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DOJ Policies Aim to Reduce Enforcement Burden on Cooperating Entities

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The Department of Justice (DOJ) appears to be continuing to revamp its approach to companies suspected of financial crimes, and emphasize the importance of prosecutions of individuals. In a number of speeches in 2018, senior department officials, including Deputy Attorney General Rod J. Rosenstein (who reportedly will leave the DOJ upon confirmation of Attorney General nominee William Barr), indicated that prosecuting culpable individuals can be a more effective deterrent than corporate penalties. Consistent with that perspective, recent department policies have sought to reduce investigative burdens on companies, particularly those that seek to cooperate. However, setbacks to the DOJ in a number of notable 2018 trials may impact the DOJ's bullishness on individual prosecutions in this year.

Policy Changes

In 2018, the DOJ continued to expand the application of its 2017 Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, applying it as nonbinding guidance in criminal cases beyond the FCPA context. That policy expansion was announced in a March 2018 speech by John P. Cronan, then-acting assistant attorney general of the Criminal Division, and Benjamin Singer, then-chief of the Fraud Section's Securities and Financial Fraud Unit, at the American Bar Association's white collar crime conference.

The speech seemed to encourage corporations to self-disclose in other types of investigations by highlighting the significant reduction in penalties that can result, with Cronan and Singer pointing to a recent foreign exchange "front-running" investigation in which a financial institution received a formal declination letter based on its self-reporting, full cooperation and enhanced compliance program. The financial institution paid $12.9 million in restitution and disgorgement, compared to a deferred prosecution agreement and payment of $101.5 million in penalties and disgorgement following a similar investigation of a different bank in which, according to the DOJ, the bank did not self-report or fully cooperate with the investigation at its outset.

The DOJ policy against piling on — when multiple agencies investigate and punish companies for the same underlying misconduct — was announced in May 2018 and seems similarly designed to reduce the burden of enforcement activity on corporations, particularly when the entity cooperates. The policy encourages DOJ attorneys to coordinate, where possible, both within the department (where multiple components are investigating the same corporate entity) and with other federal, state, local and foreign investigating authorities, to alleviate the overlapping demands multiple investigations can place on corporations and eliminate "the unnecessary imposition of duplicative fines, penalties and/or forfeiture against the company." That said, the DOJ continues to emphasize in public statements its cooperation with other authorities as a means of increasing available evidence

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and facilitating far-reaching investigations of wrongdoing, an approach that naturally increases the burdens on corporations under investigation, particularly in the cross-border context. It therefore remains to be seen whether the so-called anti-piling on policy will in fact benefit such corporations.

The DOJ's recent revised guidance on the imposition of monitors, which calls for doing so "only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens," is another indication of the current department's sensitivity to corporate concerns. In announcing the revised guidance in October 2018, Assistant Attorney General Brian A. Benczkowski stated that monitors should be "the exception, not the rule." The so-called Benczkowski memorandum strongly suggests that the DOJ is narrowing the set of circumstances in which a monitor is required and limiting the role of appointed monitors. Indeed, the policy seems to give companies the opportunity to establish that a monitor is not required on the basis of factors including the company's investment in its own compliance program and internal controls, as well as its ability to demonstrate that those controls can detect and prevent misconduct.

Finally, and most recently, on November 29, 2018, Rosenstein announced a revised policy concerning individual accountability and cooperation credit for corporations. A refinement of the 2015 memorandum by then-Deputy Attorney General Sally Yates on the same topic, the updated policy takes a more practical, less burdensome approach to the requirement that cooperating corporate entities provide information about culpable individuals. For example, it no longer requires that companies identify "all relevant facts about the individuals involved" in order to receive cooperation credit. Instead, companies need to provide relevant facts only about individuals who were "substantially involved in or responsible for" the potential criminal misconduct. Moreover, the revised policy allows a company potentially to receive cooperation credit even where it is "unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully."

To be sure, these policies do not upend the fundamentals of the DOJ's approach to enforcement and corporate cooperation. But they do reflect a change in tone and a growing apparent recognition of the burdens companies face under investigation. They also encourage voluntary self-disclosure by increasing and clarifying the benefits of and removing obstacles to obtaining cooperation credit.

Recent Enforcement Actions

The DOJ's approach to corporate enforcement also is evident in actions brought and declined in 2018. For example, under the FCPA Corporate Enforcement Policy and the pilot program that preceded it, the DOJ declined prosecution in 11 of 13 cases where a company had voluntarily self-disclosed. (The remaining two investigations were resolved with nonprosecution agreements, and no monitors were imposed.) That said, the volume of FCPA actions brought and the penalties in those actions remained relatively constant in 2017 and 2018, suggesting that in circumstances where companies fail to self-disclose, enforcement activity continues to be relatively robust.

Outside the FCPA context, cases against banks and companies for financial crimes appear to have declined in 2018, with fewer industrywide actions than in prior years. One year is likely too short to define a trend. It is, of course, possible that the DOJ has been involved in nonpublic investigative activity during this time, and such cases typically take months, or even years, to build. Where financial crime cases have been brought, the penalties are 72 percent lower than during the prior administration, according to a *New York Times* analysis. If the data holds, overall, corporations dealing with potential criminal misconduct may be better-positioned to resolve investigations on more favorable terms than in the past, particularly if they are willing to self-disclose or, at a minimum, provide substantial cooperation. Companies with robust compliance programs and the ability to track and substantiate their effectiveness may fare particularly well.

While the DOJ appears committed to individual prosecutions, particularly those arising out of broader investigations begun in the prior administration in such areas as the FCPA, criminal antitrust, and fraud and market manipulation, the DOJ suffered setbacks in 2018 that may impact its approach to individual prosecutions in the future.

Hoskins. The U.S. Court of Appeals for the Second Circuit's decision in *United States v. Hoskins* limits the DOJ's reach in FCPA actions against individuals, particularly foreign nationals. Lawrence Hoskins, a non-U.S. citizen charged with conspiring to violate the FCPA, was an employee of a U.K. subsidiary of a French company and never entered U.S. territory during the period of the criminal scheme. The Second Circuit held that Hoskins therefore fell outside the categories of persons generally covered by the FCPA, and because he could not be charged with a substantive FCPA violation, he could likewise not be charged with conspiring or aiding-and-abetting violations of the

FCPA. (For more, see our September 4, 2018, client alert "Second Circuit Curtails Use of Conspiracy and Complicity Statutes in FCPA Actions.") While this decision does not entirely foreclose the possibility that a non-U.S. citizen acting outside the U.S. could be charged with an FCPA violation — indeed, the Second Circuit expressly left open the possibility that Hoskins could be charged as an agent of the company's U.S. subsidiary — the DOJ certainly will consider *Hoskins* when deciding whether to pursue an individual in similar circumstances.

Usher. In the antitrust context, the DOJ failed to obtain convictions after a jury trial in *United States v. Usher,* a prosecution of three foreign exchange traders charged in 2017 with conspiring to violate the Sherman Act by allegedly "bid rigging" in their trading of the euro/dollar currency pair. The defense argued, among other things, that trading data showed in many instances that the defendants were not coordinating trades.

Connolly. A case arising out of global investigations into the setting of Libor rates, *United States v. Connolly* ended in guilty verdicts for both defendants, but a pending post-trial motion raises significant questions about the implications of extensive law enforcement involvement in the relevant bank's internal investigation. Before trial, one of the defendants, Gavin Black, challenged the admission of statements he made to outside counsel conducting an internal investigation of the conduct of the bank's traders involved in setting Libor rates. During the internal investigation, Black was interviewed by outside counsel under threat of termination, and he claimed his statements were compelled in violation of the Fifth Amendment due to extensive law enforcement involvement in the bank's investigation, which had "federalized" outside counsel. While the government tried to moot the issue by opting not to offer his statements at trial, Black has moved, post-trial, to vacate his conviction and dismiss the case under *Kastigar v. United States*, which bars the use of compelled testimony, and evidence derived directly and indirectly therefrom, on Fifth Amendment grounds. Judge Colleen McMahon of the U.S. District Court for the Southern District of New York stated in a recent order that the "*Kastigar*/outsourced investigation motion" is "where the Government should be concentrating its efforts" in terms of post-trial briefing. Should Judge McMahon find a *Kastigar* violation and order a new trial or a dismissal of the charges, the ruling will have a significant impact on law enforcement's interactions with outside counsel handling internal investigations in future cases.

Conclusion

The DOJ's consideration of the burdens its investigations and resolutions impose on corporations and financial institutions, and its messaging that it may seek to alleviate those burdens while continuing to investigate and prosecute individual misconduct, seem likely to continue into 2019. Depending on the circumstances, some institutions may seek to benefit from the DOJ's current approach by voluntarily disclosing misconduct or at least providing substantial assistance to the government, including with respect to culpable individuals. Indeed, because the DOJ remains committed to individual prosecutions, companies can expect the department to continue to seek their assistance in investigating the conduct of culpable employees. And while the DOJ's 2018 prosecutions have not been entirely successful, its policies and public statements suggest it will continue to aggressively investigate wrongdoing by corporate employees into 2019. If anything, the DOJ's 2018 setbacks may cause it to seek even more information, evidence and assistance from cooperating corporations, in order to support its efforts to successfully prosecute culpable employees.

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