My remarks today are part of that effort.

Voluntary Self Disclosure:

Definition:

First, there is a question of what it means to voluntarily self disclose?

Voluntary self disclosure must include the company disclosing all non-privileged information known to it at that time concerning the misconduct.

Companies are generally not required to disclose crimes to the government, except in certain regulated industries or by contract.

But clearly if you are required by law or contract to disclose the information — including because you are under a DPA or NPA or as a condition of probation or the like — that won't count as voluntary self disclosure. [UBS and Barclays under NPAs and disclosed criminal conduct — required under the terms of their agreements.]

Further, the voluntary disclosure must qualify under U.S.S.G. § 8C2.5(g)(1) — for instance if you disclose because you believe a whistleblower has already reported the information or is about to, that too won't get you credit. if only cause you hear loud footsteps…

Further, belated disclosure — just as under the USSG — won't get you voluntary self disclosure credit with the Fraud Section.

Credit:

But the second issue, is what does one get for voluntarily self disclosing a crime? Why not just wait to see whether law enforcement — whether here in

the US or overseas — discovers the wrongdoing? Having been outside counsel, I am aware that that question gets asked, and is not always answered in the way we in the government want it to be, why disclose? Why not stay mum and see if it gets discovered and then if necessary cooperate to mitigate the damage.

The answer from the Fraud Section is that we are working on becoming increasingly transparent so that question gets answered in favor of disclosure. There is a carrot and a stick component to our response.

<u>The carrots:</u> you have seen and will increasingly see what you get for voluntary self disclosure in terms of each decision that we have to make — form of disposition, fine, and monitor. There will be a meaningful gap between those companies that voluntary self disclose and those who don't, and seek to fully cooperate only once caught. Although the latter will still get some credit, it will rarely be commensurate in type or degree to the benefits accorded those who voluntarily self disclose, who will greatly increase the odds of a declination, no monitor or a significantly reduced fine — and rarer still imposition of a penalty such as are announced today in FX and LIBOR of parent level pleas.

One place to look for that gap in how we are treating companies is the Fraud Section website, where we post all resolutions except declinations — and those resolution are increasingly noting the factual basis in detail for the disposition and the reasoning of the Department in terms of the credit being given and the basis for the credit.

<u>That is the carrot. There is a stick as well.</u> The stick is that if a company does not voluntarily self disclose you cannot expect to make it up with then cooperating — that is no longer going to cut it. And in this day and age don't bank on not getting caught. One thing I was pleasantly surprised to learn when I rejoined justice, is that the impression one has that DOJ is doing nothing more than answering the phone calls of self disclosing companies, that is far from true. A very large percentage of our cases — FCPA and others — are from myriad other sources: by dint of our own spade work, by

qui tams, whistleblowers to us and the SEC, tips from regulators, and increasingly from foreign law enforcement partners with whom we are increasingly cooperating. One aspect worth noting regarding a source of criminal referrals is our foreign counterparts. As in the national security and cyber arenas, in the criminal law enforcement arena there is increasing cooperation that occurs among regulatory and law enforcement agencies abroad, who have been partners in the Department's efforts in achieving accountability for corporate misconduct. Indeed, the Alstom FCPA investigation began as a result of a tip from a foreign partner.

And we are looking at geographical locations and industries where crime is most prevalent — the COMSTAT approach — increased law enforcement scrutiny to areas of high crime. And if you are operating there, and are not taking appropriate precautions to detect and deter FCPA violations, you won't receive a soft shoulder at the Fraud Section. Vigilance will be expected when operating in such areas.

Full cooperation

The Department has long made clear the benefits of full cooperation, should a company choose to cooperate. For most companies it's a decision for the company to make whether or not to cooperate; but if a company decides to cooperate, then we expect that cooperation to be candid, complete and timely. By the same token, if a company is truly cooperating, we will reciprocate in kind; you will be treated like a cooperator in turn and not like a recalcitrant defendant. Corporations are not inherently evil; they at times get a very bad rap in the press. A corporation that gets it — that voluntarily self discloses and fully cooperates deserves and will receive credit for doing the right thing, in much the same way as individuals do.

First, what do we mean by full cooperation?

The Filip factors and the Sentencing Guidelines do give guidance about what we expect corporate cooperation to include. Let me highlight some.

We expect that when a company learns about potential criminal wrongdoing, it will investigate. What that investigation should look like will depend on the nature of the misconduct. Whether to engage internal or outside counsel, how narrow or broad, those are the company's decisions in conjunction with outside advisors.

While every internal investigation will be unique, and depend on the scope of misconduct and the size and nature of the corporation, there are a few aspects that are universal:

- We expect you to learn the relevant facts, assuming they are learnable.
- We expect the investigation to be independent and not beholden to anything but the facts.
- If you choose to cooperate with us, we expect that you will provide us with those facts, be they good or bad.
- Importantly, that includes facts about individuals responsible for the misconduct, no matter how high their rank may be.
    - The commentary to the Sentencing Guidelines in chapter 8 already provides a definition: "A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individuals responsible for the criminal conduct."

- We expect timely provision of evidence. What does that mean? That doesn't mean you need to call us on day one. In most cases it is in everyone's interest for there to be an orderly internal investigation. Exact timing varies with the facts, but once companies know the facts, we do not expect them to delay providing them to us.

A company's cooperation can be particularly helpful where the criminal conduct occurred abroad. The difficulty of investigating under these circumstances makes your cooperation especially useful to us. Cooperation in these cases means helping to overcome the barriers to identifying and producing the relevant information that we need to conduct a meaningful investigation. A company can do this by:

- Making relevant documents available where the Department would otherwise have difficulty in obtaining them, either through protracted litigation or other compulsory process.
- While we recognize there may be some real legal hurdles to the provision of some types of data and information, subject to foreign law, your first instinct when providing cooperation should be "how can I get this information to the Government?" It should not be a kneejerk invocation of foreign data privacy laws designed to shield critical information from our investigation.

What we do not require:

However, we do not require, or want, a company to embark on an unnecessarily broad or costly investigation. This is about thoughtful, reasonable steps to provide the Department with a full and accurate picture of what happened. So if a company discovers, for example, an FCPA violation in one country, we expect the company to conduct enough investigation to fully understand those facts, but absent a reason to do so, we do not expect the company to provide us with a clean bill of health for the entire company worldwide. We're not asking companies to boil the ocean. And we won't give you credit for doing so if it is not warranted. In fact, it slows us down, costs you money and delays resolution. Open discussions with our prosecutors can help you focus your internal investigation, so that you do not spend time and energy finding and providing us with facts that are irrelevant to resolving the liability for the misconduct at hand and unrelated conduct we haven't asked you to examine. And we are happy to have those conversations with the in-house and outside counsel, as you choose.

Let me tell you what else cooperation does not mean:

Scapegoating employees— yes we want evidence about individuals; not 'passive voice' "mistakes were made"; we like pronouns: who made the statements. And of course you cannot give up some employees and protect others. That would not be tolerated in an individual cooperator and it won't be tolerated in a corporate one either.

Firing employees overseas so they are no longer under company control and cannot be interviewed by us is not cooperation.

Simply put, if you choose to cooperate and are seeking full cooperation credit, expect to tell us all relevant information and make sure that we get the information we need quickly.

Benefits/Costs

And what are the benefits for full cooperation?

Our recent case filings have set forth both the advantages of full cooperation as well as the real consequences for non-cooperation and foot-dragging.

If you fully cooperate in addition to voluntarily self disclose, your benefits will be at their zenith. There is a real chance that the company might not be prosecuted at all – not just an NPA or DPA – but a declination. PetroTiger is an example of a company that self-reported and fully cooperated with the Department's investigation of a scheme to secure a $39 million oil services contract through bribery of Colombian officials. We learned about this misconduct through voluntary disclosure by PetroTiger. The general counsel and one of the company's CEOs were charged with bribery and fraud. As you likely know, the Department declined to prosecute the company, even though we clearly could have done so.

Declinations:

I assure you there are other such examples, but publicly talking about them is not appropriate unless the company has consented or disclosed the information itself. But we are working to place more general statistics on our website about such declinations, defining it so it is helpful to you, and providing anonymized examples to provide more guidance. Again, this is not just out of a desire to provide greater transparency and fairness — there is a law enforcement reason for this as well — we want people to see the benefits of voluntary self disclosure and cooperation and remediation, and the costs of not doing any or all of those things.

Non-cooperation and partial cooperation

Of course, a company can choose not to cooperate. But I believe everyone in this audience is quite aware that when companies do not cooperate in the face of a government investigation, the consequences may be severe. Two recent examples stand out:

In December last year, the Department's prosecution of French power and transportation company Alstom for FCPA violations also demonstrates the perils of non-cooperation. Alstom chose not to cooperate for years before finally seeing a different path forward. The Criminal Division pursued an extensive investigation without the company's cooperation, leading to the prosecution of four executives and charges and guilty pleas by the company and its consortium partner Maurbeni. Alstom paid a $772 million penalty – the largest in the history of the FCPA.

The plea agreement explicitly set forth many of the factors considered by the Department in reaching this resolution beyond the underlying criminal activity: specifically, we cited Alstom's failure to voluntarily disclose misconduct, even though it was aware of it, and the company's refusal to fully cooperate with our investigation for years until they saw the writing on the wall as their top executives began to be charged.

And you can read all that in its plea documents, which are on our website for you all to see.

Cooperation by Alstom came far too late for the company to earn credit. But that is not always the case. You can earn partial credit, but it will be again with a large delta between credit for full cooperation. The recent resolution with Deutsche Bank over LIBOR manipulation is a prime example. This case was brought by the Criminal Division's Fraud Section along with the Antitrust Division's New York Field Office.

Deutsche Bank's cooperation fell somewhere in between Alstom and PetroTiger. And I believe we let everyone know exactly where, and what the result was. The DPA itself spelled out the factors we took into consideration, including a detailed description of what Deutsche Bank did right in terms of cooperation, and where they fell short.

But you can't do the minimum in terms of cooperation and expect the maximum in terms of credit.

But one particular example of a cooperation shortcoming by Deutsche Bank deserves to be underscored:

- Deutsche Bank was not, by comparison to other institutions that we have resolved LIBOR cases with, particularly proactive in its investigation and disclosure.

For example, there was significant conduct by Deutsche Bank that we learned about, not from Deutsche Bank, but from the other institutions. The lesson here is – if you don't cooperate fully and don't disclose fully – someone else just might do so, and possibly to your detriment. That is not a good position to be in. And those other actors may receive the cooperation credit that you yourself could have received.

In the public filings and our announcement of the resolution, we detailed where Deutsche Bank's cooperation was helpful, and where it came up short. I hope this enhanced transparency will be instructive to other similarly situated entities as they compare themselves with companies who have resolved misconduct.

Remediation:

This is an area where you are going to see increased attention. And i am personally committed to it. The USSG gives lots of guidance about what is a responsible compliance program. That guidance is quite helpful, but the real trick is how to apply that to the particular context of the company at issue and the problem that has arisen.

Things that are of particular note to us in defining good compliance:

- Whether the company dedicates sufficient resources to the compliance function
- The quality and experience of the compliance personnel - do they have necessary financial or other specialized knowledge to understand the transactions at issue;

- The independence of the compliance function;
- Whether the company's compliance has performed a risk assessment and tailored the compliance program based on that assessment — if you are in a high risk FCPA region for instance are your devoting more resources and the right ones to the problem? — if you devote the same resources to UK as you do for Russia and China that is not a sign of an effective program;
- How a company's compliance personnel are compensated and promoted compared to other employees;
- Appropriately disciplining those employees identified by the corporation as responsible for the misconduct, those with oversight of those personnel, and those aware of the misconduct who did not take appropriate steps to address the misconduct, including how discipline is meted out to senior executives;
- What it is not: <u>not focusing on an area because it was not regulated</u> — as one company told us, explaining why they had not devoted compliance resources to an area where its employees had engaged in criminal conduct that defrauded customers. That company used its compliance function as a means to protect the company from regulatory inquiry and not as a means to protect clients and the public from criminal conduct by its employees.

The increased attention by the Fraud Section on remediation will come in various forms. We are having detailed meetings with companies solely about the compliance function. Companies that seek remediation credit are going to be asked searching questions to find out if their program is in fact up to snuff or a mere paper tiger. Some of you may have heard that that process of having compliance meetings is under way.

Further, to aid us in that endeavor we are going to be retaining compliance counsel from experience in the private sector to work with the Fraud Section to help set appropriate standards for assessing compliance programs, to work with companies and monitors in evaluating compliance functions, and to really kick the tires when people seek remediation credit. That process, which we will be interactive with private sector compliance officers will both create greater rigor to the process and also we hope empower private sector compliance officers in performing their critical function.

Multi-Party Resolutions

Finally, I want to address one consequence of greater cooperation between the DOJ and our enforcement and regulatory partners here and overseas.

The world has gotten a lot smaller since I was last in government. There is a lot more cooperation and coordination among regulators and law enforcement worldwide. In fact, we were first tipped off to Alstom's conduct by a European regulator. Deutsche Bank and our other LIBOR cases also are examples of cases that had the benefit of a wide-ranging cooperative effort among various enforcement and regulatory agencies both here in the United States and abroad. In the U.S., we worked with the CFTC's Division of Enforcement; in Europe, the United Kingdom's Financial Conduct Authority, the Serious Fraud Office, Germany's BaFIN, the European Central Bank, and the Dutch Public Prosecutor's Office; and other foreign and domestic partners.

We have heard concerns expressed about regulatory piling on. We agree that there is the potential for unfairness when a company is asked to pay for things over and over again. Different regulators obviously have different interests and these are legitimate. And companies that voluntarily operate in multiple countries obviously know that by doing so, they subject themselves to those countries' laws and regulatory schemes. That said, we are trying to address this concern so that companies are not punished unfairly. That is often easier said than done.

Ideally, all interested partners in an investigation should work to determine the appropriate overall sanction and then develop metrics for how that pie is appropriately divided. That is the ideal, and as we all know that is not always happening, by any stretch of the imagination. This is an area where DOJ is trying to lead and working at the federal level, the state level, and with overseas partners. It is frankly in our interest, if we are going to want companies to voluntarily self disclose and cooperate. And we need to do a better job. We have done that with our federal brothers and sisters, but more remains to be done to create a truly just system.

Conclusion

The message I hope all of you will take away from today's remarks is that we seek to be transparent about what we are doing — what metrics we use, how they are defined, and what credit or lack thereof you can expect. We also want to be candid about what we can do better.

We will continue to strive to be more transparent in setting forth the factors, considerations and rationales behind our resolutions. We expect you will be able to counsel your clients with concrete examples of how cooperation or the lack thereof played out in determining the final resolution.

Thank you for the honor of delivering a keynote address this year, and I look forward to answering any questions that you might have.