

## White-Collar Crime

## Expert Analysis

# White-Collar Criminal Enforcement In the Era of Trump

**A**t the beginning of 2017, speculation about the impact that the nascent Trump administration would have on white-collar criminal enforcement was widespread. Queries focused on the Trump administration's likely prosecution priorities, the impact of Trump appointees, and how Wall Street and corporate entities would be treated given Trump's business background. With the resolution of many of the Obama-era cases, the white-collar enforcement agenda of the Trump administration likely will become more evident in the coming year. A number of practitioners already have commented that they perceive a marked slowdown in Justice Department investigations of corporate America. One explanation may be a potential recalibration of the Justice Department's approach to the prosecution of business organizations,



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as alluded to in Attorney General Jeff Sessions' remarks that good corporations should not be penalized for isolated employee wrongdoing. Other factors cited are an articulated shift in the federal government's law enforcement priorities, and the loss of aggressive, seasoned prosecutors from the Justice Department.

The perception of a decline in the number of corporate investigations may or may not be borne out by statistics in the coming months and years. After one year in office, however, what is apparent is that the new administration is emphasizing individual rather than corporate liability in white-collar investigations and has shifted the focus of criminal law enforcement

toward some non-white-collar priorities. The move away from corporate criminal liability has been manifest in policy decisions by the Justice Department, such as its November 2017 endorsement of a presumption that the government will decline to prosecute a company for FCPA misconduct if

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the entity disclosed misconduct and cooperated in a timely manner.

### DOJ's Approach to Corporate Fraud

When it comes to white-collar investigations and prosecutions, the current Justice Department leadership repeatedly has announced an increased focus

on individual liability for corporate wrongdoing and, impliedly, a declining focus on corporate liability. At a conference in April 2017, Sessions, in what some have seen as a dramatic philosophical shift, remarked that “A company cannot be a guarantor that any of its perhaps thousands of employees never do something wrong. We do not need to have good companies trying to run a good ship be subjected often to millions of dollars of lawsuits or criminal penalties beyond a rational basis because one person went awry or one division chief went awry.”

Deputy Attorney General Rosenstein specifically addressed the department’s implementation of this approach in his keynote address at a program on Corporate Compliance and Enforcement on Oct. 6, 2017. During that speech, Rosenstein referenced a 2015 memorandum entitled “Individual Accountability for Corporate Wrongdoing” authored by former Obama-administration Deputy Attorney General Sally Q. Yates—the much ballyhooed “Yates Memo”—and other memoranda setting forth the department’s approach to the prosecution of business organizations. He noted that these policies were being reviewed by Sessions and his staff and that any changes would be consolidated and incorporated into the U.S. Attorneys’ Manual to promote “predictability

and consistency.” Rosenstein stated, “Management-by-memo is an inefficient and often ineffective method of enforcing government policies. Our policies should be readily accessible to the people we expect to follow them.”

Rosenstein also noted that any changes to the Justice Department’s policy on the prosecution of business organizations would affirm that the government should not use its criminal authority to unfairly extract civil payments. Finally, he promised that the policy would be clear and concise

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Federal law enforcement officials have enunciated a clear focus on non-white-collar crimes and, with numerous vacancies in the Justice Department, this shifting focus is likely to result in a decrease in white-collar investigations and prosecutions.

and reflect input from stakeholders inside and outside the DOJ. Combined, these statements suggest the rebalancing of individual and corporate responsibility for corporate misconduct that comes down on the side of more individual responsibility and less draconian corporate penalties. According to Rosenstein, the department will no longer ask whether “a company [can] be too big to jail,” but “who made the decision to set the company on a course of criminal conduct?”

To answer this critical question, Rosenstein encouraged the use of whistleblowing and self-reporting, stating that cooperation from “good corporate citizens” was critical to identify cybercrime, hacking, and financial fraud schemes. He specifically noted that the Justice Department “is working to incentivize, reward, and even partner with companies that demonstrate a commitment to combating corporate fraud.”

Other signs indicate that the Trump administration is less focused on corporate prosecutions. First, the Financial Fraud Enforcement Task Force (FFETF), launched in November 2009 to investigate fraud following the 2007-2009 financial crisis, appears to be on life support. DAG Rosenstein has said that the Justice Department was “reviewing the mandate of the FFETF to evaluate whether it continues to meet current needs.”

Another sign is the decrease in the number of deferred prosecution and non-prosecution agreements entered into in 2017. DPAs and NPAs have been the government’s preferred method to resolve complex corporate criminal investigations. Perhaps a reflection of Sessions’ belief that the use of NPAs and DPAs “undermine the rule of law by depriving the [DOJ’s] legal arguments of meaningful testing in a judicial forum,” 2017 saw the

fewest such resolutions since 2009. Although this decline may be due in part to a push during the final weeks of the Obama administration to wrap up significant white-collar cases, which resulted in inflated statistics for 2016, this statistic also suggests an increased focus on prosecuting individuals and a declining focus on corporations.

### Shifting Priorities

Another factor in a decline in the investigation and prosecution of white-collar crimes is a shift in law enforcement priorities. The most obvious shift in the types of cases prosecuted by the federal government is the increased focus on immigration. Both President Trump and Sessions are proponents of expelling undocumented immigrants, limiting legal immigration, and building up America's border controls.

2017 statistics from Immigration and Customs Enforcement (ICE) reveal that ICE made more than 143,000 administrative arrests last year—the highest number over the past three years—and that more than 226,000 people were removed from the United States. Thirty-six percent of the removals were the direct result of ICE arrests, higher than the 27 percent in 2016, which ICE attributes to the Executive Order issued by Trump in January providing direction for the enhanced

implementation of immigration and deportation laws.

Federal authorities also increased focus on crimes of violence and drug crimes. In February 2017, Sessions established a Task Force on Crime Reduction and Public Safety to identify ways in which the federal government can “more effectively combat illegal immigration and violent crime, such as gun crime, drug trafficking, and gang violence.” The group also was tasked with reviewing current federal policies in the areas of charging, sentencing, and marijuana. At the end of July, Sessions announced a 23 percent leap in firearms offense cases as a result of the administration's focus on these efforts.

Other areas of enforcement, as articulated by DAG Rod Rosenstein, include money laundering, tax crimes, and export control violations, all of which reflect President Trump's goals of promoting American business interests. Without an effort to expand Justice Department staffing, an increased focus on these areas logically will result in decreased resources devoted to investigation and prosecution of more traditional areas of white-collar crime.

### Transition of Justice Department Staff

White-collar enforcement also may be receiving less attention due to significant vacancies in several senior leadership positions

at the Justice Department and United States Attorneys' offices around the country. Most notable is the vacuum caused by the departure of Andrew Weissman, former chief of the criminal fraud section, who left the department to join the special counsel team assembled by Robert Mueller to investigate Russia's interference in the presidential election. Since Weissman's departure, his deputy, Sandra Moser, has served as acting chief of the fraud section, but no permanent appointment has been made.

The criminal fraud division likely will not receive a permanent leader until an Assistant Attorney General in charge of the Criminal Division has been appointed. Trump's nominee for this position, Brian Benczkowski, has not been approved by the Senate. This, along with interim temporary appointments for United States Attorney in both the Southern and Eastern Districts of New York—offices that traditionally handle many of the more significant white-collar criminal cases—means that the Justice Department's overall approach to white-collar enforcement is, at a minimum, in transition.

### FCPA Enforcement: Similar, But Different

Before his election, Trump repeatedly stated his belief that enforcement of the Foreign Corrupt Practices Act (FCPA)—the

go-to statute of the Obama-administration Justice Department and Securities and Exchange Commission—harmed U.S. companies' economic interests by hindering their ability to compete on an international scale. As a result, many predicted a decline in FCPA enforcement under his watch. That has proven not to be the case. The number of FCPA enforcement cases brought by the Justice Department declined only slightly in 2017 from 26 to 23.

The Justice Department expressed its commitment to the FCPA in November 2017 when it announced that many aspects of the prior administration's Fraud Section's FCPA Enforcement Plan and Guidance, also referred to as the FCPA Pilot Program, were being made permanent through incorporation into the U.S. Attorneys' Manual. Rosenstein noted one significant change to the FCPA Pilot Program, however, which reflects the administration's openness to paths for corporations to avoid criminal liability. The new policy creates a presumption that companies will receive a declination of prosecution for FCPA misconduct if they voluntarily self-disclose misconduct and cooperate in a timely manner. This revision incentivizes corporations to voluntarily self-disclose potential FCPA violations to the federal government. To date, the program, has garnered the federal government

billions of dollars, and FCPA enforcement generally seems to have become sufficiently woven into the fabric of Justice Department enforcement as to be here to stay.

In fact, the Trump administration has been active on the FCPA front. In August 2017, the Justice Department filed two significant FCPA cases in investigations that had begun under the Obama administration. The first, brought in the District of Massachusetts, charges a former U.S. Army colonel for his alleged role in a bribery and money-laundering scheme in connection with an \$84 million port development project in Haiti. The second charged the owner of several Florida-based energy companies with FCPA violations for his role in a scheme to corruptly secure contracts from Venezuela's state-owned and state-controlled energy company. Fernando Ardila Rueda pleaded guilty in federal court in Houston in October.

In September 2017, the Justice Department and SEC obtained one of the largest FCPA settlements in history when Telia, a Swedish telecommunications provider, and its Uzbek subsidiary paid \$965 million in combined penalties to resolve bribery charges in connection with business in Uzbekistan. Time will tell if, as the President's comments suggest, the Justice Department may become more hesitant about

prosecuting American corporations under the FCPA, but this case demonstrates its continued willingness to pursue foreign entities.

## Conclusion

White-collar criminal enforcement will continue to evolve in the year ahead, but some predictions can be made based on year one of the Trump administration. Federal law enforcement officials have enunciated a clear focus on non-white-collar crimes and, with numerous vacancies in the Justice Department, this shifting focus is likely to result in a decrease in white-collar investigations and prosecutions—a notion supported by anecdotal reports from white-collar practitioners. Although not as numerous, white-collar cases will continue to be brought, as exemplified by recent FCPA cases. White-collar attorneys and their clients should anticipate that these investigations will be focused on identifying and targeting the individuals responsible for wrongdoing.