SPEECH

Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the Securities Enforcement Forum West Conference

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Good afternoon and thank you, Susan [Resley], for that kind introduction. It is a pleasure to be back in San Francisco and to join all of you, including many friends and colleagues on both sides of the bar, to discuss important issues in securities enforcement.

For two years, I have had the pleasure of leading the Justice Department's Criminal Division, which includes more than 600 attorneys from 17 sections and offices. As many of you know, the Criminal Division handles a wide variety of federal criminal matters, including fraud, public corruption, cybercrime, child exploitation, transnational organized crime, international drug trafficking, human rights violations and criminal appeals. We also work on capacity building in the justice sector in countries throughout the world.

At the Criminal Division, we try to focus our efforts – often in partnership with U.S. Attorneys' Offices around the country – on issues that affect the nation as a whole. And, as a result of this national focus, we find that we are increasingly drawn into international investigations, sometimes involving many different countries.

We are dealing with a new era of crime on a global scale. During my first stint at the department, it was the exceptional case that involved international criminal groups or worldwide fraud schemes. Today, transnational criminal enterprises and global corporate misconduct are the new normal.

The increasingly international nature of crime is driven by a variety of factors. Perhaps the most significant is the global expansion of U.S. and foreign companies and the growing interdependency of our economy and those of nations around the world. Another major factor is the worldwide use of the Internet. The Internet obviously has changed the world in countless positive ways. But the Internet also allows criminals to cross borders, often anonymously, without leaving home.

Our efforts against cross-border crime reach every corner of the Criminal Division, from cyber-crime to child exploitation to transnational organized crime. But given the nature of this conference, I'd like to talk to you today about the Criminal Division's efforts to meet the challenges associated with international investigations in the securities arena.

To address cross-border crime, we are forming strong coalitions with our international enforcement and regulatory partners. Our relationships continue to evolve, but already have yielded significant successes, a couple of which I will highlight to illustrate my point.

Collaboration is especially important when it comes to threats posed to global markets. In the age of interconnected commerce, the adage about a butterfly flapping its wings in Brazil and causing a rainstorm in Manhattan applies as much to markets as it does to the weather. And when someone defrauds or manipulates a market, we all get rained on, regardless where the wrongdoing happened.

For example, this past November, two former traders with the Dutch bank Rabobank were successfully prosecuted by the Fraud Section and Antitrust Division in the Southern District of New York for manipulating LIBOR interest rates. As you know, the British Bankers' Association set the LIBOR rates based on submissions from a panel of 16 banks, including Rabobank, reflecting the rates those banks believe they would be charged if borrowing from other banks in a variety of currencies for various lengths of time. Because of this process, LIBOR was considered an objective, market-based price and served as the primary benchmark for short term interest rates for several currencies, as well as the basis for countless financial products, including interest rate contracts, mortgages, credit cards and student loans.

The defendants and their coconspirators figured out that by changing their rate submissions on behalf of Rabobank, they could manipulate LIBOR, thereby manufacturing false profits on LIBOR-based contracts held by other traders at the bank. Their crime affected not only the counterparties to Rabobank's own contracts – the objects of the fraud – but also untold others around the world with no connection to Rabobank.

And although the two defendants convicted at trial, along with two others who pleaded guilty, are British, the fraud also included a Japanese employee and charges remain pending against an Australian and another Japanese national. The government's overarching LIBOR investigation, which is continuing, has also yielded resolutions from banks in the U.S., the U.K., the Netherlands, Switzerland and Germany.

Naturally, the investigation and prosecution of this case has involved the assistance of various enforcement agencies around the world. For example, many of the documents that identified the culpable individuals came from Rabobank itself in the Netherlands. To obtain those documents, the Criminal Division's Office of International Affairs used the Mutual Legal Assistance Treaty (MLAT) process to serve a subpoena on Rabobank through the Dutch Public Prosecution Service. Both because the bank was cooperating and because the Dutch were responsive in answering questions and processing the paperwork, we obtained the documents quickly and were able to move forward with the case in short order.

In another example of mischief in the global markets, in May 2010 the Dow Jones Industrial Average plunged 600 points in five minutes in the so-called Flash Crash. We believe that the crash was triggered by a drop in the price of E-minis, a type of futures contract on the Chicago Mercantile Exchange based on the S&P 500 Index. We know that the Flash Crash exposed the fragility of markets built for a pre-internet age in the era of high-frequency trading.

A British national who worked as a futures trader has been charged in federal court in Chicago with wire fraud, commodities fraud, commodities manipulation and "spoofing," a practice of bidding or offering with the intent to cancel the bid or offer before execution. He allegedly used an automated trading program to manipulate the market for E-minis and earned significant profits along the way.

The defendant has been arrested in the U.K. and a British court has ordered that he be extradited to the U.S. to face these charges. That ruling is currently on appeal and we respect whatever decision the British courts ultimately reach. Regardless of the outcome, this is another case in which international cooperation in the investigation has been invaluable.

It is also an example of how the U.S. government is working to protect markets from every angle. While the Justice Department investigates and prosecutes the alleged wrongdoer, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission have been busy modifying regulations on high-frequency trading to help markets detect fraudulent activity and shut down automatically to insulate themselves from future events like the Flash Crash.

In April of 2016, we charged two former high-ranking executives of a Boston-based financial services company with wire and securities fraud. These individuals allegedly conspired to add secret commissions to fixed income and equity trades performed for clients of the bank's

"transition management" business, which helps institutional clients move their investments between and among asset managers or liquidate large investment portfolios.

According to the indictment, the defendants charged these secret commissions on top of the fees the clients had agreed to pay the bank and despite written instructions that the clients were not to be charged trading commissions. The defendants then allegedly took steps to hide the commissions from the clients and others within the bank, including compliance staff.

Although this scheme allegedly targeted institutional investors, it caused real harm. When we talk about institutions, we tend to forget that they are comprised of actual human beings who rely on them. The indictment alleges that the victims here include several pension funds, including British and Irish government entities. According to the charges, this U.S. bank's fraud took money out of the pockets of working people abroad. That harms not only those people but our country's reputation as a safe and trustworthy place to do business.

The crime was quintessentially transnational: it only worked because the bank was able to lure in customers abroad on the basis of its access to U.S. financial markets. For the United States to remain a world leader in the financial services market, we must ensure that our markets are fair and safe for everyone, regardless of their nationality.

International collaboration is not without its challenges. As the saying goes, "With big cases come big problems." And nowhere is that more true than in cases that transcend international boundaries. Setting aside logistical and diplomatic concerns, transnational cases include thorny investigative and prosecution issues. For example, what happens when a foreign government undertakes surveillance that would be prohibited in the United States? Or when one country grants immunity to an individual during an investigation? Or when conflicting issues of privileges and immunities arise?

Over time, the Criminal Division has gained experience and expertise in these areas and is addressing these challenges. For example, in the LIBOR case I discussed earlier, prior to our prosecution, the two traders who went to trial in November had been compelled to make statements to the U.K.'s Financial Conduct Authority, or FCA. Under U.K. law, failure to respond to an FCA interview could result in criminal penalties, including imprisonment. The FCA then sent the transcripts of the two traders' interviews to a third person, Mr. Robson, who reviewed them once and never looked at them again. Later, Mr. Robson and the two traders were indicted in New York. Mr. Robson pleaded guilty and testified at trial against the other two traders.

The traders filed a motion to dismiss the indictment on *Kastigar* grounds, alleging, in sum, that the indictment was tainted by Mr. Robson's review of the compelled interviews. After trial, Judge Rakoff held an evidentiary hearing and subsequently denied the defense motion. In short, Judge Rakoff found that the U.S. prosecutors were not exposed to the defendants' compelled

testimony and that the evidence used against the defendants derived entirely from sources untainted by their compelled testimony.

He cited steps that the department took to shield itself from exposure, including the department's instructions to the FCA and Mr. Robson not to share any information from the compelled interviews, the department's strategy of interviewing witnesses before the FCA did and the department's presentation to the FCA regarding the Fifth Amendment and *Kastigar*.

This is all to say that as our cases increasingly cross international borders, the Criminal Division is gaining more experience in dealing with these tricky issues. We try to work collaboratively with our foreign counterparts to foresee future problems. For example, last December we had a cross-border symposium with our U.K. counterparts and discussed, among other things, our respective discovery and privilege issues.

The Criminal Division is also leveraging its collaborative relationships with foreign enforcement partners to assist corporations that are seeking to cooperate with our investigations in dealing with myriad foreign data privacy regulations. In working with the corporations and our foreign counterparts, we are often able to find a way forward despite perceived hurdles. On the flip side, we are leveraging these same relationships to obtain information when non-cooperative companies make invalid assertions about particular data privacy laws in an effort to shield themselves from our investigations.

The Criminal Division has made other strides to meet the challenges of the international scope of criminal activity. We have increased our global presence and resources available to combat international crime.

First, the department has lawyers serving as eyes and ears on the ground across the world. We have attachés in eight countries. They are stationed at U.S. Embassies in Bangkok, Bogota, Brussels, London, Manila, Mexico City, Paris and Rome and we have 60 resident legal advisors and 45 intermittent legal advisors around the globe. Attachés work with U.S. prosecutors and law enforcement personnel as well as with foreign authorities in their assigned countries or regional areas on operational matters relating to criminal investigations and prosecutions, including requests for the return of fugitives and requests for mutual legal assistance.

We also recently placed Criminal Division prosecutors with Eurojust in The Hague and INTERPOL in France. We are exploring the possibility of embedding prosecutors with other foreign law enforcement as well, including the U.K. Financial Conduct Authority and the U.K. Serious Fraud Office and they in turn are considering whether to embed a representative here in the U.S. These types of positions will help to facilitate information-sharing, improve cooperation on investigations and build even stronger relationships with our law enforcement partners in other countries.

The department also has increased the resources available to the Office of International Affairs, or OIA, whose workload has increased exponentially in the last few years. We have been actively hiring additional attorneys and professional staff for OIA's Mutual Legal Assistance Treaty Modernization Project.

We hope to continue expanding our ability to help our overseas counterparts and our U.S. prosecutors. For example, OIA has been instrumental in helping obtain evidence from numerous countries in the pending FIFA soccer federation prosecution in the Eastern District of New York, as well as the cases I mentioned previously. We've also created a cyber-unit in OIA that is dedicated to responding to and executing requests for electronic evidence from foreign authorities – requests that have increased by 1,000 percent over the last decade. Of course, mutual legal assistance cannot be our only means of obtaining evidence that may be stored overseas, but our efforts to improve our bilateral relationships and our own MLAT response are essential in a world of increasingly global crime.

Collaboration and coordination among multiple regulators in cross-border matters is the future of major white collar criminal enforcement. It is also a fact that in many cases multiple regulators each seek to prosecute companies and individuals or to share in a corporate resolution, sometimes for what essentially amounts to the same or closely related conduct. We recognize that this raises legitimate questions about fairness.

As to companies, we hear your concerns about regulatory "piling on." We agree that there can be significant unfairness when a company is asked by different regulators to pay for the same misconduct over and over again. Different prosecutors and regulators obviously have different legitimate interests. And companies that voluntarily operate in multiple countries certainly 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.

For example, in 2015 Deutsche Bank's U.K. subsidiary, DB Group Services (UK) Limited, pleaded guilty to wire fraud for its role in manipulating the LIBOR. The parent company, Deutsche Bank AG, entered into a three-year deferred prosecution agreement. The company admitted its role in manipulating LIBOR and participating in a price-fixing conspiracy.

The department imposed a total penalty of $775 million and required Deutsche Bank to retain a corporate monitor for three years. This was the largest penalty imposed by the department to date in the LIBOR investigation and is also the first time in a LIBOR case that the department has imposed a monitor on a bank.

But the penalty was only $775 million – and I don't say that lightly – because of other financial penalties imposed at the same time. As part of the deferred prosecution agreement, Deutsche Bank also agreed to pay $344 million as a result of a U.K. Financial Conduct Authority action,

$800 million as a result of a Commodity Futures Trading Commission action and $600 million as a result of a New York Department of Financial Services action.

Now some will say, "The department is only willing to share with regulators and foreign countries because it demands a pot of money big enough to share." But that's not fair. In these cases, we calculated the total criminal sanctions that were appropriate based on the offense conduct and other factors and then reduced the share payable to the U.S. to account for penalties imposed by other countries or by regulators for the same conduct.

And in assessing the total financial penalties imposed on corporate defendants, the department does not only consider the fines and forfeiture figures. The department also considers the totality of the penalties imposed on a defendant. This may include compliance monitors, which we recognize can be a significant financial burden on a corporation.

Individual criminal defendants also are affected by the increasingly international scope of white collar cases, as well as the enhanced appetite among our foreign counterparts for prosecuting white collar crime. We recognize the potential for unfairness that exists when multiple enforcement agencies propose to bring multiple criminal prosecutions against the same individual for essentially the same misconduct.

While not all systems are like our own, with our double jeopardy and Fifth Amendment protections, we work with our counterparts to make sure that charging decisions relating to individuals are the most fair and sensible ones under the circumstances. And as we and our counterparts work together more frequently and better understand our respective systems, we are having those conversations earlier, so that individuals are much less likely to be caught in the middle of last minute turf battles over where and by whom a prosecution should be brought.

We make these considerations because they are fair and appropriate – but we also firmly believe that efforts to increase our transparency and consistency will result in increased accountability, as foreign authorities are more likely to collaborate; companies are more likely to cooperate; and both individual and corporate resolutions will be reached more quickly.

In the age of global markets, securities crimes have become truly international problems. The Criminal Division is working to meet the challenges of investigating and prosecuting complex, international cases with difficult legal issues.

The department does not seek to be the world's global police force. But we can – and I believe we should – lead by example: by vigorously investigating and prosecuting international crime when it violates U.S. laws and by sustaining and increasing our commitment to international collaboration in our nations' shared struggle to safeguard our markets, our networks and our citizens. We must do so to enforce our nation's laws and keep our citizens safe. Indeed, in today's world, anything less would be unacceptable.

Thank you.

Speaker

Assistant Attorney General Leslie R. Caldwell of the Criminal Division

Topic

SECURITIES, COMMODITIES, & INVESTMENT FRAUD

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