



Remarks of Deputy Attorney General David W. Ogden at the Compliance Week Keynote Address
Washington, D.C. ~ Thursday, June 4, 2009

Thank you very much for that kind introduction and for inviting me to speak with you as part of this truly impressive three days of panels on some of the most important issues for corporations – and the Justice Department – today.

I would like to talk to you this evening about some of the challenges facing all of us – at the Justice Department, but in the private sector as well – as we confront the current financial crisis and work together to restore not only stability to our financial markets, but confidence in the responsibility and accountability of corporate America.

Along those lines, the Attorney General has said – and I couldn't agree more – that "we in the legal profession – prosecutors, defense lawyers, and corporate counsel alike – have a shared responsibility when it comes to ensuring that justice is done in corporate criminal cases. We all have our clients, and we all are duty-bound to advocate zealously on their behalf. But we – and our clients – have a common interest in restoring and preserving the public's faith in corporate America, and in making certain that responsible corporate citizenship is encouraged and rewarded."

While protecting the national security has been and will remain the Department's top priority, the Attorney General and I believe that the Justice Department must wage an aggressive effort to investigate and prosecute financial crimes. Combating financial fraud is a significant priority of the Department and will be receiving our renewed emphasis and attention in the months ahead.

We have already had tremendous success in prosecuting financial fraud, including securities and commodities fraud, market manipulation, and various Ponzi schemes. For instance, the Department recently secured a guilty plea from Bernard Madoff, who perpetrated a massive scheme to defraud his clients by soliciting billions of dollars of their funds under false pretenses and converting those funds to his own benefit. And prosecutors with the Department recently indicted the chief investment officer of Stanford Financial Group, for her alleged involvement in another massive Ponzi scheme.

The Department also has devoted substantial attention to preventing and prosecuting mortgage fraud. The FBI is currently investigating more than 2,100 mortgage fraud cases, up almost 400 percent from five years ago. And the Bureau has more than doubled the number of agents investigating mortgage scams, created a National Mortgage Fraud Team at headquarters in Washington, and is working hand-in-hand with other agencies to target fraudulent activities in the housing markets. We have partnered with the Treasury Department, HUD, the FTC and state attorneys general to protect vulnerable homeowners from criminal actors looking to perpetrate predatory schemes within the Obama Administration's new "Making Home Affordable" program, which helps eligible homeowners refinance or modify their mortgages. We have also worked to make sure that loan servicers

participating in the "Making Home Affordable" program collect race, national origin and gender information so that the Department can bring civil rights enforcement actions against loan servicers who discriminate in access to the program.

And the Attorney General recently announced a major initiative to address health care fraud in coordination with the Department of Health and Human Services. As part of that initiative we have expanded our Medicare Fraud Strike Force teams from not only Miami and Los Angeles but into Houston and Detroit as well. And we expect to announce Strike Force teams in several other cities during the coming months. As part of this initiative, we have created a senior-level working group chaired by me and the Deputy Secretary at HHS to make sure that our investigators, agents and prosecutors have access to real-time claims data in order to detect and go after fraud schemes. We have had real successes in our health care fraud efforts – both on the civil and criminal sides – in returning over a billion dollars a year in taxpayer funds for over a decade. We will build on and expand that success to prevent fraud in the health care system and recover even more money for the taxpayers, shut down perpetrators, and deter those who would consider new fraudulent schemes in the health care area. And stopping fraud is a necessary element of the health care reform that the President has committed to accomplish.

But there is much more to be done. We face an unprecedented set of challenges in responding to the current financial crisis. Mortgage, securities and corporate fraud schemes have eroded the public's confidence in the nation's financial markets and the accountability of corporate executives. There is a very real and growing public sentiment that Wall Street is not playing by the same rules as Main Street.

Meanwhile, the outflow of substantial taxpayer funds in connection with Government rescue and stimulus programs creates a real risk of even more financial fraud. Approximately \$4 trillion has already been dedicated to various rescue packages and programs, such as the TARP and TALF. With respect to these rescue funds, there is the potential for significant fraud in the form of false statements, misrepresentations, theft of government property, misuse of funds, and accounting misstatements. Similarly, the approximately \$787 billion being spent through the American Recovery and Reinvestment Act ("Recovery Act"), creates the potential for a substantial increase in procurement and grant fraud at the federal and state levels. During this recovery process, the government must always be a vigilant steward of the public's funds as they are dispersed.

Given the scope of the problem, the current financial crisis requires a well-coordinated, proactive law enforcement response that draws on all the resources of the federal government. We at the Justice Department are examining ways to utilize all of the criminal and civil enforcement tools we have, in coordination with our federal agency and regulatory partners, in a strategic effort to address financial fraud. This effort will not only look back at the financial fraud that has contributed to the current economic crisis, but be forward-looking in anticipating potential fraud and making sure that we are addressing issues of competitiveness and non-discrimination during the recovery effort.

The appropriate role of the Department of Justice in responding to this crisis is clear: We will be relentless in our investigation of corporate wrongdoing, and will not hesitate to bring charges, where appropriate, for criminal misconduct on the part of businesses and business executives.

Our enforcement priorities will be informed by the realities of the crisis we face. We will protect borrowers and ensure the integrity of the financial services industry by combating mortgage fraud head-on. We will protect investors and our capital markets by vigorously attacking securities fraud. We will ensure that recipients of federal financial rescue funds do not obtain them through fraud, or use them for improper purposes. And we will make sure that federal stimulus funds are well-spent by vigilantly protecting the integrity of federal procurement and grant processes. By carrying out this mission aggressively and effectively, we will promote the integrity of our markets, preserve the public

fisc, and protect the vast majority of consumers, investors, and companies that play by the rules and adhere to the law.

You also play a critical role in this process. While we at the Justice Department carry out this vital mission, we also must acknowledge that, in many ways, we share a common cause with the leaders of corporate America. By faithfully executing their fiduciary duties to their shareholders – and their duties of honest dealing to the investing public – corporate leaders serve the same values in promoting public trust and confidence that prosecutors serve in bringing criminal cases.

Indeed, we, as lawyers, have a particularly vital role to play in this shared endeavor. As guardians of our nation's legal system, we have the unique ability – and the unique obligation – to help get our nation's economy back on course, and to sustain it for the long run.

To be sure, our system is predicated on an adversarial model. But it is important in settings like this one not to view ourselves as adversaries or antagonists, because in a real sense we are partners in ensuring that our system protects the fundamental principles of fairness, equal justice, and the rule of law. Opportunities like this —where we can speak outside of the courtroom and gain insight into how we each carry out our work —greatly advance that common effort.

I will close with thoughts about your role, and the imperative that you ensure compliance with the law and full cooperation when you learn of violations. But we at the Department of Justice recognize that this is a two-way street. And we are taking significant steps to ensure that we are holding ourselves to the highest standards in the investigation and prosecution of all our cases. With respect to the discovery process, we know it is critical that we fully meet our obligations in criminal and civil cases. At the Attorney General's request, I have initiated a thorough review of our practices in criminal cases, and civil litigation, to make sure that our lawyers have the guidance, tools, resources and training to deal with the increasingly complex and document-intensive investigations and litigation in the electronic era. We have already begun providing supplemental training to federal prosecutors throughout the Department to ensure that they understand their discovery obligations and know that they are expected to take those obligations seriously. I have created a working group of senior prosecutors and Department officials under the direction of the Assistant Attorney General for the Criminal Division and the Chair of the Attorney General's Advisory Committee of US Attorneys, to review discovery practices in criminal matters and report back to me with recommended improvements. And I have created a parallel working group under the direction of Associate Attorney General to look at our civil discovery practices and capabilities. Both working groups will report back to me on a short time-line with recommendations relating to training, protocols and best practices, resources, and other relevant considerations.

In addition, we have taken significant steps to address issues of attorney-client privilege, advancement of attorney fees, and cooperation credit in criminal cases.

As many of you know, my predecessor, Deputy Attorney General Mark Filip, released a set of new "Principles for the Federal Prosecution of Business Organizations" in August of last year. Significantly, these principles are now formally incorporated into the U.S. Attorney's Manual and thus are binding on all federal prosecutors around the country.

The new principles make clear that the attorney-client privilege and attorney work-product protection are essential and long-recognized components of the American legal system, and that federal prosecutors shall not infringe upon these protections in the course of corporate criminal investigations. The revised principles strike the proper balance between the interest in obtaining relevant information while respecting the privilege, by calling for the evaluation of cooperation efforts based on the information provided rather than on a waiver of the privilege.

These changes were made, in part, to address concerns voiced by the members of the bench, the defense bar, and Congress about how prior versions of the guidelines had been applied – or misapplied – by federal prosecutors around the country. Chief among these concerns was the belief that under the prior guidelines, corporations, as a practical matter, were required to waive the attorney-client privilege and/or attorney work-product protection in order to receive cooperation credit by federal prosecutors. We have now made clear that nothing could be further from the truth: cooperation is properly measured by a full and complete sharing of information – not whether the corporation disclosed attorney-client or work-product materials.

Corporations need not disclose, and prosecutors may not request the disclosure of, attorney-client communications and/or attorney work-product as a condition for the corporation's eligibility to receive cooperation credit.

The revised principles also address a related concern about the advancement or reimbursement by corporations of attorneys' fees for employees, officers, or directors facing investigation or indictment. In recognition of the many beneficial effects that representation by counsel has on the fair and efficient administration of justice, the U.S. Attorney's Manual now expressly provides that prosecutors may not request that a corporation refrain from advancing attorneys' fees or from otherwise providing counsel to its employees.

These are important changes, clarifying that as we demand that businesses comply with their obligations, we demand the same of ourselves —compliance with the basic principles of the Rule of Law by which government as well as business must live. Whether a case involves an individual or corporate defendant, white collar or violent crime, the Department respects the right to counsel of all persons subject to criminal investigation. In conducting investigations into alleged corporate wrongdoing, the Department's prosecutors will pursue the facts vigorously wherever they may lead and should not hesitate to recommend charges against corporate defendants when they are warranted, but they will do so while adhering to the letter and the spirit of these revised principles and within established standards of prescribed prosecutorial conduct.

The Department has already engaged in extensive training efforts to educate prosecutors and law enforcement agents throughout the Department about the new principles. And we are continuing to monitor closely how these guidelines are applied in the real world. Moreover, we are engaged in ongoing efforts outside the Department to inform investigators and attorneys at other government agencies about these guidelines, and are suggesting them as best practices for investigations of corporate entities.

As I mentioned before, criminal enforcement by the Department of Justice is just one aspect of a much larger transformation that needs to take place in order to restore confidence, stability and accountability to corporate America. You play a critical role in that transformation. And just as we are setting the bar high for ourselves in this area, we expect much from you too. As defense lawyers and in-house counsel, you have the unique ability and obligation to ensure that your corporate clients are acting responsibly in the face of great economic pressures that may lead to temptations for criminal wrongdoing. You have the ability to establish internal controls and compliance programs to prevent fraud and abuse in the first place and to address it quickly when it does occur. In a very real sense, you are in the best position to make sure that your clients live up to the highest standards of corporate responsibility, transparency and accountability.

Thus, counsel can drive a corporation's decision to make the all-important initial voluntary disclosure of criminal conduct to the government. Counsel can encourage and facilitate a corporation's complete cooperation with the government's investigation through the disclosure of relevant facts, the production of documents and other evidence, and the making available of witnesses with relevant information.

Counsel can lead the formation of appropriate compliance programs to prevent and detect corporate misconduct, and can take proactive steps to ensure that corporate activities going-forward are conducted in accordance with the law. And counsel can guide a corporation's decision to take meaningful remedial measures in response to criminal wrongdoing, including the payment of restitution and the disciplining or termination of culpable employees, officers, or directors.

These measures – voluntary disclosure, fulsome cooperation, rigorous compliance programs, and meaningful remedial measures – will inure to the benefit of your clients. In the short run, your clients should, and will, receive credit for such actions during the prosecutorial decision-making process. More importantly, in the long run, such steps will make your clients stronger corporate citizens, and will empower your clients' officers, directors, and employees to fulfill their fiduciary obligations to shareholders and their duties of honest dealing to the investing public.

Ultimately, we have a shared responsibility to ensure that taxpayer dollars spent to stimulate the economy, modify existing mortgages, or remove toxic assets are not subject to fraud or abuse and are awarded in a process that is transparent, competitive and free of discrimination. We have a common interest in making sure that public confidence in the housing and financial markets is restored. And, while we operate within an adversarial system that necessarily pits us against each other in criminal and civil litigation, we still must strive to fulfill our shared responsibility to ensure that justice is done in corporate criminal cases. I look forward to working with you toward that goal in the months and years ahead. Thank you.