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DOJ Enforcement Priorities and Outlook for 2022/2023



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Introduction

The Department of Justice (DOJ) under the Biden administration has prioritised corporate criminal enforcement. Recent policy pronouncements and public statements indicate the DOJ's commitment to: (i) seeking additional resources for the investigation and prosecution of corporate crime, including particularly cyber crime and crypto crime; (ii) victim relief; (iii) enforcing penalties against individual wrongdoers; and (iv) reviewing unrelated prior misconduct in connection with resolving investigations to deter recidivism.

Congressional Requests for Resources to “Reinvigorate” Enforcement of Business Crime

On October 28, 2021, Deputy Attorney General Lisa Monaco announced amendments to the DOJ's policy for the prosecution and resolution of corporate criminal cases.¹ The changes, discussed in more detail below, were set out in the accompanying memorandum (the Monaco Memorandum) and took immediate effect.² They reverse some of the more corporate-friendly policies of the prior administration.

In its own words, the Biden administration is seeking to reinvigorate its enforcement efforts. U.S. Attorney General Merrick Garland, at a meeting with the DOJ's component heads on March 10, 2022, signalled that the DOJ is ramping up 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”. This strengthening of the DOJ machinery will require resourcing and Biden's budgets have reflected this. The 2022 budget requested \$36.5 million to hire an additional 120 DOJ attorneys and \$325 million to fund more than 900 U.S. Federal Bureau of Investigation (FBI) agents to further develop the FBI's white collar crime programme.

Evolution of Cryptocurrency and Cyber Crime Enforcement

On March 9, 2022, President Biden issued an Executive Order on “Ensuring Responsible Development on Digital Assets” (the Executive Order).³ The Executive Order calls for measures to protect U.S. consumers, investors and businesses and

to mitigate illicit finance. In line with the Executive Order, Biden's 2022 budget sought \$150.9 million to develop the DOJ's cyber investigations and cyber security enforcement capabilities. Biden's 2023 budget earmarks \$52 million for hiring more agents, enhanced response systems and intelligence capabilities needed to enact the administration's strategy to combat the misuse of cryptocurrency. The Executive Order required the DOJ to submit a report on how to strengthen the investigation, prosecution and enforcement of criminal activity related to digital assets. On June 6, 2022, the DOJ issued its report, with input from the U.S. Department of Treasury, U.S. Department of Homeland Security, the U.S. Securities Exchange Commission and the U.S. Commodities and Futures Trading Commission. The report overwhelmingly focused on the importance of international cooperation and collaboration. Indeed, in the accompanying letter Attorney General Garland highlighted the DOJ's core recommendations: “[E]xpanding our operational and capacity building efforts with international partners; increasing information sharing, coordination, and deconfliction; and closing regulatory gaps across jurisdictions.”⁴

Recent cases indicate the DOJ's commitment to vigorously pursuing criminal activity related to digital assets. In May 2022, a D.C. federal magistrate judge found that the DOJ had successfully shown probable cause in alleging that a U.S. citizen used cryptocurrency to enable customers to evade U.S. sanctions.⁵ Allegedly, the accused individual established a platform in a sanctioned country but used a U.S.-based entity as a front for the platform's overseas operations. This marks the first known criminal prosecution of the use of cryptocurrencies to evade sanctions. In June 2022, the DOJ charged Nathaniel Chastain, a former OpenSea employee, with wire fraud and money laundering in connection with the first ever digital asset insider trading scheme. OpenSea is the largest marketplace for the trading of non-fungible tokens (NFTs). The Indictment alleges that Chastain exploited his advance knowledge of what would be featured on OpenSea's homepage for personal financial gain, purchasing dozens of NFTs just before they were featured publicly and subsequently selling them at two to five times the initial purchase price via anonymous digital currency wallets and OpenSea accounts. In the DOJ's statement, U.S. Attorney Damian Williams said: “NFTs might be new, but this type of criminal scheme is not.” Williams affirmed the department's commitment to “stamping out insider trading – whether it occurs on the stock market or the blockchain.”⁶

Increased Emphasis on Victim Compensation

At the March 2022 American Bar Association's National Institute on White Collar Crime (the White Collar Conference), Assistant Attorney General Kenneth Polite emphasised the importance of compensating parties harmed by corporate crime, remarking that "victims must be at the center of our white-collar cases". He explicitly identified crypto crime as a novel form of market-facing fraud, in which "individuals, often at an information disadvantage, are the ones being exploited by the other market participants".⁷

The DOJ is seeking to bring financial relief to the victims of COVID-19-related criminal activity. Building on the DOJ's COVID-19 Fraud Enforcement Task Force, established in May 2021, Attorney General Garland appointed Associate Deputy Attorney General Kevin Chambers as the Director of COVID-19 Fraud Enforcement in March 2022. Associate Deputy Attorney General Chambers has indicated that he will focus particularly on the identification of "large-scale criminal enterprises and foreign actors who sought to profit from Americans during the pandemic".⁸ In April 2022, the DOJ announced charges against 21 defendants in nine U.S. federal districts for their alleged participation in various healthcare-related fraud schemes.⁹

More broadly, the onus of identifying and compensating victims will sit not only with DOJ prosecutors but also with the companies under investigation. Prosecutors will expect companies to be forthcoming about victims and address "victim issues" stemming from the corporate wrongdoing. At the White Collar Conference, Assistant Attorney General Polite was unequivocal in the DOJ's position that companies must provide comprehensive disclosure of all individuals involved – including victims – in order to receive cooperation credit. Assistant Attorney General Polite specifically mentioned the "Filip Factors" presentations as an appropriate forum for disclosure of and discussion about victims.¹⁰

Holding Individuals Accountable is the DOJ's First Priority

The first policy change announced by Deputy Attorney General Monaco in October 2021 strengthens the DOJ's efforts to pursue individual accountability. Whereas policies imposed during the prior administration sought disclosure on individuals identified by companies as "substantially involved" in the alleged misconduct, DOJ policy now requires companies seeking cooperation credit to disclose all "relevant, nonprivileged facts and evidence about the misconduct and all of the individuals involved". In her remarks, Deputy Attorney General Monaco said: "To be clear, a company must identify all individuals involved in the misconduct, regardless of their position, status or seniority." The change shifts the responsibility for determining the relative culpability of the individuals back to the DOJ and away from the company seeking the cooperation credit. Indeed, Deputy Attorney General Monaco described the prior administration's policy as "confusing" and affording companies too much discretion in the determination of their disclosures.¹¹

Building on the policy change set out in the Monaco Memorandum, remarks by senior officials at the White Collar Conference made clear that enforcing penalties against individual wrongdoers is the DOJ's top priority. Attorney General Garland identified the prosecutions of individuals as "the best deterrent to corporate crime" and "our first priority because it is essential to Americans' trust in the rule of law".¹² In 2021, the DOJ's Fraud Section charged 333 individuals and convicted 329 either by trial or guilty plea. Although only a slight increase from the 326 individuals charged in 2020, there was a notable 54% increase in the conviction rate.¹³

Policy Changes to Shaping Resolutions

The second policy change announced by Deputy Attorney General Monaco in October 2021 revises the DOJ's approach to review of past misconduct. At least since 2008, DOJ prosecutors have been directed to consider historical conduct "similar to the conduct under investigation" when deciding whether to bring criminal charges. The new policy requires prosecutors, when formulating a resolution with any company that is the target or subject of an investigation, to consider the entire criminal, civil and regulatory record of that company both in the U.S. and abroad. Deputy Attorney General Monaco noted that while not all instances of prior misconduct will be relevant, prosecutors "need to start by assuming all prior misconduct is potentially relevant". This approach, Monaco posited, will better align the way in which the DOJ treats corporate and individual criminal histories.¹⁴

The third and final change committed to in the Monaco Memorandum is the revision to guidance on monitorships which signals that the DOJ may be more inclined to press for the appointment of corporate monitors than the prior administration. The DOJ's 2018 guidance required prosecutors to assess various factors in determining the suitability of a monitor and noted explicitly that many corporate criminal resolutions will not require monitors. The Monaco Memorandum rescinded and superseded this policy specifically to the extent it suggests that monitorships are reserved for exceptional circumstances. Although there will not necessarily be an uptick in the appointment of monitors, it is clear that a monitor may be imposed at the DOJ's discretion where it is thought necessary to achieve compliance with post-resolution obligations.

Recidivism and Deferred and Non-Prosecution Agreements

While the DOJ has not yet issued a new policy, Deputy Attorney General Monaco stated in her October 2021 remarks that the DOJ is evaluating its approach to corporate recidivists. She raised the question of whether repeat offenders should remain eligible for non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) and posited that some companies view these pretrial diversions as simply the cost of doing business. The Monaco Memorandum announced the establishment of the Corporate Crime Advisory Group to consider this question along with various other issues central to the DOJ's expressed goal of "updating" its approach to corporate criminal enforcement.

The DOJ's resolution with NatWest Markets Plc (NatWest) offers some indication as to the direction of travel. On December 21, 2021, Deputy Attorney General Monaco announced that NatWest would enter a guilty plea to one count of wire fraud and one count of securities fraud, make a payment of \$35 million in restitution, fines and forfeiture and agree to the imposition of an independent compliance monitor. The plea resolved a futures spoofing allegation (placing orders with the intention to cancel prior to execution) spanning conduct between 2008 and 2014, and again in 2018. Notably, the DOJ's public statements about the resolution identified NatWest as "repeat offender" with reference to both related and unrelated prior misconduct. The DOJ also determined that the alleged 2018 conduct materially breached a prior NPA notwithstanding that NatWest had self-reported on this conduct. The DOJ further noted that the alleged 2018 conduct occurred while NatWest was on probation following a 2015 guilty plea and 2017 sentencing for conspiracy

to manipulate the foreign currency exchange market. Though NatWest had already embarked on substantial improvements to its compliance programme, the DOJ also imposed a monitorship. It is clear that the DOJ is already adopting a more historic and holistic analysis of corporate wrongdoing and the early signs are that the DOJ may insist upon guilty pleas instead of NPAs or DPAs for entities that it deems to be recidivists.¹⁵

Response to Invasion of Ukraine and a Spotlight on Sanctions Enforcement

In late February 2022, the U.S., along with many of its allies, moved rapidly to impose economic sanctions and export controls in response to Russia's military invasion of Ukraine. On March 11, 2022, President Biden signed an executive order imposing further restrictions on imports and exports with respect to Russia as well as on the supply of U.S. dollar-denominated banknotes to the Russian government and to persons located in Russia.¹⁶ On April 25, 2022, the U.S., along with other allied nations, rolled out additional sanctions in response to Russia's continued aggression and in light of alleged war crimes enacted in Ukraine. The latest round of sanctions, issued on June 2, 2022, targets prominent Russian officials, luxury property of elites, and asset management and service companies key to Russian attempts to evade sanctions. The Department of Commerce also further restricted export of goods used by the Russian military.¹⁷

On March 2, 2022, Attorney General Garland announced the establishment of the U.S. interagency Russian sanctions taskforce KleptoCapture.¹⁸ KleptoCapture is headed by Manhattan federal prosecutor Andrew Adams and is overseen by Deputy Attorney General Monaco. The taskforce is charged with "hold[ing] accountable Russian oligarchs and others who seek to evade U.S. sanctions or otherwise profit from corrupt conduct", through enforcement of international sanctions instituted against the Russian state and its affiliates and elites. Although the geo-political and legal situation remains very fluid, the DOJ has signalled its clear intention to allocate time and resources to the vigorous enforcement of Russia-related sanctions and, in particular, the seizure of assets belonging to those perceived by the U.S. as supporting and/or benefitting from Putin's regime. As noted by Attorney General Garland shortly after the seizure of a yacht belonging to Russian oligarch Suleiman Kerimov, "... there is no hiding place for the assets of individuals who violate U.S. laws. And there is no hiding place for the assets of criminals who enable the Russian regime".¹⁹

Conclusion

Biden's DOJ is adopting a holistic approach to enforcement: it is seeking additional funds, hiring new personnel, revising existing enforcement policies and embarking on novel prosecutions. As Deputy Attorney General Monaco concluded in her October 2021 remarks, "this is a start – and not the end – of this administration's actions to better combat corporate crime".

Endnotes

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