The Future of White Collar Enforcement: A Prosecutor's View
Prepared Remarks of U.S. Attorney Preet Bharara
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Thank you, Sam, for that gracious introduction.

It is a great thing Sam mentioned the formation of the White Collar Committee for a lot of reasons. I think as complicated as this issue is, the more people who are smart about it the better.

Now, as you may be reading, we've been extraordinarily busy lately.

We are in the midst of investigating and prosecuting every conceivable type of significant crime and criminal.

On the terrorism front, in the last three weeks alone: James Cromitie; Faisal Shahzad; Ahmed Khalfan Ghailani.

At the same time, however, we have always been a leader and innovator in the fight against white collar crime, in all of its creative forms. And that work is as high a priority for our Office today as it has ever been.

Our focus on white collar crime in general, and financial fraud in particular, flows from a commitment that long precedes me.

It is a commitment to certain principles and goals: That our markets should be fair; that our playing fields should be level; and that our citizens' accounts should be secure.

In service of these goals, we have aggressively pursued fraud whenever and wherever we have found it. And we do not intend to stop or slow down – especially now, with the economy down, public frustration up, and epic frauds surfacing with increasing frequency.

We do so, however, knowing that with our subpoena and grand jury power comes the power to injure individual lives and destroy corporate reputations. So, we must always take care to exercise our discretion with great care and an even hand.

Now, this talk is billed as an address about the future of white collar enforcement.

In looking forward, however, it is I think useful for context to talk for a moment about what we've seen in the white collar area in the past year, which of course will inevitably inform the future.

“White collar enforcement” is, of course, a broad term and encompasses myriad types of misconduct of varying seriousness and consequence – accounting fraud, ponzi schemes, insider trading, mortgage fraud. It involves stealing taxpayer money, corporate secrets, pension funds, and precious artwork, among other things. There has always, however, been a traditional demarcation between white collar crime on the one hand, and violent and street crime on the other.

But such a distinction does seem to be growing more blurry.

Just two weeks ago, for example, we announced arrests in a classic pump-and-dump scheme. Nothing unusual there – except that we came across it in the course of investigating individuals suspected of a massive narcotics conspiracy at the Port of New York and New Jersey.

Meanwhile, just a week ago, we charged dozens of people alleged to be part of an Armenian organized crime group, whom we charged with many traditional racketeering offenses. But the central crime alleged was a massive white collar crime – indeed, what we believe to be the largest Medicare fraud in history attributable to one criminal enterprise.

In a way, even bank robbery is morphing into a white collar crime. As I noted when we three weeks ago charged a number of people alleged part of a scheme to steal millions from banks through the use of a computer Trojan horse known as the Zeus program, the modern, high-tech bank heist does not require a gun, a mask, a note, or a getaway car. It requires only the Internet and ingenuity. And it can be accomplished in the blink of an eye, with just a click of the mouse, and at a distance of thousands of miles.

Combined with the trend of traditional white collar criminals employing more techniques of ordinary street criminals, these quick examples of developments perhaps present a question worthy of future discussion – whether the very paradigm of “white collar crime” has outlived its usefulness. But that’s a whole different speech.

Nonetheless, a couple of these recent examples also highlight one other white collar trend that I think will inform the future.

That is the increasing globalization of crime – not just narcotics and arms trafficking, but white collar crime as well.

Much of the difficulty in investigating financial fraud derives from the global nature of business and the economy: more and more often in white collar cases, schemes are hatched, ill-gotten gains are secreted, assets are transferred, and fugitives are harbored – in some country other than the United States. That presents a host of challenges, and those challenges will only get more daunting.

But just as we in the Southern District have figured out how to make international terrorism cases and international narco-trafficking cases where the defendants and

much of the evidence is abroad, we will be continuing efforts to do more of the same in our white collar cases.

So, a main question presented today I suppose is what can you expect from my Office and the Justice Department in terms of white collar enforcement in the coming months and years.

That is much too broad a question for me to address in an even remotely thorough way in the few minutes that I have, but let me just mention a couple of areas where questions I think have been asked about the Government's posture.

First, as a general matter, you can expect from me and my Office what I hope you have always expected from the Southern District of New York and what I myself expect from the people who work for me. I expect my AUSAs to be open-minded, fair, and supremely principled in how charging decisions are made and how dispositions are handled. At the same time, I expect them to be aggressive, creative, and tireless in discharging the duty that the taxpayers pay them to perform.

So long as you take it up the chain, I have a general policy of meeting with defense lawyers if there is a complaint or appeal.

Second, with respect to dispositions against business organizations, let me say a brief word. In recent times, there has not been a large number of criminal charges against corporations.

Let me mention what should and should not be inferred from that fact. In my view, no person is above the law – whether natural or artificial. That means that in the right case, and after a full analysis of the Filip factors, criminal charges against an entity are absolutely on the table.

In fact, I can tell you that I am in the habit of asking AUSAs in appropriate cases whether they have considered charging the corporation when we are contemplating charges against individuals; and if the answer is no, I ask why and I expect a rigorous answer. And we have long discussions about what type of disposition, short of indictment, is appropriate for a business organization when potential charges are in the offing.

Finally, there is one substantive area of white collar enforcement that I want to address this evening – insider trading. It is an increasingly noteworthy topic in white collar enforcement, and I predict it will become only more so in the future.

Now I am told there are some people who don't see what all the fuss is about. Insider trading, they suggest, is not a particular scourge and is a poor pick as a priority for law enforcement. I know that no one in <u>this</u> room thinks that. (Perhaps that's because you all have bills to pay.)

It will come as no surprise to anyone here that I believe illegal insider trading is extremely significant and should be to everyone who cares about the protection of confidential information and the integrity of the markets.
Insider trading involving a tipper and a tippee is both a theft and a fraud, and it is intolerable. Your law-abiding institutional clients all believe and understand this also.

Your institutional clients are in business, after all, because they believe in the market. Fair and efficient markets depend, ultimately, on public information and honest dealings and enforced rules. And every cheater— whether he trades on inside information or manipulates the market or makes misrepresentations—cheats every other participant and offends the principles of the market that honest players live by and make their living on.

Unlawful insider trading should therefore be offensive to everyone who believes in, and relies upon, the market. And it is an affront not only to the fairness of the market but also to the rule of law.

And it only further feeds the pervasive crisis of confidence in our financial system, what some see as a lack of faith in the economic order and a lack of trust that the same rules apply to everyone.

So, what is the scope of the insider trading problem at this moment? Unfortunately, from what I can see from my vantage point as the U.S. Attorney here, illegal insider trading is rampant and may even be on the rise. And the people who are cheating the system include bad actors not only at Wall Street firms, but also at Main Street companies.

Disturbingly, many of the people who are going to such lengths to obtain inside information for a trading advantage are already among the most advantaged, privileged, and wealthy insiders in modern finance.

But for them, material non-public information is akin to a performance-enhancing drug that provides the illegal “edge” to outpace their rivals and make even more money.

In some respects, inside information is a form of financial steroid. It is unfair; it is offensive; it is unlawful; and it puts a black mark on the entire enterprise.

At the same time and for a host of reasons, the detection, investigation, and criminal prosecution of illegal insider trading has become increasingly difficult. It has perhaps never been more difficult to attack through traditional investigative means.

This is so for a number of reasons. Among other things, the sheer volume and complexity of modern stock trading heightens the difficulty of pinpointing specific illicit trades that were based on illegally acquired inside information.

When an institution or a trader can jump in and out of positions at the speed of light and in enormous volumes, illicit trades become easier to mask, harder to find, and subject to plausible deniability.

In this context, moreover, pre-textual trading designed to stymie enforcement becomes that much easier to pull off.

Moreover, in the modern information age, there has been a veritable explosion of newsletters, websites, blogs, tweets, and feeds publishing every last rumor and report of potential mergers and acquisitions and earnings reports.

That of course makes it easier for an accused insider trader to argue – in the absence of incriminating recorded evidence to the contrary – that any trades were based on some report somewhere, which may never have in fact been believed or even read.

And so on account of these two factors – because illegal insider trading appears so prevalent and because it so difficult to prove – our response has been two-fold.

First, as you know from public cases, we and the FBI have devoted significant resources to this priority. But we both have recently added even more resources to this effort – because there is more to be done and more deterrence to be achieved.

The investigation and prosecution of illegal insider trading has been, and will remain, a top criminal priority for our Office and the FBI, just as it is civilly for the SEC.

Second, given the nature of the offense and the difficulty in proving it, we remain committed to using every lawful investigative tool available to investigate and prosecute insider trading offenses – and any other offense for that matter.

Some have asked, why use court-authorized wiretaps in insider trading cases? The quick answer is that every legitimate tool should be at our disposal – especially where, as in the case of insider trading, an essential element of the crime is a communication, it does not take a rocket scientist to understand that it would be helpful to have the actual recording of the communication.

Recordings are the absolute best evidence, and so we will not shrink from using them.

The question of why we use wiretaps to investigate illegal insider trading is, to my ear, like my asking a defense lawyer, why do you cross-examine the Government's witnesses at trial?

In both cases you do it to get at the truth – and, as a general principle, both the prosecution and the defense are entitled to use every lawful and necessary available tool to get at the truth.

In fact, there was an interesting and ironic juxtaposition that occurred just two weeks ago, which I think helps to make the point. On October 4th, a well-known criminal defense lawyer was arguing to a judge, in connection with one of our more well-known cases, that a wiretap should be suppressed because the Government could not meet the burden of showing the necessity of the tap in an insider trading case.

Now, just a few floors away at 500 Pearl Street, at almost literally the same time, another well-known lawyer was arguing to a jury – equally strenuously – that they had to acquit his client in an insider trading case because even though there was a cooperating witness, without a recording, the Government had not met its burden of proof.

Here's what he argued to that jury: "I am here to suggest to you that if they come into this courtroom under our system and ask you to find that man guilty, notwithstanding the presumption of innocence, they need to bring you more than what they brought you. They need to bring you some more hard evidence. They need to bring you a tape recording, an e-mail, something more . . ." That was the always-excellent and formidable Mark Pomerantz, arguing in United States v. Contorinis.

So I am here to tell you that court-authorized wiretaps, so long as all the legal requirements can be met, will continue to be in our toolbox in insider trading cases.

As a more general matter, with respect to white collar enforcement, the investing public rightly wants to see us a step ahead of, rather than ten paces behind, white collar criminals who are becoming smarter, bolder, and more sophisticated.

The public correctly wants us to use every tool to thwart criminals and prevent fraud. And that is exactly what we are doing. We will use every aggressive and innovative method available to address many of the unprecedented challenges that we face today.

And especially when sophisticated business people begin to adopt the methods of common criminals, such as the use of anonymous cellphones, we have no choice but to treat them as such. To use tough tactics in these circumstances is not being heavy-handed; it is being even-handed.

It would be difficult to explain to the public why alleged financial fraudsters deserve a milder approach just because they wear a white collar.

So that, in a nutshell, is some of what you can expect from my Office in terms of white collar enforcement going forward.

I just want to say one more thing that comes to my mind given that I am in this room. The last time I spoke in this room was I think two years ago on a panel addressing the issue of prosecutorial independence.

At the time I was chief counsel to Senator Schumer on the Senate Judiciary Committee and was invited by Dan Alonzo – also on the panel, by the way, were Cy Vance and Eric Schneiderman. And Senator Whitehouse.

It never occurred to me back then that I might one day myself be the United States Attorney in this district.

But I think it is useful to be mindful always about the vital importance of prosecutorial independence. I saw the fired US Attorneys last week at the NAFUSA conference, and I told them that the searing lesson of that experience was to always remember the central importance of independence.

One of those core values for the Department generally, and for the US Attorney's offices specifically, is of course, independence. And I don't think I could discharge any of my responsibilities well, much less enforce the law against white collar crimes, without holding that principle paramount.

It is the principle that politics and prosecution do not mix.

It is the principle that a prosecutor's only allegiance is to the truth and that his only duty is to justice.

It is the principle that the only agenda any public prosecutor can have is a commitment to the wise and just exercise of discretion and judgment.

In my view, independence is as indispensable to the fair administration of justice as a law degree, a badge, or a statute book. Perhaps more so.

Independence, properly understood, is neither defiance nor insubordination. It is merely the wise and just exercise of judgment and discretion – done without fear or favor, as the oath has always required.

When independence is under fire, justice is at risk.

Before sitting down, I briefly want to mention two things I would hope I could expect from you who are in the white collar defense bar.

First, I hope that one promising trend continues. And that is criminal referrals from members of the white collar bar.

Increasingly, you and your clients are in the best position to witness fraud and malfeasance on the part of others. This exhortation is a bit of a white collar version of, "If you see something, say something."

And sometimes, of course, your clients are the victims of fraud themselves. We're going to trial in one such significant case in two weeks.

Others of our most significant cases have come in the door because members of this elite group recognized that a client was being defrauded and came in quickly.

And these cases take all sorts of forms – a recent and notable trend is the theft of intellectual property by a rival or a former employee, which is sometimes a more devastating hit to a company than almost anything else. And those business crimes also undermine the integrity of our financial system and economic order.

And we are developing an expertise and national reputation in the handling of computer crime and intellectual property offenses.

One more thing: It is hard to overstate the importance of speed because in those kinds of cases, a central purpose of our law enforcement effort is to make sure we can preserve – or find – assets that might otherwise disappear if the fraud went undetected for a longer period. And that is often going to be your victim-client's first concern as well.

Second, as much as we would like you to report the malfeasance of others, it has also never been more important to self-report misconduct.

I know that sounds like a cliché, but certain admonitions become clichés precisely because of their self-evident truth.

First, we always consider, when making charging and disposition decisions, whether the alleged misconduct was self-reported. In the same way that individual defendants do very well when they come clean first, so do business entities.

Second, you and your clients are repeat players. Some of your institutional clients are mammoth global corporations who might be the subject of separate and unrelated inquiries by my Office or other parts of the Department, and a reputation for a corporate culture of either intransigence or willful blindness will inevitably not help in the future case no matter who the next investigating office is. The opposite reputation, on the other hand, is like gold in the bank.

Finally, with the enactment of the Dodd-Frank bill and the increased inducements to whistleblowers, every corporate client now faces something of a prisoner's dilemma upon the discovery of misconduct.

Prosecutors will no doubt not consider it a point in a company's favor if its self-reporting post-dates the report of a corporate whistleblower. And so it is more important than ever to make a beeline for the SEC and/or my office when something hits the fan.

So, please don't be strangers. Come and see us and tell us about crimes. I promise we will be all ears.

At the end of the day, however, my expectations from the people in this room are much broader than the mere after-the-fact reporting of potential criminal activity.

That is because the future of white collar enforcement is much more likely to be shaped by you and your clients than by me and my prosecutors. The key to the kingdom lies more with you, than with me.

It is you who represent, advise, and work in many of the institutions that are now – or may one day find themselves – in hot water.

Long before my office issues a subpoena or an attorney general or inspector general comes calling, lawyers like you in this room will likely have had countless opportunities to guard against creeping corporate corruption.

You will have had opportunities to establish better compliance practices, to encourage better self-policing, to urge more transparency, and to otherwise help foster an ethic of integrity, candor, and restraint in the business world – and to convince any clients who need convincing that this is usually also just good business.

So I truly believe that much of the solution lies in the wisdom and integrity of the bar, this bar – so often the front-line counselors for the most powerful and influential financial institutions and corporations in America.

Part of my hope and faith in your salutary role derives from my own abiding faith in the noble ideal of the legal profession.

Though we lawyers are much maligned, I continue to believe in the increasingly quaint and uncommon view that to become a lawyer is to join a noble profession. And that applies not only to lawyers in public service, but to all of you in the private sector as well. And I hope and trust that you think this also.

I often say that there is no one better situated to promote equality, preserve liberty, and prevent cruelty than the person who has genuinely dedicated himself to becoming both a master and a servant of the law.

Add to that the power to steer corporate actors towards a permanent course of integrity and good citizenship.

Every <u>good</u> lawyer knows how to defend zealously against charges, once brought.

But it is the essential ability of the <u>great</u> lawyer – a counselor in the finest tradition – to render unthinkable the bringing of charges in the first place.
And not by being a clever student of legal loopholes or by earning a reputation for scorched-earth and ad hominem litigation or by papering the files for a future advice-of-counsel defense.

That may be great lawyering, but it is not necessarily being a great lawyer.

Unlike the merely good lawyer, the great lawyer understands that charges are rendered unthinkable when the client's conduct and character have been rendered unimpeachable.

Unlike the merely good lawyer, the great lawyer understands that the most important advocacy often takes place in the boardroom, rather than the courtroom.

The great lawyer knows it is often more productive to direct the harshest words to the obstinate client, rather than the aggressive investigator.

The great lawyer abhors obstruction, not merely because of the potential effect on a prosecutor's decision in charging or a judge's decision in sentencing, but because obstruction is an affront to the rule of law and is deeply offensive to any officer of the court.

The great lawyer earns not just respect, but genuine admiration, from both the Court and the Government, and that reputation, over time, helps not just one client in one case, but every client in every case.
And along the way, the great lawyer – in part, by setting an example – plays a part in setting a course for integrity and good corporate citizenship.

And so the truly great lawyer – motivated by conscience, guided by principle, and empowered by training – can serve as the greatest antidote against a creeping corporate corruption that has so sapped people's faith in our economic order.

In the end, the good lawyer makes a living; the great lawyer makes a difference.

It is an honor to be among so many great lawyers here this evening.