

WHITE-COLLAR CRIME

Expert Analysis

White-Collar Enforcement After Two Years of Trump

The half-way point of President Donald Trump's term offers an opportunity to examine the data and assess the impact of his administration on business-related prosecutions. The data confirms that, as many predicted, the landscape of white-collar criminal enforcement has been altered under Trump's pro-business administration. Focused primarily on violent crime, opioid cases and, most notably, immigration violations, Justice Department statements and policies over the last two years have made clear that prosecuting business conduct is not a top priority. The administration's shift in emphasis has resulted in a decline not only in the number of traditional white-collar cases brought, but also in the amounts of fines and penalties imposed on white-collar wrongdoers. At the same time, immigration-related offenses accounted for more than half of all federal prosecutions in fiscal year 2018.

Shifting Enforcement Priorities

At the American Conference Institute's 19th Annual Conference on the

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Foreign Corrupt Practices Act in April 2017, then Acting Principal Deputy Assistant Attorney General Trevor N. McFadden acknowledged rumblings that federal prosecutors no longer

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were encouraged to pursue white-collar crime. Although the Justice Department was understood to be doubling down on the prosecution of violent crime "given the spike in violent crime—and especially in murders—in some areas of the country," McFadden asserted that the Department nevertheless remained focused on a wide array of white-collar matters, including enforcement of the FCPA.

Even so, Justice Department statements and policy revisions have signaled the contrary. When it comes to business organizations, rather than "employ the hammer of criminal enforcement to extract unfair settlements" from corporate entities, Justice Department officials have emphasized individual liability and have relaxed departmental guidelines to allow for increased leniency where a business entity cooperates and voluntarily discloses wrongdoing. See Robert J. Anello and Richard F. Albert, "Sessions' Justice Department's Pragmatic Approach to Corporate Accountability," N.Y.L.J. (June 8, 2018).

As McFadden put it, the aim of the Fraud Section and FCPA Unit of the Criminal Division is not to "prosecute every company we can, or break our own records for the largest fines or longest prison sentences," but instead to promote voluntary compliance with the law by companies and individual employees.

Further policy pronouncements welcomed by many in the business community, such as the adoption of a standard aimed at reducing the "piling on" of repeated punishments on highly regulated industries and changes to the Principles of Federal Prosecution of Business

Organizations which make it easier for companies to obtain cooperation credit without having to provide information about every individual involved in the wrongdoing, illustrate the government's moderated approach to corporate wrongdoing. Data from the past two years show the real-world impact of the Justice Department's shift in approach.

White-Collar Statistics

A May 2018 analysis from Syracuse University's Transactional Records Clearinghouse (TRAC) reports that the volume of federal white-collar fraud prosecutions is at its lowest level in twenty years. In fiscal years 2010 and 2011, the period reflecting prosecutions resulting from the 2008 financial crisis, prosecutions hovered around 10,000 per year. This number fell to just over 8,000 in fiscal year 2012 and has gone down since.

The figures show a decline in the prosecution of fraud cases since then, to just under 6,000 in fiscal year 2017, their lowest level in two decades. A November 2018 report from TRAC revealed that the number of federal white-collar crime prosecutions continued to decline throughout fiscal year 2018—down 3.7 percent from the year before and over 30 percent from five years ago. The decrease is particularly significant when compared to the 34.8 percent increase in overall prosecutions for fiscal year 2018. According to TRAC, the total number of new federal prosecutions filed annually also had ebbed since 2013, but jumped from 122,492 in Trump's first year to 165,070 in his second year.

TRAC reported that the single largest category of federal prosecutions brought in fiscal year 2018 was immigration offenses—60.9 percent of all

prosecutions (up from 37.5 percent in fiscal year 2017)—with narcotics prosecutions running a distant second with 13 percent. According to annual statistical reports issued by the Justice Department, in the period prior to Trump's election, from 2008-2016, the number of immigration-related prosecutions hovered between 37 and 43 percent of the total number of prosecutions.

Some words of caution and context are required in considering these statistics. Because bringing significant business-related prosecutions can require lengthy periods of investigative effort, the volume of such cases brought is not necessarily indicative of an administration's enforcement priorities. Instead, the amount of money recouped in penalties, disgorgement, and restitution may more clearly illustrate the degree of continuity of white-collar enforcement from one administration to the next.

This data, analyzed by The New York Times and outside experts in a November 2018 report, provides a revealing picture of the impact the Trump administration has had on white-collar crime. Ben Protess, Robert Gebeloff and Danielle Ivory, "Trump Administration Spares Corporate Wrongdoers Billions in Penalties," The New York Times (Nov. 3, 2018).

To prepare its report, the Times culled data maintained by the University of Virginia School of Law and Duke Law School and the SEC's annual reports to create its own database of Justice Department corporate criminal prosecutions and civil fraud actions as well as administrative enforcement actions. The Times' methodology in preparing its report was reviewed in advance by former employees of the Justice Department and the SEC during both Republican

and Democratic administrations. See "How the Trump Enforcement Numbers Were Calculated," The New York Times (Nov. 3, 2018).

The report compares the cases filed by the Justice Department and the SEC during the first 20 months of the Trump presidency with the final 20 months of President Barack Obama's administration. That report revealed a 72 percent decline in corporate penalties from Justice Department criminal prosecutions, down to \$3.93 billion from \$14.5 billion in the Obama administration's final months.

According to the Times' report, the government's philosophical shift favoring big business and prioritizing the interests of individual shareholders extends across the federal financial enforcement agencies, with the exception of the Commodities Futures Trading Commission. This conclusion is borne out by other analyses. For instance, a study conducted by Cynthia Giles, a fellow at the Harvard Environmental and Energy Law Program and former head of enforcement for the Environmental Protection Agency, shows that civil penalties imposed against polluters by the EPA are at their lowest level since 1994.

In the two decades before Trump took office, EPA civil fines averaged more than \$500 million a year. In 2018, this average declined to \$72 million, an 85 percent drop. "EPA Fines for Polluters Drop 85% Under Trump," The Washington Post (Jan. 24, 2019).

Of course, a number of circumstances beyond the administration's enforcement priorities may explain some of the decrease in penalties recouped. These include recent Supreme Court rulings that capped the amounts the SEC can obtain, the natural ebb in activity at the start of a new administration, and

the relative success of the economy and stock market which some maintain make it difficult for agencies to uncover misconduct because “evidence of malfeasance is often easier to identify in tougher economic times.”

High-profile investigations begun during the Obama administration and concluded during the Trump administration may serve as further real-world evidence of the current administration’s more moderate position on corporate liability. Barclays Plc pushed back against the Obama Justice Department’s demand for penalties between \$5 billion and \$7 billion dollars for its role in selling mortgage bonds during the financial crisis, resulting in the government filing a lawsuit under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) at the end of Obama’s term.

In March 2018, Trump’s Justice Department settled the case for \$2 billion. Similarly, the Royal Bank of Scotland, also charged with selling improper financial products during the financial crisis, under the threat of criminal prosecution during Obama’s tenure, reached a \$4.9 billion civil settlement with the government after Trump was sworn into office.

Cases That Buck the Trend

While the Barclays and RBS cases reinforce the perception of a shift in approach, there are idiosyncratic examples of aggressive white-collar enforcement from the Trump administration, such as the FCPA investigation of Walmart. During Obama’s term, the Justice Department spent years investigating whether the giant retailer had bribed officials in Mexico, India, and China in violation of the FCPA. Justice officials and the SEC pushed for steep penalties—in the neighborhood of \$600

million according to media reports—and sought a guilty plea from the company or one of its subsidiaries. According to anonymous sources, after Trump was elected but before he was sworn in to office, negotiations between the government and Walmart waned.

The parties were reported to have settled on terms more favorable to the company, with Walmart stating that it had reserved \$300 million for a possible resolution. Months later, however, no settlement had been reached. Media reports indicate that prosecutors’ insistence that Walmart

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admit to misconduct as part of the settlement has posed a significant stumbling block.

Further, despite the decline in federal fraud prosecutions, numbers have risen in other areas of white-collar practice. For instance, the number of prosecutions of international corruption brought by the Justice Department’s FCPA Unit ballooned more than three-fold in 2018. Traditionally, the FCPA Unit focused only on prosecuting the bribe-giver in these cases because the “foreign official” bribe-receivers were exempt from the anti-bribery provisions. Over the past year, prosecutors have taken a more aggressive approach by asserting jurisdiction and charging such officials under the

federal money laundering statutes. As a result, in 2018, the FCPA Unit brought twenty-six non-FCPA cases (up from seven in 2017) on top of twenty-one FCPA prosecutions.

As a result, despite Trump’s stated antagonism toward the FCPA, 2018 surprisingly was the most prolific year in the history of foreign anti-corruption enforcement by the U.S. government. This also was reflected in the amount of monetary penalties imposed on corporations for FCPA-related conduct increased in 2018, rising by 52 percent from \$1.9 billion in 2017 to \$2.9 billion in 2018—an increase attributable mostly to the \$1.8 billion Petrobras settlement, one of the largest in FCPA history.

Conclusion

The data supports early predictions of a shift in the way the Justice Department would approach white-collar wrongdoing under President Trump. Overall, even though the total number of federal prosecutions has increased, the volume of white-collar prosecutions is significantly down, as is the quantum of financial consequences imposed by the government in white-collar cases. Not surprisingly, the statistics show that criminal enforcement has been more focused on immigration and violent crime. That said, the Trump Justice Department has remained aggressive and creative in its pursuit of individual wrongdoers in certain business-related areas, particularly in international corruption and foreign bribery.