New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 253—NO. 40
TUESDAY, MARCH 3, 2015

WHITE-COLLAR CRIME

Expert Analysis

White-Collar Enforcement Under Attorney General Eric Holder

By **Elkan Abramowitz**

And **Jonathan Sack**

Taking office in February 2009, Attorney General Eric Holder faced an enormous challenge—some would say enormous opportunity—in the realm of white-collar criminal enforcement. The country was in the midst of a financial crisis, caused most immediately by a sharp collapse in real estate prices, resulting in trillions of dollars of losses in securities closely tied to real estate.

The enormous losses led to widespread calls to hold people accountable for criminal activity, but criminal investigations and prosecutions faced a number of obstacles. Among them were the difficulty of distinguishing between losses due to fraud and losses due to market and economic forces, and distinguishing between a fraudulent state of mind and genuine uncertainty about the future, particularly given the complexity of the underlying transactions and large number of institutions and individuals, including leading government officials, who were shocked by the severity and suddenness of the real estate collapse.[1] Though some of the effects of the financial crisis have dissipated, Attorney General Holder's record in white-collar enforcement may, to a large extent, be defined by competing views about whether the department responded to the crisis appropriately.

As the Attorney General's tenure winds down, we give our impressions below of how, in general terms, the department responded to the financial crisis, including some seeming innocuous choices that may have affected the nature and extent of its response. Next, we highlight key initiatives of the department beyond the financial crisis, many of which concern the financial institutions, which largely continue to the present. Lastly, we discuss what may be the priorities of the department going forward—priorities that seem to owe much to the apparent successes and criticisms of the department under Holder.

Response to Financial Crisis

With the benefit of hindsight, we can sketch the approaches taken by the Department of Justice to the financial crisis, particularly as some of the department's biggest cases have come to fruition in the past year. The department's efforts have been characterized by the collection of billions of dollars in fines and penalties arising, for the most part, from civil rather than criminal cases brought against financial institutions, and from company deferred prosecution agreements rather than criminal charges against the principal financial institutions blamed by many for the financial crisis.[2]

These enforcement efforts brought to the fore two powerful laws authorizing the filing of civil fraud charges by the government: the False Claims Act (FCA) and the Financial Institutions Reform, Recovery and Enforcement Act, better known as FIRREA. In September 2014, Holder spoke of the cases brought under these statutes—resulting in fines and penalties of more than $23 billion—and the government's intention to continue to rely on these laws to pursue financial fraud.[3]

These efforts have been criticized by some judges, politicians and commentators. To some, law enforcement has been too harsh, and to others, it has been too lenient, in particular to the extent the department has not charged individual company officers and employees.[4] The Attorney General's public comment that the prosecution of financial institutions could cause collateral harm to the economy—that, as commentators said, they were "too big to jail"—came under attack in some quarters.[5]

An organizational decision made by department leadership may have contributed to the results of its post-crisis enforcement efforts. Following the financial crisis, a Financial Fraud Task Force was established by President Barack

ELKAN ABRAMOWITZ *and* JONATHAN SACK *are members of Morvillo Abramowitz Grand Iason & Anello.* GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

Obama and led by Holder. The task force functioned more as a clearinghouse and data collector than as a strategist or steerer of cases. This approach contrasted with the department's response to the financial reporting scandals of the early 2000s when it formed a large and dedicated task force to concentrate on Enron-related prosecutions and, in the same vein, generally had many of its high-profile accounting fraud cases handled by a small number of U.S. Attorney's Offices. By comparison, it seems the department's response to the 2008 financial crisis lacked centralized strategy and coordination.

The impact of this organizational strategy may have been deepened by another difference between accounting fraud cases brought in the 2000s and the post-financial crisis cases brought in 2010 and later: a change in the type and extent of internal investigations into alleged misconduct by corporations.[6] Internal investigations into accounting fraud (sometimes conducted by new management) tended to be aggressive and exhaustive, and in many cases they combined with financial restatements to give prosecutors a road map to a prosecution.

In contrast, internal investigations following the financial crisis often lacked these characteristics, we think in part because both the government and the institutions involved were preoccupied with basic questions of survival and turnaround, and because the institutions may have come to question the wisdom of such investigations in light of the monitorships and other effects that often followed. Consequently, the department did not get as much benefit from internal investigations following the 2008 financial crisis as it had received in the not too distant past.

Debate will surely continue over the extent to which criminality—as opposed to ignorance or innocent error—contributed to the financial crisis, and over the success of the law enforcement response. But, as important as these questions are to judging Holder's tenure, white-collar prosecutions proceeded aggressively in other areas as well.

> Holder's record in white-collar enforcement may, to a large extent, be defined by competing views about whether the department responded to the financial crisis appropriately.

Other Areas of Enforcement

Financial institutions have been the subject of investigation and prosecution for a range of activity unrelated to transactions in the run up to the financial crisis. Large-scale investigations have touched virtually every type of activity carried out by large financial institutions: not just investment banking but also processing payments, trading and wealth management.

As to processing payments, bank compliance with anti-money laundering (AML) requirements and prohibitions on dealing with enemy countries have received considerable scrutiny. In June 2014, for example, French bank BNP Paribas agreed to pay a record fine—almost $9 billion—and pleaded guilty to AML violations related to the bank's transfer of funds on behalf of sanctioned countries, including Iran, Sudan and Cuba.[7] In other cases, rather than bringing criminal charges based on specific underlying transactions, federal prosecutors have charged banks with failing to maintain an effective system to detect and prevent money laundering. In December 2012, the department entered into a deferred prosecution agreement with British bank HSBC in which the bank admitted to AML and sanctions violations and agreed to forfeit $1.256 billion.[8] Such cases have been notable for extending the reach of U.S. jurisdiction to largely foreign activity because of a nexus to our financial system.

Large financial institutions have also been subject to investigations and prosecutions arising from trading relating to interest rates and foreign exchange. The government has obtained upwards of $6 billion from settlements with banks including Barclays, UBS and Rabobank in connection with an alleged manipulation of the London Interbank Offered Rate, the benchmark interest rate used in many commercial and consumer transactions.[9] Similarly, six banks, including HSBC, UBS, Citigroup, JPMorgan Chase and Bank of America agreed to pay $4.3 billion to regulators in the United States, United Kingdom and Switzerland to settle allegations that traders tried to move key foreign exchange benchmarks to their advantage.[10]

Lastly, as to wealth management, financial institutions as well as individuals have been targets of the department's and IRS's investigations of false tax reporting of off-shore income, which has resulted in a guilty plea from Credit Suisse Group[11] and deferred prosecution agreement with UBS,[12] the conviction of numerous individual taxpayers, and the large-scale collection of taxes from taxpayers who have availed themselves of the offshore voluntary disclosure program. The federal effort has resulted in recovering billions of dollars in tax revenue.[13]

While space does not permit a detailed discussion of all areas of white-collar enforcement in recent years, two more broad categories warrant mention—the Foreign Corrupt Practices Act (FCPA) and insider trading. The FCPA continues to take up the time of many prosecutors and defense lawyers, resulting in a large number of cases and settlements in recent years, one of the most recent being the department's deal with Alstom, a French

power and transportation company, which required the company to admit making more than $75 million in unlawful payments and to pay over $772 million to the government. The penalty is the biggest criminal fine ever levied for FCPA offenses and the second biggest FCPA enforcement action overall.[14] Recent speeches by department officials suggest no letup in the department's efforts.[15]

Prosecutions of insider trading also have been a large focus in recent years, particularly from the U.S. Attorney's Office for the Southern District of New York, and have relied upon the use of investigative techniques, such as wiretaps, which are relatively rare in white-collar cases.[16] The U.S. Court of Appeals for the Second Circuit's recent decision in *United States v. Newman*, though arguably curtailing future prosecutions of remote tippees, is unlikely to reduce law enforcement interest in bringing viable insider trading cases.[17]

Conclusion

Despite the breadth and ostensible success of law enforcement efforts under Attorney General Holder, a concern with holding individuals accountable remains a theme of recent comments by department officials, particularly in the context of discussing a company's obligation to cooperate fully with the government.

In September 2014, Holder gave a speech arguing that holding company officials individually accountable is vital to deterring corporate wrongdoing.[18] Other department officials have urged companies to "make securing of evidence of individual culpability the focus of your investigative efforts,"[19] and have advised company counsel that a company will only receive full cooperation credit if it "root[s] out the misconduct and identif[ies] the individuals responsible, even if they are senior executives."[20] Reflecting these views, the department sharply criticized Alstom, in connection with an FCPA settlement, for failing to make voluntary disclosure of misconduct and cooperate fully with the government until criminal charges were filed against several executives.[21]

The department's deal with Alstom, a French power and transportation company, required the company to admit making more than $75 million in unlawful payments and to pay over $772 million to the government. The penalty is the biggest criminal fine ever levied for FCPA offenses.

As Holder approaches the end of his tenure, we see an ironic turn of events. Following the bursting of the Internet bubble in 2000, a series of accounting scandals led to internal investigations and extensive company cooperation with law enforcement authorities. Many commentators and some courts concluded that undue pressure was imposed on companies, which was reflected most acutely in the KPMG tax-shelter related prosecutions and Judge Lewis Kaplan's decisions in *United States v. Stein*.[22] The department's policy on corporate prosecutions, embodied (ironically) in a document called the "Holder Memorandum," was changed as a result.[23]

Now, following the 2008 financial crisis, companies once again may be feeling pressure to develop evidence for the government and against their employees. We hope the department is mindful not to repeat practices which led to reforms in the past.

1. See Treasury Chairman Ben S. Bernanke, "The Economic Outlook," Testimony before the Joint Congressional Economic Committee (March 28, 2007).
2. See, e.g., *United States v. JPMorgan Chase Bank*, 13 Civ. 220 (S.D.N.Y.) (FCA settlement); *United States v. Wells Fargo Bank*, 12 Civ. 7527 (S.D.N.Y.) (FCA and FIRREA claims); *United States v. CitiMortgage*, 11 Civ. 5473 (S.D.N.Y.) (FCA and FIRREA settlement); *United States v. Bank of America*, 3:13-cv-446 (W.D.N.C.)(FCA and FIRREA settlement).
3. See Press Release, Office of Pub. Affairs, U.S. Dept. of Justice, Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014).
4. See Jed S. Rakoff, "The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?" The New York Review of Books (Jan. 9, 2014); Elkan Abramowitz and Jonathan Sack, "Courts Push Back Against Government Deals with Companies," NYLJ (Nov. 5, 2013).
5. Elkan Abramowitz and Jonathan Sack, "The 'Civil-izing' of White-Collar Criminal Enforcement," NYLJ (May 7, 2013).
6. Elkan Abramowitz and Jonathan Sack, "Why So Few Prosecutions Connected to the Financial Crisis?" NYLJ (Sept. 4, 2013).
7. Devlin Barrett, Christopher Matthews and Andrew R. Johnson, "BNP Paribas Draws a Record Fine for 'Tour de Fraud,'" The Wall Street Journal (June 30, 2014).
8. Press Release, Justice Department, "HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement" (Dec. 11, 2012).
9. See, e.g. Press Release, Department of Justice, "Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty" (June 27, 2012).
10. Chiara Albanese, "5 Things to Know About the FX Probe Settlement," The Wall Street Journal Blog (Nov. 12, 2014).
11. Andrew Grossman, John Letzing and Devlin Barrett, "Credit Suisse Pleads Guilty in Criminal Tax Case," The Wall Street Journal (May 19, 2014).
12. Press Release, Justice Department, "UBS Enters into Deferred Prosecution Agreement" (Feb. 18, 2009).
13. Jeremy H. Temkin, "Congress Weighs in on Offshore Enforcement," NYLJ (Mar. 24, 2014).
14. Press Release, Justice Department, "Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges" (Dec. 22, 2014).
15. Justice Department, "Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act" (Nov. 19, 2014).
16. Reed Albergotti, "Rajaratnam Appeal Targets Wiretaps," Wall Street Journal (Oct. 25, 2012).
17. Elkan Abramowitz and Jonathan Sack, "Implications of Second Circuit Reversal of Insider Trading Convictions," NYLJ (Jan. 6, 2014).
18. Justice Department, Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014).
19. Justice Department, Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program (Sept. 17, 2014).
20. Justice Department, Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014).
21. Max Stendahl, "DOJ Sends Message with Historic Alstom FCPA Pact," Law360.com (Dec. 22, 2014).
22. *United States v. Stein*, 05cr888 (S.D.N.Y.).
23. The Holder Memorandum is available at http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF. The Justice Department's current "Principles of Federal Prosecution of Business Organizations" is available at: www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.