27. Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings

January 30, 2012

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
ALL ASSISTANT UNITED STATES ATTORNEYS
ALL LITIGATING DIVISIONS
ALL TRIAL ATTORNEYS

FROM: THE ATTORNEY GENERAL

The Department has placed a high priority on combating white collar crime. This includes the fight against fraud, waste, and abuse, whether it is in connection with health care, procurement, or other financial fraud, as well as consumer protection, the environment, antitrust, tax, commodities and securities fraud. The Department and the Financial Fraud Enforcement Task Force and its members are committed to using all of the remedies available -criminal, civil, regulatory, and administrative. To facilitate that goal, I am issuing this policy statement to update and further strengthen the Department's longstanding policy that ensures that Department prosecutors and civil attorneys coordinate together and with agency attorneys in a manner that adequately takes into account the government's criminal, civil, regulatory and administrative remedies.

Department policy is that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings. By working together in this way, the Department can better protect the government's interests (including deterrence of future misconduct and restoration of program integrity) and secure the full range of the government's remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion and debarment).

The potential for parallel proceedings arises in many of the Department's white collar enforcement priorities, and it is essential that an effective and successful response involve an evaluation of criminal, civil, regulatory, and administrative remedies. Although some matters may come to the attention of the Department through a criminal investigation, it may be appropriate for the matter to include and/or be resolved through a civil, regulatory, or administrative remedy. Conversely, there may be matters that come to the attention of the Department's civil attorneys or attorneys of other agencies in the first instance that would be appropriate for the Department's prosecutors to investigate and pursue to ensure culpable individuals and entities are held criminally accountable. Early and effective communication and coordination will help avoid many problems and enhance the overall result for the United States.

Courts have recognized that "[t]here is nothing improper about the government undertaking simultaneous criminal and civil investigations" provided that we use those proceedings and associated investigative tools for their proper purposes and in appropriate ways. *United States v. Stringer*, 535 F.3d 929, 933 (9th Cir. 2008), *vacating in part, and reversing in part, United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006); *see also United States v. Kordel*, 397 U.S. 1, 10 (1970) ("It would stultify enforcement of federal law to require a government agency ... invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the outcome of a criminal trial."); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) (en banc) ("In the absence of

substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.").[FN1]

Where parallel proceedings are conducted effectively, the government is able to make more efficient use of its investigative and attorney resources. If the government does not consider and properly manage potential parallel matters, it may not be able to realize all of the remedies available to the United States. For these reasons, it is important that criminal, civil, and agency attorneys coordinate in a timely fashion, discuss common issues that may impact each matter, and proceed in a manner that allows information to be shared to the fullest extent appropriate to the case and permissible by law.

Every United States Attorney's Office and Department litigating component should have policies and procedures for early and appropriate coordination of the government's criminal, civil, regulatory and administrative remedies. Many of the Department's litigating components and United States Attorneys' Offices that routinely engage in parallel proceedings already have in place effective policies and procedures to manage them. These policies and procedures should stress early, effective, and regular communication between criminal, civil, and agency attorneys to the fullest extent appropriate to the case and permissible by law. In keeping with this objective, such policies and procedures should specifically address the following issues, at a mInImum:

Intake: Early evaluation of all matters for criminal, civil, regulatory, or administrative action. A case referral from any source, including an agency referral, a self-disclosure, or a *qui tam* action, to any component of the Department or to a United States Attorney's Office, is a referral for all purposes. From the moment of case intake, attorneys should consider and communicate regarding potential civil, administrative, regulatory, and criminal remedies, and explore those remedies with the investigative agents and other government personnel.

Investigation: Consideration of investigative strategies that maximize the government's ability to share information among criminal, civil, and agency administrative teams to the fullest extent appropriate to the case and permissible by law. In cases where civil, regulatory, or administrative remedies may be available, prosecutors should, at least as an initial matter, consider using investigative means other than grand jury subpoenas for documents or witness testimony. If a *qui tam* action or other time-sensitive civil or administrative matter is under investigation, consideration should be given to postponing service of grand jury subpoenas, as appropriate. Prosecutors may obtain evidence without the grand jury through administrative subpoenas, search warrants, consensual monitoring, interviews, and potentially through other means, and with appropriate safeguards, that evidence may be shared with attorneys responsible for pursuing the government's civil, regulatory, and administrative remedies. Civil attorneys can obtain information through the use of False Claims Act civil investigative demands and that information may be shared with prosecutors and agency attorneys. Where evidence is obtained by means ofa grand jury, prosecutors should consider seeking an order under Federal Rule of Criminal Procedure 6(e) at the earliest appropriate time to permit civil, regulatory, or administrative counterparts access to material, taking into account the needs ofthe civil, regulatory, administrative, and criminal matters, including relevant statutes of limitations, and the applicable standards governing such an order.[FN2] At all times, consistent with their obligations under Rule 6(e), prosecutors should keep careful track of the sources of information so that non-grand jury material is identified and can be shared with the government's civil, regulatory, and administrative teams. Prosecutors should, of course, do so in a manner that does not jeopardize a grand jury investigation. Civil trial counsel should apprise prosecutors of discovery obtained in civil, regulatory, and administrative actions that could be material to criminal investigations.

Resolution: At every point between case intake and final resolution (e.g., declination, indictment, settlement, plea, sentencing), attorneys should assess the potential impact of such actions on criminal, civil, regulatory, and administrative proceedings to the extent appropriate.

For example, a prosecutor, when considering a plea agreement, should also consider the impact the charge used as a basis for the guilty plea (e.g., health care fraud as opposed to obstruction) and the facts set forth in support of the plea agreement could have on a subsequent civil case (collateral estoppel, res judicata) and/or administrative exclusion or debarment. Effective and timely communication with representatives of the agency authorized to act on the agency's behalf, including suspension and debarment authorities, should occur so that agencies can pursue available remedies at an appropriate time.

The recommendations outlined above should be followed to the fullest extent appropriate and permissible by law. There may be instances, however, in which the secrecy of an investigation is paramount to the success of the investigation (e.g., an undercover operation), and compliance with the above described policies may be impractical.

The support and contributions of agencies and the government's investigative offices are critical to our ability to conduct effective parallel proceedings. It is vital that investigators obtain appropriate credit for all of their work in support of the government's remedies, including civil and administrative remedies. Many already have taken steps through work plans and credit in the performance review process. I commend and appreciate these efforts and encourage continued support in this area from agencies and investigative offices. I also commend and encourage the continued practice by agencies of making simultaneous joint referrals, where appropriate, to both civil and criminal attorneys.

I direct the Office of Legal Education, in consultation with the U.S. Attorneys' Offices, the Civil Division, the Criminal Division, and other litigating divisions within the Department to facilitate the provision of instruction and training materials on parallel proceedings.

FN 1. When conducting parallel investigations, Department attorneys should be mindful of arguments like those raised in Stringer and United States v. Scrushy, 366 F. Supp. 2d 1134 (N.D. Ala 2005), that civil, administrative, or regulatory proceedings are being used improperly to further a criminal investigation. In addition, the Department's civil and criminal attorneys should work together, and with agency attorneys, to consider and plan for grand jury secrecy and discovery issues early in the process of conducting parallel proceedings. The Department has provided and will continue to provide training opportunities to assist civil and criminal attorneys, and joint training with agency attorneys, in evaluating these issues.

FN 2. In some circumstances, a prosecutor may have less authority to disclose grand jury information to a regulatory or administrative, than to a civil, counterpart. Federal Rule of Criminal Procedure 6(e)(3)(E)(i) authorizes a court only to order the disclosure of grand jury information "preliminarily to or in connection with a judicial proceeding." *See U.S. v. Baggot*, 463 U.S. 476 (1983) (an Internal Revenue Service investigation to determine a taxpayer's civil tax liability is not preliminary to or in connection with a judicial proceeding within the meaning of Rule 6(e)(3)(E)(i)).

[updated July 2012] [cited in USAM Chapter 1-12.000; Civil Resource Manual 228; Criminal Resource Manual 2464]