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WHITE-COLLAR CRIME

Signaling Tougher Tone, Biden Administration Steps Backward

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A recent address by Deputy Attorney General Lisa Monaco, along with recent pronouncements by the leadership of the Securities and Exchange Commission, confirm that the Biden Administration wants to portend a return to tougher corporate enforcement. By undoing some of the higher profile policy changes of the prior administration that many perceived as business-friendly, the current administration has served notice on the business and financial community of a return to practices characteristic of a more aggressive enforcement regime.

The Administration's signaling a change in tone was widely expected. If that change in tone means, more substantively, that the Justice Department, SEC, and other federal law enforcement agencies intend to shift their priorities and reallocate resources toward effectively investigating and prosecuting more complex business cases, the results should be revealed in the enforcement numbers and the headlines over the coming months and years. Time will tell.

The key policy changes announced thus far, however—including a return to the Yates Memo policy of requiring cooperating corporations to provide full information about all involved in wrongful conduct, no matter what their culpability; a reversal of any presumption against monitorships; and a renewed effort to seek admissions of wrongdoing in SEC enforcement settlements—appear to be more symbolism than serious efforts at effective reform. Substantively, many will see these changes as a reversion to prior policies that did not work particularly well in practice and rightly were the subject of criticism.

Background

The Trump Administration de-prioritized white-collar enforcement. As discussed previously in this column, the Trump Administration's pronouncements indicated a resource shift to other law enforcement priorities such as immigration and violent crime, and policy changes reflected the view that prior enforcement efforts had imposed excessive costs on business. See Anello and Albert, *White-Collar Criminal Enforcement in the Era of Trump*, NYLJ (Feb. 8, 2018). Indeed, over the course of Trump's term, the empirical evidence confirmed that the number of white-collar prosecutions and the amounts of penalties imposed dipped substantially. For example, an analysis released in March 2020 by Syracuse University's Transactional Records Access Clearinghouse found that, as of that date, the number of defendants charged with white-collar crimes in 2019 was the lowest annual total since the DOJ began tracking them back in 1986, and that as of the date of the report, for 2020, the number was trending more than 9% below 2019's all-time low. A November 2018 New York Times article identified a 72% decline in corporate financial penalties in criminal prosecutions by the Justice Department from $14.15 billion under the last 20 months of the Obama Administration to $3.93 billion under the first 20 months under

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the Trump Administration. See Protess et al., *The Trump Administration Spares Corporate Wrongdoers Billions*, New York Times (Nov. 3, 2018). The data confirmed what practitioners observed: White-collar investigations and enforcement actions, particularly big ones, were fewer and farther between.

Monaco Address and SEC Pronouncements

Deputy Attorney General Lisa Monaco heralded a return to more vigorous white-collar enforcement, providing the Biden Justice Department's most detailed comments thus far on the subject in an Oct. 28, 2021 keynote address at the American Bar Association's 36th National Institute on White-Collar Crime. Monaco stressed the oft-repeated DOJ theme that it would prioritize the prosecution of responsible individuals as opposed to merely punishing organizations. As part of that thesis, Monaco announced that the Biden administration will restore prior guidance, set forth in the Obama Administration's controversial "Yates Memo," that corporations must provide the department with "all non-privileged information" about individuals "involved in or responsible for the misconduct at issue," regardless of their position or culpability, to receive cooperation credit. Monaco also announced the retraction of any DOJ guidance that may have suggested that corporate monitorships were disfavored.

Monaco further revealed the policy change that the DOJ will be looking at a company's entire history of prior misconduct (including its criminal, civil and regulatory record) to assess its commitment to compliance and culture of disincentivizing criminal activity, rather than restricting that review to similar misconduct. Monaco also noted the creation of a Corporate Crime Advisory Group which will be tasked with assessing new technologies that facilitate data processing and reviewing the appropriateness of alternative resolutions to corporate criminal cases including deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs), or plea agreements.

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Recent statements regarding enforcement by senior SEC officials sound similar themes and include policy changes that likewise hearken back to the Obama Administration. In an Oct. 13, 2021 speech, SEC Enforcement Division Director Gurbir Grewal, argued that low investor confidence in the fairness of the financial markets is due in part to a perception that regulators are either failing to hold criminal corporate actors accountable or are enforcing rules inequitably. Among the principal reforms Grewal announced was increased emphasis on requiring admissions of wrongdoing from corporate defendants as part of SEC enforcement actions, rather than relying on the SEC's traditional "no admit, no deny" resolutions. In a Nov. 4, 2021 speech at the Securities Enforcement Forum, SEC Chair Gary Gensler highlighted that the Biden administration would seek to pursue high impact cases, emphasizing the importance of requiring admissions of wrongdoing in cases where "heightened accountability and acceptance of responsibility are in the public interest."

In another procedural change, Grewal also announced an intention to limit pre-charge Wells meetings with senior Enforcement Division leadership in cases believed not to entail novel or complex legal issues. Practitioners who have experienced the benefits of thorough review by top leadership may view this change as reducing the effectiveness of the Wells process and likely to result in more unwarranted cases and wasted resources.

Yates Memo Revived

The Yates Memo, issued by then Deputy Attorney General Sally Yates on Sept. 9, 2015, promised more aggressive efforts by the DOJ to pursue individual accountability for corporate wrongdoing. The theory of requiring cooperating corporations to provide full information regarding all individuals involved in corporate misconduct, regardless of their position or the corporation's view of their culpability, was to enable prosecutors to pursue prosecutions of more individuals, and more senior officers, by eliminating a company's discretion effectively to shield any personnel through subjective judgments about their culpability.

Many were skeptical, however, that the memo's policy would have a substantial impact on the DOJ's prosecution of individuals given the incentives of corporations to settle cases through DPAs and NPAs, and the inherently

greater difficulties in bringing complex white-collar cases against individuals. This skepticism turned out to be largely correct. As pointed out by Prof. Brandon L. Garrett of Duke University Law School, from 2001 to 2014, 104 companies out of 306, or 34%, had officers or employees prosecuted as part of DPAs or NPAs and in the years following the Yates Memo, from 2015 to 2018, this percentage did not meaningfully change. Brandon L. Garrett, *Declining Corporate Prosecutions*, American Criminal Law Review, Vol 57:109 (2019)

Indeed, the Procrustean nature and impracticality of the Yates Memo policy is fairly apparent on its face. Consider, for example, a fraud conspiracy that entails a senior executive intentionally directing that a software program over-calculate certain charges for the company's services, which overcharges are then put into effect by scores of unknowing sales staff members. Little purpose is served by forcing a company to provide "all information" about staff who were "involved in" the misconduct but whose culpability or responsibility for that conduct is obviously insufficient to make them worthy of prosecution. A policy announced from the top of DOJ that purports to require "all information" about such personnel is not likely to be enforced.

Deputy Attorney General Rod J. Rosenstein made these very points in a Nov. 29, 2018 speech announcing that the Yates Memo guidance would be scaled back such that corporations seeking cooperation credit need identify only individuals who were "substantially involved in or responsible for" the criminal conduct, noting that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted." He continued that experience taught that the Yates Memo policy was not practical and "not strictly enforced in some cases because it would have impeded resolutions and wasted resources" particularly in cases where the government and the company disagreed about the scope of the misconduct. Deputy Attorney General Monaco did not address these criticisms in her announcement of the revival of the Yates Memo policy.

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Monitorships

Monitorships are sometimes imposed on corporations as part of a negotiated agreement to resolve a prosecution via a guilty plea, DPA, or an NPA. They entail the appointment of an independent third party to assess adherence to the terms of the agreement, typically those that require remediation and enhancement of compliance structures. After pointed criticisms regarding some questionable practices regarding the selection of monitors, a DOJ internal review resulted in a set of formal policies regarding the choosing and role of monitors, outlined in a 2008 memorandum by Acting Deputy Attorney General Craig S. Morford.

In the ensuing years, the imposition of a compliance monitor was a regular feature of negotiated resolutions of corporate criminal prosecutions, estimated by some as occurring in one-third of such cases. In response to rising criticisms of the high costs and questionable effectiveness of monitorships, in October 2018, the Trump Administration issued revised guidance, in a memorandum by Assistant Attorney General Brian Benczkowski, understood by most to indicate a presumption against monitorships. The Benczkowski Memo stated that "the imposition of a monitor will not be necessary in many corporate criminal resolutions" and instructed federal prosecutors to consider several factors in addition to those outlined by the Morford Memo including whether the misconduct occurred under a different corporate leadership or compliance environment, adequate remedial measures have been taken, and the monetary costs to the business justified the monitorship. Consistent with the messaging of the Benczkowski Memo, observers noted a substantial decline in monitorships under the Trump DOJ, down from 26% of corporate NPA and DPA agreements between 2016 and the middle of 2018, to 16% of such agreements in 2019, to zero such agreements in 2020. See Robert J. Anello, *Who Watches The Store? Drastic Decline Of Corporate Monitors Under Trump*, Forbes, The Insider (Sept. 8, 2020); Michael

Volkov, *The Curious Absence of Corporate Monitors*, JD Supra (Jan. 19, 2021).

Instances of monitorships entailing excessive costs, and monitors exceeding the parameters of their appointments and seeking to impose their will improperly on companies have been at the heart of most criticisms of the practice. See, e.g., Rachel Louise Ensign and Max Colchester, *Meet the Private Watchdogs Who Police Financial Institutions*, Wall Street Journal (Aug. 30, 2015) (describing a 2014 resolution of Arizona's state prosecution of Western Union where company complaints resulted in three monitors being dismissed within four years). More significantly, however, a recent academic study examined the questionable effectiveness of corporate monitors. The study examined 193 DPAs and NPAs between the DOJ and publicly listed companies over the period of 2001 to 2019, one-third of which included a monitor. Although the study found 18-25% fewer violations of law when a monitor was assigned to a violating firm relative to a matched sample of violating firms not required to appoint a monitor, the effect did not persist after the monitor's term was completed. See Gallo et al., *Out of Site, Out of Mind? The Role of the Government-Appointed Corporate Monitor*, University of Chicago, Booth School of Business, Working Paper, March 17, 2021.

Perhaps future pronouncements from the Justice Department will include analysis of ways to make monitors more effective and more efficient. Deputy Attorney General Monaco's announcement, however, did not address these issues.

Admissions of Wrongdoing in SEC Enforcement Actions

SEC Enforcement Director Grewal's call for corporate admissions of wrongdoing in enforcement actions is another reversion to an Obama era policy. Following criticism of the SEC's longstanding "no admit, no deny" settlement practice culminating in forceful comments by Judge Jed Rakoff in *SEC v. Citigroup Global Markets*, then SEC Chair Mary Jo White implemented a new policy in June 2013. As she described it in a September 2013 speech, the agency would require admissions in an expanded category of cases where there was "a special need for public accountability and acceptance of responsibility" and described broadly defined circumstances when the Commission might exercise its discretion to require admissions. Critics, led notably by Sen. Elizabeth Warren, quickly criticized the SEC's implementation of the policy, complaining about the low number of cases involving admissions, and asserting that the policy appeared to focus on low level, garden variety violations rather than egregious cases, and to target individuals and small entities rather than large institutions or banks. See Office of Sen. Elizabeth Warren, *Rigged Justice 2016: How Weak Enforcement Lets Corporate Offenders Off Easy 1* (Jan. 29, 2016).

A detailed empirical study published in 2018 concluded that although the number of settlements entailing admissions increased following White's announcement, "[n]o matter how you count," the number of settlements that contain admissions remained low. For instance, the rate was approximately 3.6% of settlements between June 2013 and September 2014. Measuring the significance of the cases involving admissions was more difficult. The study nevertheless also provided support for critics, finding that 46% of such settlements entailed total monetary sanctions under $1 million. See Winship and Robbennolt, *An Empirical Study of SEC Settlements*, U. Ariz. L. Rev. Vol 60:1 (2018).

In light of the modest overall effect of the SEC's policy change during the Obama era, critics fairly question whether the newly announced return to emphasizing admissions will have an appreciable impact on enforcement goals, and whether the practical considerations that limited the implementation of the policy—achieving acceptable settlements without undue expenditure of resources—will again limit the policy's effectiveness this time around.

Conclusion

The Biden Administration has signaled a return to more vigorous white-collar enforcement. Because its key announcements thus far entail the reinstitution of prior policies of questionable efficacy, however, some may see them as revealing a disappointing lack of fresh thinking.