…I thought I would speak today about a feature on the landscape that – as a former DOJ official and a long-time admirer of that institution – deeply concerns me: my perception that the Department and perhaps other enforcement agencies have moved away from traditional notions of prosecutorial discretion, founded in self-discipline about the facts and the law, a search for proportionality and acknowledgment of the need for restraint in negotiating pleas and settlements, and moved toward a greater willingness to use leverage to negotiate maximum fines and penalties. . . As I will explain, I believe that shift damages the reputation of law enforcement, drives a wedge between good businesses and the government, and sets back the cause of justice.
But before turning to those thoughts, and some modest ideas about what to do about it, I want to start with first principles, what I hope to be largely common ground. As a society, we need to ensure that US businesses do everything they can to comply with the law, that culpable individuals and companies are appropriately punished, and that victims of corporate crime are fully compensated. Corporate crime hurts people, businesses, and the economy. I am sure no one here disagrees with any of that. Much of what we have worked on together at ILR over recent years has involved looking for creative new approaches to law enforcement meant to incentivize more effective prevention efforts, better internal protection and encouragement of whistleblowers, increased cooperation with law enforcement in event of violations, and greater alignment of the interests of both business and government to favor prevention of crime before the fact over enforcement after the fact. At the risk of belaboring the obvious, it is important, as we express concern about “over-criminalization,” to start with the recognition that business has at least as great a stake in legal compliance and good business ethics as the government does, and an
acknowledgment of the important role of law enforcement in the business realm. Of course, retribution against true wrongdoers and compensation of real victims of crime are central goals of law enforcement. But its goal should also be a significant part to find ways our laws and law enforcement can better incentivize the best compliance practices and business ethics that prevent crime from happening in the first place. And ways law enforcement can build on the common interests of business and government to ensure that corporate crime is not just detected and punished when it occurs, but that it does not occur in the first place.

I believe that this is where we should start. And I am increasingly concerned that law makers and law enforcement today aren’t really asking themselves those basic questions, or at any rate, not asking them enough. As a Justice Department official, both as DAG and at the Civil Division, I did not shrink from enforcing the law in the business space. But I am increasingly concerned that a new and unbridled leverage-based way of doing law enforcement bears significant blame for eroding
the faith of the American people in critically important institutions, both private and governmental, by which I mean both our country’s business community on the one hand, and the US Department of Justice and other law enforcement agencies, on the other.

On the business side, we have a corrosive perception by much of the American public and a great deal of political rhetoric to the effect that corporate crime is rampant and that it is the cause of most of America’s economic unfairness and social ills. The thesis is that companies would prefer to go on breaking the law so long as doing so is profitable; and that laws against corporate crime are not effectively enforced and corporate wrongdoers are never brought to justice, and so it just goes on and on, and we are all getting ripped off. That popular conception is vexing, not because we imagine that there is no such thing as corporate crime – to the contrary – but because so many at American companies of all sizes today are investing more in compliance and ethics than at any time in history, and as a result, by most accounts, American companies are the most law abiding businesses in the world. A great
many in our business community highly value compliance and good business ethics. That gets lost in the cynicism out there. And of course, the popular perception is also vexing because many in the business community believe that far from getting a pass, they are subjected to over-enforcement and over-criminalization.

That popular perception is deeply damaging to law enforcement, too, and that damage is really just the other side of the same coin. There is a growing perception by many in the electorate (and much political rhetoric) that federal law enforcement is feckless and regularly “bought off” through resolutions of corporate investigations – civil settlements and plea agreements – that are mere “slaps on the wrist” or “costs of doing business” while it allows the real wrongdoers to go free. The government responds to this critique with higher and higher dollar settlements and plea bargains, and now with an announced policy to emphasize enforcement against corporate executives – the so-called Yates Memo. Yet I would submit to you that the government’s perception problem is getting worse, not better.
Now there are doubtless many contributing causes to this miserable state of affairs. I want to focus on one: a subtle but marked shift in DOJ’s enforcement approach from one largely grounded on considerations of fact, law and proportionality – and one that recognized the proper role of self-restraint given the Department’s outsized bargaining power – to a new one based more on leveraging its outsized bargaining power to maximize the number and size of settlements and pleas.

My concern is that this leverage-based approach sometimes yields large-dollar plea agreements and settlements and accompanying press releases and headlines about criminal behavior despite weak underlying evidence – including often very weak evidence of mens rea – or very aggressive or unclear theories of liability and damages. Because the leveraged settlements and pleas can be obtained despite weak factual predicates and uncertain legal grounds, credible prosecutions of individuals on the same theories are often not practicable or, if prosecutions are pursued, the government loses them. Whereas the
government has enormous bargaining power over companies and thus can leverage corporate pleas, individuals have more to lose and less to gain from a plea and will often litigate weaker allegations where their companies have settled. The resulting huge settlements and lack of individual prosecutions help drive the popular perceptions of widespread corporate criminality and supine or incompetent law enforcement unwilling or unable to take on powerful interests.

So this leverage-based approach not only yields unjust and disproportionate outcomes, but it is also counterproductive from almost every perspective. I will talk a bit more about what I mean by a “leverage-based” approach, but first I want to contrast it with what I believe was once the prevailing approach at DOJ.

II. The Problem

A. The Justice-Based Approach

Traditionally, prosecutorial discretion at DOJ was largely governed by the principle of proportionality and a discipline of restraint. One
reason for this was that in many statutory schemes Congress has given
the enforcement agencies the power to seek potential penalties that in
many actual instances could far exceed a reasonable result. Not all
offenders are deserving of the full force of the harshest penalties
authorized. Of course, in litigated outcomes, courts (or juries) are
entrusted with fitting the punishment to the crime. But most corporate
crime matters are settled, resulting in a bargain between the company
and the government without involvement from the court, and thus the
question arises how the government should approach establishing its
initial demand and its bottom line.

My experience at the Civil Division in the 90s – and as a lawyer in
private practice in that era – was that government lawyers generally
recognized the need for a proportionate result, one where the facts and
law truly supported liability, and the agreed-upon penalty was
proportionate to the offense. That was the principle of proportionality.
And government lawyers also realized that to get to that outcome, they
often needed to observe a practice of restraint. The fundamental reason
for that, although perhaps not immediately obvious, was straightforward: factors beyond a corporate defendant’s guilt or innocence affect how a corporation reacted to an investigation or complaint. Where potential penalties are extreme – for example, where the civil monetary penalties triggered by potential False Claims Act allegations total hundreds of times the size of the alleged fraud and far exceed a company’s total asset value – even a low probability of a company-destroying outcome can compel that company to capitulate to weak charges. And there are, of course, external pressures on corporate defendants to resolve investigations – pressures from capital markets or reputational effects – that have little to do with culpability and can compound willingness to plead, settle or pay more than the facts and law would justify.

Generally, the enforcement agencies felt a responsibility to account for these realities in their charging decisions and in their settlement and plea demands. They understood that it is not only the final adjudication or settlement that will affect a company’s business, but also the initial charging decision, and so prosecutorial discretion must play a role from
the very beginning stages of an investigation. And in my experience, government lawyers typically checked themselves and supervisors checked prosecutors – not only to be sure the United States got a sufficient deal that vindicated the law, vindicated victims, and vindicated the interests of the United States, but also to be sure that their overweening bargaining power did not drive an unjust or unduly punitive one.

I suppose what I am calling this traditional approach to be in the spirit of the Justice Department’s official motto, which reads: “Qui Pro Domina Justitia Sequitur,” which DOJ’s website explains means “Who Prosecutes on Behalf of Lady Justice.” The motto, which is on the Departmental flags that stand in the office of every Senate-confirmed DOJ official, has an interesting history. According to the DOJ website, until the reign of Henry II, legal proceedings in England were conducted in Latin, and the English Attorney General would traditionally introduce himself (it surely always was a man) as “Qui Pro Regina Sequitur,” or that he “who prosecutes on behalf of the Queen” or King. In DOJ’s
motto, Lady Justice – not the sovereign – is identified as the client. What I am calling the traditional approach is also in the spirit of the Department’s *unofficial* motto, the words that ring the alcove outside the Attorney General’s office and for me give still more meaning to the official one: “The United States wins its point whenever justice is done its citizens in the courts.”

Justice and not the sovereign is the client. Justice and not victory is the goal. Of course, pursuing victory for the sovereign very often coincides with the cause of justice. But the facts and law must support it. And the punishment should fit the crime.

**B. The Leveraged-Bargaining Approach**

But over the course of years, I have sensed that the Department has moved away from this proportionality- and restraint-based approach toward what I will call a leveraged-bargaining model. More government lawyers appear to take the view that whatever penalty the government can extract from a company is presumptively fair, that the outcome is self-justified by the defendant’s willingness to agree to it. Indeed, I have
heard it suggested by some in the enforcement community that it would be wrong for government lawyers to leave money on the table; if they took less than they could get, then they would be depriving the Treasury of money that could have been recovered. “Who am I,” they implicitly ask, “to give away the people’s money?”

Thus, instead of asking what (if any) penalty would be fair and proportionate in the light of the facts and law, the enforcement agencies seem increasingly to be asking themselves “how can we maximize what this company pays?” And because the new goal is the maximal outcome, the government like any good plaintiffs’ lawyer will (perhaps even thinks it should) bring to bear all of the tools in its arsenal, press every point of leverage, and make demands designed to drive the highest number. And in the end, if a defendant is unhappy with the result of the process or believes it to be unjust, the thinking goes, the company has only itself to blame for agreeing.

Of course, the demand and push-back of the bargaining process are and were always part of a settlement dynamic. By the same token,
considerations of fairness and proportionality continue to inform the
government’s positions in many cases. Many government lawyers in
many cases still employ rigorous self-discipline and seek just, rather
than maximal, outcomes. I am speaking here of a movement along a
spectrum, but it seems to me there has been a marked shift. And the
fallacy in the new approach is that it fails to recognize the significance
of the reality that the parties are not on an equal playing field. The
government has the power to compel disproportionate outcomes and
compel settlements in cases that it probably could never win in litigation.

Now, to be clear, the government should never fail to proceed out of fear
of losing a righteous case in court. I am talking about the government’s
ability to settle a non-righteous case out of court.

1. **Enormous Penalties**

   There are several factors that confer outsized leverage on
prosecutors. Ultimately, the biggest source is the powerful arsenal of
potential punishments and sanctions Congress has given the enforcement
agencies. Many companies look at the potential consequences of losing
in court – astronomical potential fines and penalties, with almost limitless adverse collateral consequences – and feel they have no choice. They will push back in negotiation and develop their defenses of course – but in the end the pressures to capitulate and seek the best deal they can are hydraulic. Unpacking the elements of the leverage, there is the simple fact of potential indictment or other public disclosure of an investigation, each of which can have a harmful impact on a company, regardless of the ultimate resolution of a case. Then there are statutes like the False Claims Act that bring with them the threat of multiple damages plus civil monetary penalties where damages can be calculated in ways to generate truly unfathomable numbers.

As to the civil monetary penalties, it is worth mentioning that all such penalties are going up this year – many of them going up a lot. There will be an adjustment for inflation in accordance with a provision included in last year’s federal budget. According to a rule recently promulgated by the Railroad Retirement Board, False Claims Act penalties for example will nearly double. The minimum per-claim
penalties would rise to over $10,000, from $5,500. That’s the new *minimum*. The maximum per-claim penalty would rise to over $21,000, from $11,000. The government interprets the law to mean that a number in that range must be applied per every prescription or item or service, depending on how contractors or providers bill the government. And so the mandatory minimum statutory penalties will double what are often already absurd levels.

Yet, these monetary or criminal penalties may not even provide the most leverage. Instead, the threat of debarment or exclusion often provides the biggest stick. Debarment means that a company cannot enter into contracts with the government for a period of years – for a defense contractor, for example, this could literally end the business. Exclusion means that so-called indirect providers such as pharmaceutical and medical device companies cannot receive reimbursement from federal health care programs for a period of years. Given the market share of those programs, exclusion is viewed as a corporate death sentence.
Faced with such prohibitive consequences of litigating, companies have considered it imperative in most cases to engage with the government, cooperate where appropriate to seek to persuade that no violation occurred or that any harmful effects were small, but ultimately capitulate to almost any government bottom line. The risks of losing are too high. It is worth a great deal to every company in this situation to resolve the enforcement action as soon as possible, to obtain closure and certainty. The value of that closure and certainty is government leverage.

2. Piling On

Beyond the extreme potential penalties applicable to any given investigation or case and the value of closure, dysfunction on the government side compounds the pressure and, therefore, perversely the leverage. It has been the case for some time that news of a possible corporate law violation can set off something of a feeding frenzy on the enforcement side. Multiple federal and state agencies with overlapping jurisdiction each open an investigation of the same conduct, often publicly. Where one agency starts an investigation, other agencies pile
on. DOJ, the SEC, CFPB, the FTC, etc. may each join the fray. And when a federal enforcement agency gets involved, one or many state attorneys general or other state regulators are likely to follow.

Of course, some investigations warrant the involvement of multiple agencies or multiple sovereigns. Different agencies have different areas of expertise and different interests to safeguard. Where multiple agencies share information and coordinate enforcement efforts, outcomes can actually improve. Unfortunately, though, we often see investigations where agencies are not sharing information and are not coordinating their efforts. This wastes the resources of both the government and the target of the investigation. And because each agency seeks its own penalty, its own headlines, even if each agency is trying for a proportionate result (which, I fear, many are not) there is obvious potential for enormous total penalties that far exceed the seriousness of the violation.

At the beginning of the Obama Administration, when I was at the Department of Justice, the President established the Financial Fraud
Enforcement Task Force. We tried to put together a structure that would better coordinate efforts among the various enforcement agencies and between the federal and state governments – goals other administrations had tried to achieve and failed. Unfortunately, this one, too, appears to have failed. We continue to see multiple agencies running their own investigations, sometimes withholding information from other investigators, seeking to extract their own headlines and their own large dollar resolutions. This reality of uncoordinated and redundant investigations adds pressure on defendants to seek aggregate or global settlements out of proportion to any actual culpability.

The existence of large and destructive potential penalties, collateral consequences, the costs of multiple and uncoordinated investigations: none of these are new – though the piling on may be more egregious than ever in many areas and potential penalties are going up. The imperative that companies feel in these situations to find a way to resolve them quickly, with accompanying leverage for the government, is also not new. What is new in the last fifteen years, in my view, is the
government’s greater willingness to exploit that leverage, and to abdicate to the bargaining process what it had previously seen as its own obligations of ensuring proportionality through the exercise of careful self-scrutiny and appropriate restraint. As I said, it seems many in government think the bargain itself, given the defendant’s willingness to agree, becomes self-justifying. Even worse in my view, the failure to extract the last possible penny is seen by some as a derogation of a government lawyer’s duty to maximize the return to the federal Treasury. Seemingly lost in the shuffle is the sightline to what should be – what I have always understood to be – the enforcement lawyer’s polestar: the idea that it is justice for citizens, not victory for its own sake, that government lawyers are supposed to pursue.

III. The Consequences

As frustrated as we are in the business community, I believe that this shift in enforcement approach has hurt the government almost as much. Without question, fines and settlements are through the roof. To pick one measurement, according to a recent study by a University of
Virginia Law professor, corporate criminal penalties alone grew from well under $1 billion dollars in 2001 to more than $15 billion in 2015 alone. The trend line shows a steady year-over-year increase resulting in this fifteen-fold annual increase in just fifteen years. This is not a statistical blip.

There is reason to believe some of these settlements and pleas come even where the government’s case is weak – indeed, where the government would have profound difficulties proving a case in court. In a significant number of matters that have resulted in corporate pleas, the government has sought to prosecute individuals and the prosecutions cratered. More often, the government has not even tried to pursue prosecutions of individuals. Those failures call into doubt the prior corporate pleas, because corporate liability generally follows only if an individual or individuals acting within the scope of their job duties violate the law. Corporations are not in fact “people too,” but are instead legal entities made up of people. And thus some agent of the corporation, some individual person, must have the requisite culpable mental state.
Therefore, if the government does not have enough to prosecute any individual, it generally doesn’t have enough to prosecute the corporation. Prosecutors do not want to let the bad guys off and they are not incompetent. The more plausible explanation in the mine run of cases is that when it comes down to it, the prosecutors recognize, before or after they secure a corporate plea, that they do not have a prosecutable case against any individual.

But we have these corporate plea deals anyway, often with very large penalties, at least in part because one of the Department’s central goals appears to have become generating the most dollars and lining up the most pleas and settlements. Perhaps that is because big dollars and lots of pleas drive the “metrics” in a metrics-driven world. The enforcement agencies, including especially DOJ and DOJ components, make annual announcements about new aggregate records of fines and penalties. We see almost daily headlines about record-setting plea deals. And one has to concede, if you like efficiency, that big dollar pleas and settlements are very efficient. The Department recently bragged that its
$23.1 billion in civil and criminal recoveries in the fiscal year ending Sept. 30, 2015 “represent more than seven and a half times the approximately $2.93 billion of the Justice Department’s combined appropriations for the 94 U.S. Attorneys’ offices and the main litigating divisions in that same period.” A seven hundred fifty percent annual ROA is very good, looked at through a P&L lens, which the Department expressly invites us to do. Prosecutorial leverage is generating balance-sheet leverage. But because this is law enforcement, that should be cause for concern, not celebration, not only because the establishment of such metrics is in serious tension with the goal of pursuing justice in every case, but also because that phenomenon coincides with a growing perception among defense attorneys and in-house counsel – anecdotal to be sure but very widespread – that these large corporate settlements and pleas increasingly come in cases with weak facts or weak legal theories.

Now, it may be obvious why this is bad for the targets of investigations, but why is it bad for the government? Because as mentioned the leverage that generates all those dollars and all that
efficiency doesn’t work as well with individuals. Their incentives are different and individuals will more often insist on their day in court. And frankly, appreciating the devastating personal dimensions of an unsuccessful criminal prosecution, I suspect many prosecutors – though by no means all, sadly – are more inclined to exercise restraint in weak cases where individuals are concerned. But in such cases – big corporate settlement and no individual prosecution – the public’s presumption is not that the corporate case was weak. After all, the public asks, why would the corporation have agreed to that massive settlement and why would the government have demanded it if there was not a strong case? The settlement or plea is seen as proof that a crime has been committed and the perception is that the government has simply let individuals off the hook, that it has folded because it feared losing a righteous case it should have brought, or that it has allowed companies to buy their executives’ freedom through the large settlements.
Although I believe that picture is largely or entirely wrong, it has become a real political narrative, almost as bad for the Department as any narrative could be.

How bad is it? Well, earlier this year, Senator Elizabeth Warren issued a report entitled *Rigged Justice: How Weak Enforcement Lets Corporate Offenders Off Easy*. The report touches on two central themes: first, it criticizes the federal agencies for settling cases rather than pursuing harsher punishments for corporations and individuals in court. It says:

“[F]ederal agencies rarely pursue convictions of either large corporations or their executives in a court of law. Instead, they agree to criminal and civil settlements with corporations that rarely require any admission of wrongdoing and they let the executives go free without any individual accountability.”

Second, Senator Warren’s report faults the corporations for buying their way out of trouble through these settlements:
“These corporations paid millions—or billions—of dollars to make these cases disappear before any public hearing…. [B]ecause the prosecutors never took any of these corporations or their executives to trial, there was never a need for anyone to answer in court under oath for their actions.”

Former Labor Secretary Robert Reich sounds many of these same themes in his recent book.¹ He writes:

“Government officials like to appear before TV cameras sounding indignant and announcing what appear to be tough penalties against corporate lawbreakers. But the indignation is for the public, and the penalties are often tiny relative to corporate earnings. The penalties emerge from settlements, not trials. In those settlements, corporations do not concede they’ve done anything wrong, and they agree, at most, to vague or paltry statements of fact. That way, they avoid possible lawsuits from shareholders or other private

litigants who have been harmed and would otherwise use a conviction against them.

“Corporate executives who ordered or turned a blind eye to the wrongdoing, meanwhile, get off scot-free.”

Lest you think this is exclusively a Democratic theme, let me assure you it is not. Senator Richard Shelby at one recent hearing said:\(^2\)

No one in the financial sector or elsewhere should be “able to buy their way out from culpability when it’s so strong it defies rationality . . . . Ultimately, it seems like the Justice Department seems bent on money rather than justice and that’s a mistake.”

And Senator and Presidential candidate Bernie Sanders is surely right when he articulates the impression held by many Americans:\(^3\)

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“The average American sees kids being arrested and sometimes even jailed for possessing marijuana or other minor crimes. But when it comes to Wall Street executives, some of the wealthiest and most powerful people in this country, whose illegal behavior caused pain and suffering for millions – somehow nothing happens to them. No police record. No jail time. No justice.”

So after years of aggressive enforcement and huge settlements, no one is happy. We seem to have only losers. No winners. We have corporate pleas and we don’t have corresponding convictions of individuals. The credibility of business and government alike has suffered. America’s standing with its own citizens and in the world is undermined by this perception of widespread corporate criminality paired with feckless enforcement agencies. And the tendency to leverage large settlements in weaker cases is a big part of the problem.

IV. Some Reflections on Deputy AG Yates’ Individual Accountability Policy

Before I share some modest thoughts about finding a way forward, I want to mention one more reason why DOJ’s shift from a justice,
proportionality and restraint-based law enforcement model toward a leveraged-bargaining model has hurt the public interest, and that comes back to the first principles I talked about when I began. As I said, I think pretty much every thoughtful person would agree that a guiding objective of the law and law enforcement should be aligning the interests of the business community squarely and unambiguously with the government’s interest in preventing violations of the law before they occur. The public wins when companies are compliant and ethical; it loses when crimes occur. With human beings involved, some crimes will always occur, and so another prime objective of the law and law enforcement should be to align those interests so that companies unambiguously benefit when they share information about possible violations with law enforcement; and to align them so that businesses help make sure that responsible persons are held accountable. The deterrence generated by the threat of after-the-fact penalties obviously has an important role to play in reducing violations in the first place. Deterrence is a core purpose of proportionate punishment. But if the business community loses confidence that it will be treated in a just and
proportionate way – which is a highly problematic side-effect of a leverage-bargaining approach to law enforcement – then the perceived interests of the business community and the government become distinctly misaligned, and the important objective of securing full cooperation in reporting potential violations and convictions of the wrongdoers is dramatically disserved.

Excessive penalties and vigorous pursuit of factually or legally marginal prosecutions will inevitably push information underground. It is lamentable, but it only stands to reason that if companies fear, based on experience, that the government is likely to use every point of leverage to drive highly punitive outcomes, they will be less willing to disclose violations to the government. Companies will be less incentivized to fully investigate allegations or to create detection and prevention mechanisms that might trigger obligations to disclose. Justice-based and proportionate law enforcement – and concrete incentives for those who cooperate – beget cooperation. Leverage-based
law enforcement suggests to business that no good deed will go unpunished, and thus pushes the other direction.

Which brings me to the controversial memorandum issued by Deputy Attorney General Sally Yates, the so-called Yates Memorandum. Let me say that I sympathize with Deputy AG Yates on several levels. First, she has made clear she very much would prefer the memo to be known as the “Individual Accountability Policy,” rather than bear her name. As someone saddled with several “Ogden Memos” from my time at Justice, I do feel her pain. To the extent people like the memo, the credit is likely due to others. And to the extent people don’t like them, well, then you really wish they had another name. But more seriously, the Yates Memo is clearly an effort by the Department to respond to the criticisms and concerns I have been talking about, specifically the widespread popular and political perception that the government is failing to hold corporate executives accountable for criminal acts, even while companies are paying billions of dollars in fines for those supposed criminal acts.
And at many levels, I find myself in sympathy with the goals and at least three of the premises of the Yates Memo. First, where an individual has committed a crime or where that person has caused his company to commit a crime, then that individual should be prosecuted and punished. Second, the Department has a problem that is caused by its leveraging of that $3 billion in resources into $23 billion in penalties. To do it, it needs to spread its troops pretty thin. Leveraging a settlement is a lot less resource-intensive than actually building a prosecutable case. But in the process, it may be that in some cases the settlement comes and the Department moves on to the next case before it has figured out whether it has a case or not. That is bad if it leverages an unjust settlement from a company. But it is also bad if it results in an individual who really committed a crime escaping accountability. And third, I agree with the premise that when a company knows about criminal behavior by its own employees, government policy (as I said earlier) should do what it can to encourage the company to align itself with law enforcement and against the violation, and self-report and cooperate.
So far so good. But the devils here are in the details. I know DAG Yates has said she considers the early returns on the policy encouraging. But what I have said to this point today should reflect what I think are substantial obstacles to the Yates Memo accomplishing its goals of greater cooperation and more individual accountability.

What are those obstacles? First, the leveraged bargaining model will continue to discredit the Department so long as it generates huge settlements and pleas on marginal facts and law. Unless the Yates Memo, by mandating more thorough investigation, moves the Department away from leveraged-bargaining with corporate defendants and back toward a justice-based model – and I harbor some faint hope it might do so at least marginally – it won’t solve the problem if I am right that the problem is the product of the leveraged deals themselves far more than a systematic failure to focus on individuals.

Second, the leveraged-bargaining model undermines the confidence of the business community and the defense bar that disclosures of individual involvement will yield proportional and just
outcomes. That lack of confidence deters full disclosure. The Department is asking companies, in effect, to trust it to treat their most valued employees and leaders fairly, and often to do so even when the company thinks that neither it nor they have done anything wrong. The leveraged bargaining approach makes it a lot harder to trust. And the incentive for companies to cooperate – while often real – is not concrete. All of which means that, by demanding all information as a condition of getting any cooperation credit, the policy may yield less information, not more.

V. Way Forward

It has taken many years to create this set of problems and there is no easy fix. But I would suggest a few specific approaches:

- First, given these concerns, Congress should consider adjusting the limits on potential penalties to reflect the potential for them to drive leveraged and bargain-justified outcomes rather than just and proportionate outcomes.
Second, we should encourage discussion about how the
Department can re-emphasize the time-honored justice,
focused, restraint- and proportionality-based approach to law
enforcement. I hope that the Department of Justice will
consider what policies it can put in place to ensure that
prosecutors are exercising their discretion with the goal of
achieving justice rather than maximizing monetary outcomes.
The Department should look at its metrics and its systems of
rewards, and consider whether focusing on aggregate dollars
and returns on investment sets a proper tone. I think it does
not. Leaders should remind government lawyers to check
their flag: the Department prosecutes on behalf of Lady
Justice, not the Queen’s Treasury, and wins its point only
when justice is done its citizens in the courts. As I said, many
government lawyers subscribe to and implement that
traditional ethos even now, and these better angels should be
strengthened and incentivized.
• Third, the government should create appropriate mechanisms to coordinate when various agencies or multiple sovereigns are involved in an investigation. This includes information-sharing, a clear division of responsibilities, and coordination of the ultimate enforcement goal. The government needs to discipline itself to avoid piling on and seek a single just and proportionate outcome with respect to every alleged violation.

• And, fourth, we should be looking for new ways to align the interests of corporations, the government and the public in prevention – moving away from a too-singular focus on after-the-fact enforcement.

I have written and spoken on one particular concept that I would like to raise again here, and that is the notion of focusing on the development of state-of-the-art ethics and compliance programs across industry – programs that are designed to identify, mitigate, reduce, punish and prevent fraud – with accompanying recognition by the government of companies that are trying to do the right thing with these
types of programs. There are many voices within corporations – the better angels on the business side – arguing for compliance and ethics and cooperation with the government. The point is that we need to strengthen and incentivize those better angels by ensuring that doing the right thing really will prove to be in the best interest of the company.

We have recently seen significant advances in determining what constitutes a state-of-the-art program, and with those advances, we should be able to move toward a system in which we incentivize companies to adopt and maintain these programs by offering specific and concrete benefits for doing so. A House Judiciary subcommittee recently held a very interesting hearing on the False Claims Act, where one of the major takeaways was a recognition that we know now how to identify and implement what works in ethics and compliance programs. I would commend to you a report by the Ethics & Compliance Initiative Blue Ribbon Panel that goes into detail on this score, as well as former Deputy Attorney General Larry Thompson’s insightful testimony.
The goal is to find concrete ways to strengthen and incentivize the better angels of our nature, in business and in government. And I believe we can move the needle in the right direction, not by going back to the future, but emphasizing our core values of justice and proportionality and finding creative new paths that enhance prevention, appropriate compensation of the victims of crime, and individual accountability.