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Skadden Discusses DOJ’s White Collar Crime Enforcement Priorities

By [Gary DiBianco](#), [Andrew M. Good](#), [Ryan D. Junck](#), [Jessie K. Liu](#) and [David Meister](#) March 18, 2022

Comment

Remarks made by U.S. Department of Justice (DOJ) officials at the March 2022 American Bar Association’s (ABA’s) National Institute on White Collar Crime (the White Collar Conference) reflect the DOJ’s prioritizing white collar criminal enforcement under the Biden administration.¹

On March 3, 2022, U.S. Attorney General Merrick Garland and the head of the DOJ’s Criminal Division, Assistant Attorney General Kenneth Polite, announced at the conference the DOJ’s areas of focus for 2022. Unsurprisingly, those themes were topics covered throughout the conference and included: (i) additional resources for investigating and prosecuting corporate crime (including cybercrime and crypto crime, as listed below); (ii) a renewed focus on identifying individuals responsible for corporate misconduct; (iii) continued attention on compliance programs and guidance around the DOJ’s expectations for remediation in response to identified wrongdoing; (iv) cybercrime, the crypto currency space, and environmental, social and governance (ESG) issues; and (v) ensuring that corporations take into account the victims of their misconduct when implementing remedial measures. Matters relating to Russia also garnered attention, and Attorney General Garland’s [March 2, 2022, announcement](#) of the U.S. interagency Russian sanctions taskforce KleptoCapture generated additional discussion.

Congressional Requests for Increased Resources for White Collar Crime Enforcement

Attorney General Garland announced at the conference the DOJ’s plans to hire new personnel to strengthen corporate criminal enforcement capabilities. The Biden administration’s 2022 budget includes a requested \$36.5 million to hire an additional 120 DOJ attorneys and a \$325 million request to fund more than 900 U.S. Federal Bureau of Investigation (FBI) agents in order to further enhance the FBI’s white collar crime program. Attorney General Garland emphasized this focus during his [remarks](#) at a meeting with the DOJ’s component heads held on March 10, 2022, when he affirmed that the DOJ is bolstering its efforts to protect U.S. economic institutions by “reinvigorating our antitrust enforcement, by reinvigorating our white collar crime enforcement, by reinvigorating our environmental crime enforcement.”

Attorney General Garland also noted that he is appointing a chief prosecutor dedicated to combatting “pandemic fraud,” an action aimed to build on the existing work of the DOJ’s COVID-19 Fraud Enforcement Task Force that was established in May 2021.² Attorney General Garland remarked, “As a defense attorney, prosecutor and judge, I have also seen the Justice Department’s interest in prosecuting corporate crime wax and wane over time. ... Today, it is waxing again.”

Holding Individual Wrongdoers Accountable as a Top DOJ Priority

Both Attorney General Garland and Assistant Attorney General Polite highlighted that enforcing penalties against individual wrongdoers is the DOJ’s top corporate enforcement priority. Attorney General Garland posited that individual prosecutions are “the best deterrent to corporate crime” and are “essential to Americans’ trust in the rule of law.” He stated that the DOJ will take advantage of certain “force multipliers” to more effectively investigate misconduct, including partnerships with other government agencies in the U.S. and internationally, pursuing an “enormous expansion” in the use of data analytics (such as using big data to identify payment anomalies and other fraud indicators) and incentivizing companies to provide more robust disclosures regarding individual wrongdoers. Attorney General Garland reinforced the DOJ’s 2021 announcement (detailed in our November 2, 2021, [client alert](#) “Practical Steps To Address DOJ Changes to Corporate Enforcement Policies”) that comprehensive reporting of individuals involved in corporate misconduct is a baseline requirement for companies to receive cooperation credit in the context of a DOJ investigation. This is a shift from the Trump administration’s more qualified standard, which required companies seeking cooperation credit to report only individuals who were “substantially” involved in the alleged illegal conduct.

Compliance and Remediation Guidance

Several comments by Assistant Attorney General Polite on the importance of corporate “tone from the top” signaled continued focus on compliance programs and suggested that the DOJ may expect companies to hold senior executives accountable, even absent their direct involvement in alleged misconduct. Assistant Attorney General Polite clarified that in investigations, DOJ analysis of a corporation’s remedial efforts will focus on the entity’s efforts to ensure individual accountability. He suggested that companies should consider replacing executive officers, “even if there is not any evidence that a CEO personally committed a crime,” in cases where such officers may have “modeled poor ethical behavior for the workforce or fostered a climate in which subordinates committed wrongdoing with intent to benefit the company or permitted weak internal controls that allowed the crimes of individuals to go undetected.”

Such comments reinforce the importance of building and maintaining strong compliance programs, which, as Assistant Attorney General Polite also highlighted in his remarks, should focus on individual accountability so that individual employees “facing a singular ethical challenge” feel they are “informed, trained and empowered to choose right over wrong.” He noted that, in instances where an employee missteps, companies should also have a system in place that “immediately detects, remediates, disciplines and then adapts to ensure that others do not follow suit.”

Assistant Attorney General Polite’s remarks also made clear that the DOJ will focus on compensating parties harmed by corporate crime, stating that “considering victims must be at the center of our white-collar cases.” He indicated that prosecutors will expect companies under investigation to set forth in resolution discussions (mentioning “Filip factors” presentations in particular)³ the steps being taken to address the “victim issues” arising from the corporate wrongdoing. In addition to echoing Attorney General Garland’s emphasis on individual accountability, Assistant Attorney General Polite further promoted the DOJ’s position that companies should aim for as comprehensive disclosure to the DOJ as possible in order to receive any cooperation credit, and that such disclosure should contain “all relevant, nonprivileged facts and evidence about the misconduct and all of the individuals involved.”

Continued Emphasis on Cryptocurrency and Cybercrime Enforcement and ESG Issues

Crypto- and cyber-related enforcement was a theme throughout the conference, which featured a panel entirely dedicated to cryptocurrency enforcement and its quickly evolving regulatory landscape. The conference’s anti-money laundering and asset forfeiture panel also focused on cryptocurrencies, and the topic was referenced in other contexts. For example, Assistant Attorney General Polite identified this space as an area where the DOJ would increase its efforts to provide compensation to victims, highlighting crypto crime as a burgeoning form of essentially market-facing fraud, in which “individuals, often at an information disadvantage, are the ones being exploited by other market participants.” Notably, the DOJ’s 2022 budget requests include a requested \$150.9 million to augment the department’s cyber investigations and cybersecurity enforcement capabilities.

Attorney General Garland also discussed the white collar crime-related work of the DOJ’s Antitrust Division and Environment and Natural Resources Division, as well as the related activities of U.S. attorney’s offices nationwide, suggesting an increased attention on ESG issues that is mirrored in another of the DOJ’s budget requests: \$44 million for advancing “environmental justice initiatives, including investing in green and energy efficient projects” and furthering the DOJ’s role in interagency “climate justice activities.” This ESG focus was also apparent in the panel on conducting internal workplace culture reviews, which discussed the contrasting elements and sensitivities involved in executing such reviews versus a typical white-collar investigation, the effects such reviews can have on corporate profit and productivity and employee well-being, and effective methods for using review results to inform institutional reform.

Prosecutor Andrew Adams To Lead KleptoCapture Task Force

Statements made during the White Collar Conference revealed that it has been a busy time for the DOJ. Attorney General Garland took the occasion to announce that KleptoCapture, the Russian sanctions taskforce he had announced the previous day, would be headed by Manhattan federal prosecutor Andrew Adams and overseen by Deputy Attorney General Lisa Monaco. The taskforce, which is charged with “hold[ing] accountable Russian oligarchs and others who seek to evade U.S. sanctions or otherwise profit from corrupt conduct,” through the aggressive enforcement of international sanctions instituted against the Russian state (and those considered its affiliates) in response to Russia’s military invasion of Ukraine, will work in coordination with the transatlantic taskforce that the leaders of the European Commission and the governments of France, Germany, Italy, the U.K., the U.S. and Canada announced in a [joint statement](#) on February 26, 2022.

Impact of the DOJ’s Agenda

Given the DOJ’s renewed concentration on white collar enforcement, companies should review their compliance programs, in particular to ensure that they are covering risks related to the key areas of focus for the DOJ, including ESG issues, cybersecurity, cryptocurrencies, economic sanctions and export controls. This will be particularly important for companies operating in relatively new industries such as financial technology and cryptocurrency exchanges. Should the DOJ’s requests for increased resources be approved by Congress, the expansion would likely translate into increased investigations and, ultimately, prosecutions. As the DOJ has made clear, robust compliance programs are key to both preventing misconduct and mitigating its impact should it occur.

ENDNOTES

¹ Attorney General Garland’s full remarks are available [here](#), and Assistant Attorney General Polite’s full remarks are available [here](#).

2 On March 10, 2020, the DOJ also announced the appointment of a Director for COVID-19 Fraud Enforcement, tasked with spearheading the DOJ's criminal and civil enforcement efforts related to combatting pandemic-related fraud.

3 The Filip Factors are certain principles outlined in the U.S. Attorney's Manual; Filip Factors presentations are presentations made to U.S. regulators by an investigated company's counsel, in which counsel advocates for the form(s) of enforcement action they think their client should be subject.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "DOJ Reveals White Collar Crime Enforcement Priorities: Key Themes From the March 2022 ABA National Institute on White Collar Crime," dated March 15, 2022, and available [here](#).