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White-Collar Crime 2023

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USA: Trends & Developments

Jackie Perczek
Black Srebnick



Trends and Developments

Contributed by:

Jackie Perczek
Black Srebnick

Black Srebnick is a premier criminal defence and civil trial law firm in Miami, Florida. It is nationally recognised for its successful litigation of complex high-profile cases, and represents corporate and individual clients in civil and criminal cases before federal and state courts throughout the United States. The firm uses a highly focused team approach in the investigation, preparation, motion practice and trial presentation of each case. Partners Roy Black, Howard Srebnick, Jackie Perczek and Maria Neyra re-

cently teamed up to obtain a Not Guilty verdict in *United States v Khoury*, No. 20-CR-10177 (District of Massachusetts), which was the only acquittal out of 57 criminal cases arising from the so-called “Varsity Blues” investigation of allegations that wealthy parents paid bribes for their children’s college admission. Black Srebnick also maintains a cutting-edge criminal appellate practice and has successfully handled appeals in multiple federal and state forums, including in the United States Supreme Court.

Author



Jackie Perczek is ranked among the leading lawyers in Florida for white-collar investigations and the defence of complex criminal cases. She is an equity partner at Black

Srebnick, where she often leads the defence teams in the pre-trial preparation of complex criminal cases requiring collaboration with

multiple counsel, both in the US and internationally. Jackie also defends individuals and corporations in high-stakes civil disputes involving allegations of sexual misconduct. Jackie co-chairs the Amicus Committee of the Florida Association of Criminal Defense Lawyers, and co-teaches a class at the University of Miami Law School on Situational Ethics in the Adversarial System of Justice.

Black Srebnick

201 S. Biscayne Blvd.
Suite 1300
Miami, FL 33131
USA

Tel: +1 (305) 371 6421
Fax: +1 (305) 703 4934
Email: jperczek@royblack.com
Web: www.royblack.com

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2023 Trends in Corporate Criminal Enforcement in the United States

Early in his administration, President Joe Biden declared the fight against corruption a core national security interest of the United States. In a 2021 White House memorandum, the President announced the United States Strategy on Countering Corruption, which focuses on fortifying national and transnational efforts to fight corruption, curb illicit finance, hold corrupt actors accountable, strengthen diplomatic engagement and leverage foreign assistance to achieve anti-corruption policy goals.

In line with the President's directives, in 2021 and 2022 the U.S. Department of Justice (DOJ) made robust policy changes to invigorate anti-corruption enforcement efforts and promote a culture of corporate compliance and accountability. In 2022, DOJ showcased significant criminal enforcement actions, resulting in the forfeiture of millions of dollars and the imposition of millions more in fines and other penalties. This trend continued in 2023, with important changes to DOJ's corporate enforcement policies, a surge of resources invested to expand DOJ's enforcement reach, and the collection of fines, penalties and forfeitures totalling billions of dollars.

DOJ revises its Corporate Enforcement Policy

In January 2023, DOJ announced revisions to its Corporate Enforcement Policy, which applies to all corporate criminal matters nationwide, including money laundering, asset recovery and Foreign Corrupt Practices Act (FCPA) investigations. The Policy provides incentives for companies that:

- voluntarily disclose misconduct to DOJ before that misconduct is publicly reported or known to DOJ;

- fully co-operate in the investigation; and
- timely remediate the misconduct.

In DOJ's view, a company's self-disclosure, co-operation and remediation "set the right tone" by leading by example and creating a corporate culture of compliance.

One important revision to DOJ's Corporate Enforcement Policy in 2023 was to the policy providing that if a company self-discloses misconduct, fully co-operates and meaningfully remediates the wrongdoing, there is a presumption that DOJ will decline to prosecute the company. Under the old rule, that presumption did not apply if certain aggravating factors existed, such as:

- the involvement of the company's executive management in the misconduct;
- significant profit from the wrongdoing;
- the egregiousness or pervasiveness of the misconduct; or
- criminal recidivism.

Under the 2023 revised policy, prosecutors now have discretion to decline prosecution of the company even when aggravating circumstances are present if the company meets the following three factors:

- the self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct;
- at the time of the misconduct and the disclosure, the company had an effective compliance programme that enabled the identification of the misconduct and led to the company's self-disclosure; and
- the company provided extraordinary co-operation to DOJ's investigation and undertook extraordinary remediation, including revealing

all those who participated in the misconduct, regardless of their position within the company.

The policy revision also provides that when aggravating factors are such that declination of prosecution is not appropriate, the company will still receive significant benefits for coming forward and co-operating, including a substantial reduction of the fine called for under the relevant statutes, and DOJ will not generally require a corporate guilty plea (even for companies that are repeat offenders), unless there are multiple or particularly egregious aggravating circumstances.

DOJ revises its Corporate Compliance Program and increases focus on the use of personal electronic devices and messaging platforms

DOJ's "Principles of Federal Prosecution of Business Organizations" set forth the factors that prosecutors consider in deciding whether to prosecute a company, negotiate a guilty plea, or enter into other agreements to resolve an investigation. Some of those factors relate to the adequacy of the company's compliance programme at the time of the offence, with a focus on three fundamental questions:

- Is the company's compliance programme well designed?
- Is the programme being applied earnestly and in good faith? In other words, is the programme adequately resourced and empowered to function effectively?
- Does the company's compliance programme work in practice?

With these guiding principles, DOJ's criteria and expectations for a compliance programme are set out in the Criminal Division's Evaluation

of Corporate Compliance Programs (ECCP). DOJ announced changes to the ECCP in 2023, including how DOJ views corporate policies on employee use of personal electronic devices and communication platforms, including services that offer ephemeral messaging, where messages automatically disappear after they are viewed (WhatsApp, Signal, Telegram, Snapchat, etc).

Disappearing messages can be contrary to a company's record-keeping obligations and can pose significant compliance risks by making it easier to engage in or conceal misconduct. Therefore, under the revised ECCP guidelines, DOJ will evaluate whether corporate policies are in place to ensure that electronic communications are preserved and can be accessed. Prosecutors will also evaluate whether these policies are communicated to employees and meaningfully enforced on a consistent basis. For example, during an investigation, prosecutors may ask whether the company can access communications on messaging services and whether the communications are saved on corporate servers, and may demand the production of these communications. The Assistant Attorney General warned: "A company's answer – or lack of answers – may very well affect the offer it receives to resolve criminal liability. So when crisis hits, let this be top of mind."

DOJ launches the Pilot Program on Compensation Incentives and Clawbacks

DOJ announced additional policies in 2023 intended "to drive compliance-promoting behaviour" by making compliance a factor in corporate compensation structures. In DOJ's view, a company that imposes financial penalties for wrongdoing not only deters risky behaviour but also fosters a culture of compliance. In the Deputy Attorney General's words, "nothing grabs attention or demands personal investment

like having skin in the game, through direct and tangible financial incentives”.

Accordingly, DOJ launched the Criminal Division’s Pilot Program on Compensation Incentives and Clawbacks, aimed at ensuring that a company’s compliance efforts include clawing back or recouping compensation paid to employees responsible for or involved in the company’s misconduct.

DOJ contemplates that companies will remediate not only the conduct of the employees who engage in wrongdoing but also the conduct of their supervisors. Therefore, under the pilot programme, prosecutors will examine the compensation structure of directly responsible employees as well as the compensation of supervisors who knew of the misconduct or turned a blind eye to it.

Prosecutors will also consider the compensation structure of the company’s compliance team to determine whether the team is independent and empowered to act, by asking the following questions, among others:

- Is compensation for employees who are responsible for investigating and adjudicating misconduct structured in a way that ensures the compliance team is empowered to enforce the policies and ethical values of the company?
- Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel or others within the organisation that have a role in the disciplinary process generally?

Once it reaches a criminal resolution with DOJ, a company in the pilot programme must integrate compliance-related criteria into its compensa-

tion structure, and must report to DOJ annually about it during the term of the resolution. To illustrate, the Deputy Attorney General referenced the terms of the Danske Bank investigation, stating: “For example, as part of its plea agreement... in addition to forfeiting USD2 billion, Danske, the largest bank in Denmark, agreed to revise its performance review and bonus system to include criteria related to compliance. So now, Danske executives with a failing score for compliance will also fail to secure a bonus.”

For companies that claw back or in good faith attempt to claw back compensation to wrongdoers, the pilot programme provides for a meaningful reduction of any fine that may be imposed on the company as part of the criminal resolution.

DOJ targets corporate crime that threatens national security

Earlier this year, DOJ announced that it was devoting a surge of resources to combat the threat that corporate crime poses to US national security, adding 25 new prosecutors and a Chief Counsel for Corporate Enforcement to the National Security Division. According to DOJ, this expansion was necessary partly because “the majority of our major corporate criminal resolutions have implicated United States national security; and this number has more than doubled from 2022 to 2023”.

DOJ also announced that it was expanding its enforcement of sanctions and export controls laws, and declared this “a top priority for the National Security Division of the Department of Justice”. To this end, the National Security Division has published updated enforcement policies and a voluntary self-disclosure programme for businesses engaged in transactions with

sanctioned countries and designated individuals and entities.

In addition, the Deputy Attorney General announced a joint effort by the National Security Division and the Treasury and Commerce Departments to inform the private sector about enforcement trends and provide guidance on compliance with sanctions and export laws. These agencies have since released their first joint compliance note, warning against the use of intermediaries or trans-shipment points to circumvent export controls that restrict Russia's access to technology and other items it needs to sustain its war in Ukraine.

DOJ super-charges crypto and ransomware enforcement

DOJ continues to intensify enforcement in the cryptocurrency and ransomware spaces. In 2022, United States Attorney General Merrick Garland issued a comprehensive report on "The Role of Law Enforcement in Detecting, Investigating, and Prosecuting Criminal Activity Related To Digital Assets". The Report details the substantial steps already taken by DOJ against the illicit use of digital assets, and provides recommendations on how to further strengthen DOJ's ability to prosecute and disrupt cryptocrimes.

In 2023, DOJ merged the Computer Crime and Intellectual Property Section with the National Cryptocurrency Enforcement Team (NCET), creating a single "super-charged" office that consolidates expertise in all aspects of fighting cybercrime. This new group is composed of "an all-star team of cryptocurrency attorneys" and other experts in banking, cryptocurrency, anti-money laundering and asset recovery. The Deputy Assistant Attorney General referred to the merged NCET team as "the government's most impressive collection of cryptocurrency-

knowledgeable criminal lawyers, equipped with a deep understanding of the technology, business, and legal side of cryptocurrency".

In early 2023, DOJ announced a major NCET case: the takedown of Bitzlato, a Hong Kong-registered cryptocurrency exchange, and the arrest of one of its executives. In the words of the Deputy Attorney General: "Today the Department of Justice dealt a significant blow to the cryptocrime ecosystem... Bitzlato facilitated the transmission of hundreds of millions of dollars in illicit funds, fueling darknet marketplaces and laundering the proceeds of ransomware attacks."

One month later, DOJ announced another NCET arrest, this time involving commodities fraud and market manipulation in connection with the Mango Markets crypto-exchange. DOJ also announced the arrest of the founders of Forsage, a cryptocurrency investment platform, for their alleged role in a global Ponzi scheme involving USD340 million. And DOJ is currently prosecuting Sam Bankman-Fried for his alleged involvement in a global multimillion-dollar scheme to defraud the customers and lenders of Bankman-Fried's crypto hedge funds.

In addition to cryptocurrency, "an urgent priority for the merged Computer Crime and Intellectual Property Section and the National Cryptocurrency Enforcement Team is the fight against ransomware". DOJ views ransomware as a threat to national security. NCET has collaborated in the disruption of the malwares Snake and Cyclops Blink, and its enforcement efforts in this space are likely to rise in 2024.

The new super-charged NCET team is also expected to escalate the civil and criminal forfeiture of crypto-assets. Indeed, DOJ has aggres-

sively pursued such asset forfeitures, with a historic USD3.36 billion cryptocurrency seizure in 2022 in connection with a dark web fraud scheme involving illegal drugs and other illicit goods. In 2023, DOJ seized over USD112 million in virtual currency in one case alone, involving virtual currency accounts linked to alleged cryptocurrency investment scams.

DOJ continues to combat pandemic-related fraud

In 2020, the United States Congress passed legislation to provide emergency financial assistance to people suffering economic hardship during the COVID-19 pandemic. Trillions of dollars went to people in need, but these assistance programmes were exploited by people in the US and abroad, resulting in the theft of hundreds of billions of dollars, according to DOJ.

In May 2021, the Attorney General established the COVID-19 Fraud Enforcement Task Force to combat pandemic relief fraud. Since then, DOJ has filed criminal charges against thousands of defendants and has seized nearly USD1.4 billion in stolen relief funds.

In August 2023, DOJ announced the results of its latest COVID-19 fraud enforcement action. Following a co-ordinated nationwide sweep, DOJ instituted 718 enforcement actions for offences related to more than USD836 million in alleged COVID-19 fraud, recouped over USD200 million through civil and criminal forfeitures, and criminally charged more than 300 individuals with pandemic-related fraud.

This will not be the last of DOJ's enforcement actions against pandemic relief fraud. Congress extended the statute of limitations for various pandemic-related offences, and DOJ has made clear that it will continue to aggressively inves-

tigate and prosecute pandemic relief fraud. In remarks following the recent nationwide sweep, Attorney General Garland said that this "latest action... should send a clear message: the COVID-19 public health emergency may have ended, but DOJ's work to identify and prosecute those who stole pandemic relief funds is far from over".

DOJ makes good on its word that accountability is good for business

Earlier this year, the Deputy Attorney General reiterated that individual accountability remains "the most important priority" in DOJ corporate enforcement. She stated: "Our message is clear: the department will zealously pursue corporate crime in any industry, and we will hold wrongdoers accountable, no matter how prominent or powerful they are... Our goal is simple: to shift the burden of corporate crime away from shareholders who frequently play no role in the misconduct and onto those who are directly responsible."

Similarly, the Assistant Attorney General for the Criminal Division sent "an undeniable message: come forward, co-operate, and remediate. Our number one goal in this area... is individual accountability". He provided a stern reminder that "the potential benefits under our corporate enforcement policy only flow from being a good corporate citizen. The consequences will be far more severe for those companies that sit back and wait for us to come knocking. There is an enormous gulf between the benefits associated with doing the right thing and the punishment associated with not".

DOJ made good on these words with its Deferred Prosecution Agreement (DPA) with ABB Ltd. This Swiss-based global technology company (listed on the New York Stock Exchange) agreed to pay USD462.5 million to resolve FCPA charges

involving bribery of a South African official to win contracts for a power plant project. That ABB was able to obtain a DPA is astonishing: the company was a three-time repeat offender with a history of corporate misconduct, and this was the third time it was charged with FCPA offences.

But the DPA outlines in detail why ABB was able to obtain a deferral of prosecution despite its history of misconduct: according to DOJ, ABB engaged in “extraordinary cooperation and demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct” by:

“(i) promptly providing information obtained through its internal investigation, which allowed DOJ to preserve and obtain evidence as part of their own independent investigation;

(ii) making regular and detailed factual presentations to DOJ;

(iii) voluntarily making foreign-based employees available for interviews in the United States;

(iv) producing relevant documents located outside the United States in ways that did not implicate foreign data privacy laws; and

(v) collecting, analyzing, and organising voluminous evidence and information that it provided to DOJ, including the translation of certain foreign language documents”.

The DPA also outlines ABB’s “extensive remedial measures”, which included “hiring experienced compliance personnel and, following a root-cause analysis of the wrongdoing, investing significant additional resources in compliance testing and monitoring throughout the organi-

sation; implementing targeted training programs, as well as onsite supplementary case-study sessions; conducting continuing monitoring and testing to assess engagement with new training measures; restructuring of reporting by internal project teams to ensure compliance oversight; and promptly disciplining employees involved in the misconduct”.

Finally, ABB “enhanced and has committed to continuing to enhance its compliance program and internal controls”, and agreed to continue to co-operate with DOJ in any ongoing investigation, including of the officers, directors, business partners, distributors and consultants of the company.

Therefore, while it is clear that DOJ will continue to intensify its enforcement efforts against corporate crime, it is equally clear that accountability, voluntary disclosure, full co-operation and extensive remediation will continue to be good for business.

Looking ahead to 2024

DOJ’s aggressive stance on corporate enforcement is likely to continue unabated. For FY2024, DOJ has requested a budget from Congress of nearly USD50 billion. Among other things, the budget prioritises national security, cybersecurity and COVID fraud enforcement, and requests USD11.3 billion for the FBI and USD2.9 billion for the U.S. Attorney’s Offices. It is not difficult to see that this budget will infuse significant resources into corporate investigations and prosecutions, and that corporate and white-collar enforcement will predictably trend upward in 2024.

Indeed, as this chapter was readying for publication, DOJ announced a new Mergers and Acquisitions Safe Harbor Policy for companies that timely self-disclose misconduct discovered

Contributed by: Jackie Perczek, **Black Srebnick**

during the acquisition process. On 4 October 2023, the Deputy Attorney General proclaimed that “today, for the first time, we are announcing a Department-wide Safe Harbor Policy for voluntary self-disclosures made in the context of the mergers and acquisition process. Going forward, acquiring companies that promptly and voluntarily disclose criminal misconduct within the Safe Harbor period, and that cooperate with the ensuing investigation, and engage in requisite, timely and appropriate remediation, restitution, and disgorgement – they will receive the presumption of a declination”.

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