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Policy Shifts at the Department of Justice — 2018 in Review

Introduction

In 2018, the Department of Justice (DOJ) issued a number of important policy updates and rollouts that will have long-term and far-reaching impact. Although public attention may focus on personnel changes and the Robert Mueller investigation, this article presents an easily navigated yet detailed summary of other significant developments, focusing on the realm of government investigations and white collar prosecution. This alert also sheds light on what the policy shifts may mean for companies interfacing with the DOJ in the coming year.

Below is a list of topics discussed in this alert. You may click on a topic to jump there.

Debut of the *Justice Manual*

In September, the DOJ announced the rollout of an updated *United States Attorneys' Manual*, which it re-branded the "*Justice Manual*."[1] The change marked the first comprehensive revision of the *Justice Manual* (*Manual*) in more than two decades. The new name is designed to reinforce the *Manual*'s goal to serve as "a valuable means of improving efficiency, promoting consistency, and ensuring that applicable DOJ policies remain readily available to all employees as they carry out the Department's vital mission."

Although the DOJ described the changes as mostly administrative (the stated goals of the review were to "identify redundancies, clarify ambiguities, eliminate surplus language, and update the *Manual* to reflect current law and practice"), a number of significant changes were made that may shed light on DOJ policy moving forward. For example, the subsection "Need for Free Press and Public Trail" was removed from the *Manual*'s "Confidentiality and Media Contacts Policy." The change seems consistent with the current Administration's focus on curbing leaks to the media. The revised Manual also omits references to redistricting or racial gerrymandering, and has a new section on religious liberties.

Updates to the *Manual* also include the addition of the memoranda, guidance documents and policies described in this alert.

False Claims Act Developments

Policy developments in the "Granston Memo" and the "Brand Memo" may result in reduced False Claims Act (FCA) *qui tam* litigation.

Background

Under the FCA, 31 USC § 3729 et seq., individual whistleblowers, known as "relators," may sue defendants, on behalf of the US, that they believe engaged in fraud against the government. Such litigation goes by the name "*qui tam*" as a shorthand from the Latin description of the action. These whistleblowers have the potential to earn triple damages for the government, and up to 30% of the damages and penalties may be provided to them personally. The DOJ has the right to intervene and join these actions, to let the relators proceed alone, or to dismiss the action. With assistance of such whistleblowers, the government recovered US$2.88 billion in 2018.

The Granston Memo

Although a substantial sum, this is the smallest FCA recovery in nearly a decade, and nearly US$1 billion less than the amount recovered in 2017. Despite the reduction in recovery, the volume of *qui tam* complaints received by the DOJ remains strong. Perhaps in response, in January 2018, Michael Granston, the Director of the DOJ's Civil Fraud Section, issued a memorandum, leaked to the public, but now incorporated into the *Justice Manual*, directing DOJ lawyers to evaluate a number of factors when considering dismissal of FCA cases brought by whistleblowers. The Granston Memo[2] appears to encourage DOJ lawyers to dismiss cases that could otherwise lead to unnecessary or wasteful litigation. Although the Granston Memo acknowledges that the DOJ has not historically used its authority under Section 3730(c)(2)(A) to seek dismissal notwithstanding realtors' objections, it argues that dismissal is an "important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."

The Granston Memo's non-exhaustive list of factors DOJ lawyers can use as a basis for dismissal of *qui tam* complaints include:

1. The complaint is "facially lacking in merit," meaning the legal theory is defective or the factual allegations are frivolous
2. To prevent "parasitic or opportunistic *qui tam* actions," a complaint should be dismissed because it duplicates a pre-existing government investigation and adds no useful information to the investigation
3. The complaint should be dismissed to prevent interference with agency policy or programs

1 U.S. Dept. of Justice, *Department of Justice Announces the Rollout of an Updated United States Attorneys' Manual*, September 25, 2018, https://www.justice.gov/opa/pr/department-justice-announces-rollout-updated-united-states-attorneys-manual.

2 U.S. Dept. of Justice, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, January 10, 2018, https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.

4. The need to protect the DOJ's litigation prerogatives, particularly to avoid the risk of unfavorable precedent
5. Safeguarding classified information and national security interests
6. Whether intervention would cost the government more than it was expected to gain
7. Problems with the relator's actions that frustrate the government's ability to investigate the claims

In addition, the Granston Memo suggests that DOJ lawyers have alternate bases for seeking dismissal, such as the "first to file" bar, public disclosure bar, enforcement of Rule 9(b) and the materiality requirement, and that under most standards, they have discretion to do so. The guidance was incorporated into the revised *Justice Manual*.

The Brand Memo

Also in January, Associate Attorney General Rachel Brand issued a second important memorandum in this area.[3] The so-called Brand Memo limits the DOJ's use of guidance documents in civil enforcement by building upon a memorandum by then-Attorney General Jeff Sessions in 2017 prohibiting DOJ components from issuing guidance documents that effectively bind the public without undergoing notice and comment rule-making procedures. The Brand Memo applies Attorney General Session's memo to DOJ litigators in determining the legal relevance of other agencies' guidance documents in affirmative civil enforcement cases, particularly qui tam whistleblower complaints. The Brand Memo precludes DOJ lawyers from "effectively converting" non-binding regulatory guidance into legal mandates – they cannot and should not use internal guidance to establish violations of the law. Specifically, the short memorandum directs prosecutors to rethink whether guidance documents opining on the appropriateness or legality of a defendant's conduct should have any bearing on the DOJ's decisions to litigate. Notably, the Brand Memo is absent from the updated *Justice Manual*.

Analysis

These policy pronouncements signal that DOJ will carefully consider whether to bring FCA cases or move for dismissal, and potentially limit the circumstances under which the DOJ will find the claims to be meritorious enough to seek enforcement. The Granston and Brand Memos signal a commitment to use the FCA carefully; only to protect federal interests, and to preserve resources where the claims are not sufficiently supported by established law.

For example, without citing the Granston Memo directly, the DOJ informed the Supreme Court in November that it intended to exercise its authority to dismiss a *qui tam* suit if the court denied *certiorari*.[4] The DOJ took this position despite simultaneously explaining that it supported the ruling from the Ninth Circuit that allowed the *qui tam* suit to proceed beyond the pleadings stage. As the ground for exercising its authority, the DOJ cited the expense and burden placed on the government by the litigation. Similarly, in December, the DOJ moved to dismiss 11 related *qui tam* suits filed in various districts.[5] The DOJ exercised its authority in those cases based on dissatisfaction with the alleged theory of liability, proposed by a professional relator, that would interfere with common healthcare practices.

These memoranda provide insight for defense counsel in *qui tam* cases. There may be opportunity for them to demonstrate that intervention is unnecessary and dismissal is proper by considering how a client's facts align with the factors outlined in the memos. And, importantly, defendants may be able to convince DOJ lawyers that dismissal under Section 3730(c)(2)(A) would save the DOJ from expending significant resources where comparable recovery is unlikely.

The memoranda also guide relators' counsel in how to avoid the dismissal of a suit – namely by crafting their complaint in a way that shows a clear violation of law, by cooperating extensively during the investigative process and by demonstrating that the agency's interest will be advanced, not harmed, by the litigation.

Foreign Corrupt Practices Act Policy on M&A and Successor Liability

In July, Deputy Assistant Attorney General Matthew S. Miner of the Criminal Division announced that the DOJ will apply its Foreign Corrupt Practices Act (FCPA) corporate enforcement policy to successor companies that discover corruption issues before, during and after the merger and acquisition process.[6] Miner stated that "while [DOJ] has made great strides . . . relating to the Department's approach to corporate enforcement, and the FCPA in particular, one area where [DOJ] would like to do better is with regard to mergers and acquisitions." Miner hopes that applying the FCPA to mergers and acquisitions will "foster a climate in which companies are fairly and predictably treated when they report misconduct . . . to increase self-reporting and individual accountability."

3 U.S. Dept. of Justice, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases*, Jan. 25, 2018, https://www.justice.gov/file/1028756/download.

4 Brief for the United States as Amicus Curiae, *Gilead Sciences, Inc. v. United States ex. Rel Jeffrey Campie, et al., No. 17-936 (Nov. 2018).*

5 See *Health Choice Grp. LLC v. Bayer Corp, No. 5:17CV-126-RWS-CMC (E.D. Tex. Dec. 17, 2018).*

6 U.S. Dept. of Justice, *Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets*, July 25, 2018, https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th.

Disclose, Remediate, Cooperate

While there is great emphasis placed on reporting corrupt behavior unearthed before an acquisition or during due diligence, Miner noted that the DOJ recognizes that in some instances, the acquiring company does not have complete access to a target company's data and records. Thus, the DOJ will still reward disclosures of wrongdoing that are made subsequent to the acquisition. The DOJ wants company advisors and management to feel comfortable disclosing misconduct whenever it is discovered. Additionally, in order to incentivize companies to willingly disclose, Miner noted that "DOJ . . . will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ . . . may consequently decline to bring enforcement actions." Companies that adhere to the DOJ's tried and true trio of activities – promptly report misconduct, fully cooperate with DOJ, and enact and enforce remedial measures – will be "presumed eligible for a declination of prosecution." While a company may be eligible for a declination of prosecution, any gains from illicit conduct must be forfeited.

Liability for Individuals

While the DOJ will look favorably upon companies that disclose misconduct even after an acquisition, companies should be aware that past wrongdoers will not be off the hook for corrupt behavior. The DOJ will continue to focus on individual accountability and prosecute those responsible for concealment of past wrongdoing.

The Implications/Analysis

Prior to Miner's announcement, the resource guide for the FCPA and corporate enforcement provided little assistance for how companies should proceed if they uncover misconduct by a business they were in the process of acquiring or had already acquired. Additionally, the previous guidance noted merely that the DOJ had only taken action against successor companies in limited circumstances. Therefore, Miner's announcement sheds light on an otherwise dark area pertaining to the disclosure of FCPA violations after an acquisition.

Because of this development, resolving corruption problems found during international mergers and acquisitions should be more certain. Application of the FCPA to successor companies must be considered during mergers and acquisitions. With the announcement of the DOJ's policy for handling disclosure of misconduct found after an acquisition, companies have a roadmap for disclosing any problems despite due diligence and self-reporting any misconduct.

Extraterritorial Limits of the FCPA

In August, the Second Circuit Court of Appeals issued an important decision relating to the extraterritorial reach of DOJ and Securities and Exchange Commission (SEC) prosecutors attempting to reach certain defendants. In *U.S. v. Hoskins*, the court held that the "government may not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes."[7]

U.S. v. Hoskins

Lawrence Hoskins, a UK national and former executive of the UK subsidiary of Alstom SA., was charged with conspiracy to violate the FCPA for his role in bribery schemes involving the US subsidiary Alstom Power U.S. Hoskins is not employed by Alstom Power U.S. and was not physically in the US during the alleged bribery scheme.

The US District Court for the District of Connecticut granted in part Hoskins's motion to dismiss, concluding that where Congress chooses affirmatively to exclude certain classes of individuals from liability under a criminal statute, prosecutors may not circumvent that exclusion by charging such individuals with conspiracy to violate that statute.[8]

On appeal, the Second Circuit presumed that Hoskins was a foreign national who never entered the US during the alleged scheme. The court examined whether he may nonetheless be held liable under a conspiracy or complicity theory for violating the FCPA provisions targeting American persons and companies and their agents, officers, directors, employees and shareholders, and persons physically present within the US.

The court determined that because the FCPA defines precisely the categories of persons who may be charged for violating its provisions and also states clearly the extent of its extraterritorial application, the FCPA does not comport with the government's use of the complicity or conspiracy statutes, and affirmed the lower court in part.

As to the second object of the conspiracy, however, the Second Circuit reversed the lower court. The government will be permitted to attempt to prove that Hoskins acted as an agent of a domestic concern when conspiring with employees and other agents of that domestic concern who took part in the scheme while in the US. In reaching its decision, the court found that the FCPA contains no provision assigning liability to a non-resident foreign national, acting outside the US, and who is not an officer, employee or agent of domestic concerns and issuers. The Second Circuit noted that courts will not apply a US law extraterritorially unless the affirmative intention of Congress is clearly expressed. To the contrary, the FCPA's legislative history shows Congress explicitly recognized that a statute focusing on criminalization required a delicate touch where extraterritorial conduct and foreign nationals were concerned. "Protection of foreign nationals who may not be learned in American law is consistent with the central motivations for passing the legislation, particularly foreign policy and the public perception of the United States. And the desire to protect such persons is pressing when considering the conspiracy and complicity statutes: these provisions are among the broadest and most shapeless of the American law, and may ensnare persons with only a tenuous connection to a bribery scheme." The Second Circuit also looked to statutes with extraterritorial application, and concluded that the application is limited by the statute's terms. Furthermore, courts have repeatedly ruled that generally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute.

7 *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

8 *United States v. Hoskins*, 73 F. Supp. 3d 154 (D. Conn. 2014); *United States v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. 2015).

Analysis

The holding is of significant interest, as it narrows the DOJ's jurisdictional reach over non-resident foreign nationals. Notably, this ruling directly contradicts the DOJ and SEC's *FCPA Resource Guide*, which states that the US government may hold non-resident foreign nationals liable for conspiring to violate the FCPA "even if they are not, or could not be, independently charged with a substantive FCPA violation." The *FCPA Resource Guide*[9] notes, "the United States generally has jurisdiction over all conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States."

Hoskins leaves open multiple questions, however. First, will the DOJ continue to pursue the same *Hoskins*-style FCPA prosecutorial theory in other circuits? Although *Hoskins* is binding on the DOJ in the Second Circuit, nothing precludes it from pursuing its theory in other circuits, perhaps in the hopes of generating a circuit split, which would enhance the odds of Supreme Court review.

Second, the Second Circuit's opinion does not dispose of all charges against Hoskins. He still faces counts including money laundering that he did not challenge on appeal. This is noteworthy because, in addition to its expansive jurisdictional theory of prosecution under the FCPA, the DOJ has been aggressive in using the Money Laundering Control Act (MLCA) to reach conduct in international bribery cases that fall outside the FCPA. Will the Second Circuit's opinion prompt more challenges to the DOJ's theories of prosecution under the MLCA?

Emphasis on International Cooperation

In addition to the policy on "Piling On" (discussed herein), the DOJ made a number of moves in 2018 signaling that cooperation between US and overseas authorities is a priority for it.

Steven Peikin, Co-Director of the SEC Division of Enforcement (which also prosecutes violations of the FCPA), stated, "the US authorities cannot – and should not – go it alone in fighting corruption. As global markets become more interconnected and complex, no one country or agency can effectively fight bribery and corruption by itself. Anticorruption enforcement is a team effort. The [US] fight against corruption is much more effective when our international colleagues join us in a shared commitment to eradicating corruption and bribery."[10]

Some of the largest FCPA enforcement settlements in history occurred in 2018: Petrobras entered into a non-prosecution agreement with the DOJ that included largest FCPA penalty of all time, and the DOJ also settled with Société Générale in one of the top 10 largest FCPA criminal penalties. Both of these cases involved substantial assistance from the authorities in Brazil and France, respectively. In addition, the DOJ publicized international investigative aid in FCPA matters with authorities in Austria, the Bahamas, the Cayman Islands, Croatia, Cyprus, Germany, Latvia, the Netherlands, Singapore, Spain, Switzerland, Turkey, and the UK.

9 U.S. Dept. of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

10 Secs. and Exch. Comm'n, *The Salutary Effects of International Cooperation on SEC Enforcement*, Dec. 3, 2018, https://www.sec.gov/news/speech/speech-peikin-120318.

Analysis

With the emphasis on cooperation, prosecutors are more likely to share evidence in ongoing investigations and to leverage resources across borders, potentially resulting in faster, more efficient investigations. This trend is likely to continue; although, increasing data privacy regulations (including the General Data Protection Regulation [GDPR] of the European Union) may strain the ability of regulators and companies under investigation to share information overseas. How the DOJ navigates these challenges remains to be seen.

DOJ Relaxes All or Nothing Yates Memo

The DOJ has softened its policy known as the "Yates Memo" that required companies to produce all relevant information on individuals involved in misconduct in order to be eligible to receive any cooperation credit with DOJ lawyers.[11] Rather than the prior "all or nothing" approach, the new policy requires the company to "identify all individuals substantially involved in or responsible for the misconduct at issue." The new policy is incorporated into the *Justice Manual* in the section on the DOJ's "Principles of Federal Prosecution of Business Organizations,"[12] particularly 9-28.700 ("The Value of Cooperation").[13]

Reason for the Change

DOJ Deputy Attorney General (DAG) Rod Rosenstein announced[14] the revised policy in a speech to the American Conference Institute's International Conference on the Foreign Corrupt Practices Act on November 29. During the speech, Rosenstein explained the rationale for the policy change, advising that the Yates Memo had unrealistic consequences. He said, "[W]e learned that the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources," and that "[o]ur policies need to work in the real world of limited investigative resources." He further said, "[w]hen we allow only a binary choice – full credit or no credit – experience demonstrates that it delays the resolution of some cases while providing little or no benefit."

The Yates Memo, introduced in 2015, established a clear line. Its "all or nothing" approach required that a company undertake a careful analysis before beginning cooperation to determine whether it could meet the threshold to earn credit.

11 U.S. Dept. of Justice, *Individual Accountability for Corporate Wrongdoing*, Sept. 9, 2015, https://www.justice.gov/archives/dag/file/769036/download.

12 U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations*, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

13 U.S. Dept. of Justice, *The Value of Cooperation*, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700.

14 U.S. Dept. of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act*, Nov. 29, 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

Civil Attorneys May Exercise Discretion

In addition, the DAG explained that DOJ civil attorneys will have more discretion to resolve litigation. "When criminal liability is not at issue, our attorneys need flexibility to accept settlements that remedy the harm and deter future violations, so they can move on to other important cases." He added, "[o]ur civil litigators simply cannot take the time to pursue civil cases against every individual employee who may be liable for misconduct, and we cannot afford to delay corporate resolutions because a bureaucratic rule suggests that companies need to continue investigating until they identify all involved employees and reach an agreement with the government about their roles."

Analysis

The change marks a shift similar to the manner in which the DOJ handled corporate cooperation from 2006 to 2015. It appears that the DOJ expects that these changes will increase companies' willingness to cooperate with the DOJ and lead to more efficient prosecution efforts. The approach also reduces the potential conflicts between a company and its employees during an investigation.

This shift is also likely to increase the pace of FCA settlements because of the discretion now afforded civil attorneys. The DOJ's stated goal is to resolve matters by remedying whatever harm may have occurred rather than trying to assess the actions of every individual involved.

Reducing Duplicative Penalties

On May 9, DAG Rosenstein announced a new Policy on Coordination of Corporate Resolution Penalties (Policy).[15] In a speech to the New York City Bar White Collar Institute, Rosenstein explained that the Policy's aim is to "enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties," which Rosenstein refers to as "piling on."[16] Specifically, the new Policy "instruct[s] Department components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company in relation to investigations of the same misconduct."

Reason for the Change

Rosenstein stated the Policy will alleviate the concern that "[i]n highly regulated industries, a company may be accountable to multiple regulatory bodies," which "creates a risk of repeated punishments that may exceed what is necessary to rectify the harm and deter future violations." Furthermore, "'Piling on' can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement."

The Policy Is Not *Carte Blanche*

The new Policy does not intend to eliminate duplicative punishments in all instances. Rosenstein warned that "[s]ometimes, penalties that may appear duplicative really are essential to achieve justice and protect the public. In those cases, [the DOJ] will not hesitate to pursue complete remedies, and to assist [its] law enforcement partners in doing the same." He further cautioned that, "[c]ooperating with a different agency or foreign government is not a substitute for cooperating with the [DOJ]," and the DOJ "will not look kindly on companies that come to the [DOJ] only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments."

Coordination of the Policy

In addition to the Policy, the DOJ "established a new Working Group on Corporate Enforcement and Accountability," which will include "Department leaders and senior officials from the FBI, the Criminal Division, the Civil Division, other litigating divisions involved in significant corporate investigations, and the U.S. Attorney's Offices," and "will make internal recommendations about white collar crime, corporate compliance, and related issues."

Policy Specifics

The Policy is laid out in the *US Attorney's Manual* at § 1-12.100[17] and provides four guidelines:

1. "Department attorneys should remain mindful of their ethical obligation not to use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments."
2. "Department attorneys should coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture against the company. Specifically, Department attorneys from each component should consider the amount and apportionment of fines, penalties, and/or forfeiture paid to the other components that are or will be resolving with the company for the same misconduct, with the goal of achieving an equitable result."
3. "The Department should also endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."
4. "The Department should consider all relevant factors in determining whether coordination and apportionment between Department components and with other enforcement authorities allows the interests of justice to be fully vindicated. Relevant factors may include, for instance, the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities."

15 U.S. Dept. of Justice, *Policy on Coordination of Corporate Resolution Penalties*, May 9, 2018, https://www.justice.gov/opa/speech/file/1061186/download.

16 U.S. Dept. of Justice, *Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute*, May 9, 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

17 U.S. Dept. of Justice, *Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings* at § 1-12.100 https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings.

Analysis

Two things can be gleaned from this move. First, from a deterrence perspective, the DOJ is seeking to avoid excessive punishment for companies faced with investigations by multiple agencies. It signals an effort to preserve law enforcement resources and avoid any effect that could chill sound business decisions.

It remains to be seen whether other bodies will cooperate or follow this guidance, as it only applies to the DOJ. Thus, the policies could signal or pave the way for the DOJ to seek or impose less harsh penalties when other regulators are involved.

Second, the policy provides teeth to defendant-companies' arguments – made for years – that fines and penalties imposed by other regulators should be considered in settlement negotiations. The hope is that this policy shift will lead to fairer, more standardized and efficient outcomes.

Considerations for Corporate Monitorships

In October, Assistant Attorney General (AAG) Brian Benczkowski issued a memorandum providing guidance on the usage and selection of monitors resulting from corporate criminal resolutions, such as deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs) and plea agreements (the "Benczkowski Memo").[18] The guidance superseded the 2009 Breuer Memorandum[19] on monitor selection, but supplemented the 2008 Morford Memorandum[20] on the same subject.

Is a Monitor Even Necessary?

The most notable aspect of the Benczkowski Memo is the announcement of several factors DOJ prosecutors will consider in determining whether to require a corporate monitor as part of a settlement in the first place.

Those factors are:

- Whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems
- Whether the misconduct was pervasive across the business organization or approved or facilitated by senior management
- Whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems
- Whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future

The guidance also provides that the DOJ will consider whether any changes within the company since the occurrence of the underlying conduct are adequate to safeguard against a recurrence. Criminal Division attorneys are instructed to consider the remedial measures taken, as well as the unique risks and challenges the company faces, including industry, location and the nature of the company's clientele.

What's New About the Selection Process?

With respect to the selection process, the Benczkowski Memo provided for these changes:

- The DPA, NPA or plea agreement itself must (1) describe the monitor selection process, and (2) describe the process for replacing the monitor if necessary
- There is no longer a requirement that the Chief of the relevant section serve as on the Standing Committee, though the Criminal Division must still form the Standing Committee to evaluate monitors
- Each candidate must certify "that he/she has notified any clients that the candidate represents in a matter involving [DOJ], and that the candidate has either obtained a waiver from those clients or has withdrawn as counsel in the other matter(s)"
- The company must identify which of the three candidates is the company's first choice
- DOJ must describe why the selected candidate is being recommended

Focusing All DOJ Lawyers on Compliance

In a speech discussing the new guidance, Benczkowski announced a change to the DOJ's approach to assessing corporate compliance programs more generally.[21] From late 2015 to mid-2017, the DOJ retained a full-time compliance consultant to attempt to address the need for compliance expertise at the DOJ. In October 2018, Benczkowski announced that the DOJ had no intention of filling the position, and instead planned to enhance compliance training across it. He remarked that having a specialized position was "shortsighted from a management perspective" because it conferred expertise that would be enticing to the public sector, and result in a high level of turnover in the position. Further, he asserted, there are "inherent limitations" in having compliance expertise consolidated in a single person in a single litigating section, rather than spreading the knowledge across the DOJ to be considered throughout the prosecutorial process. So, rather than have the attorneys assigned to each particular case confer with a single compliance expert, the DOJ intends to provide them with enhanced training so that they have general compliance and specialized subject-area compliance expertise.

18 U.S. Dept. of Justice, Selection of Monitors in Criminal Division Matters, Oct. 11, 2018, https://www.justice.gov/opa/speech/file/1100531/download.

19 U.S. Dept. of Justice, *Selection of Monitors in Criminal Division Matters*, June 24, 2009, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf.

20 U.S. Dept. of Justice, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, March 7, 2008, https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

21 U.S. Dept. of Justice, *Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance*, Oct. 12, 2018, https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

Analysis

The guidance seems to signal a softening of the imposition of corporate monitors, highlighting that they "will not be necessary in many corporate criminal resolutions." This approach emphasizes the burdens placed on companies emerging from criminal investigations by monitorships, and highlights the presumption against the imposition of a monitor absent a showing of a clear need and benefit. Further, even where monitors will be deemed necessary, the "scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."

While seemingly pro-business and anti-unnecessary oversight, the memorandum reinforces the importance of compliance programs and controls, as well as targeted and prompt remediation of the underlying conduct and deficiencies. The guidance appears to invite companies and defense counsel to demonstrate through the settlement process that there is no need for a monitor. This policy shift will likely result in fewer monitors being imposed in the coming year, as they will now only be included as a settlement term if there is "a demonstrated need for, and a clear benefit to be derived from, a monitorship relative to the projected costs and burdens."

China Initiative: How Recent Fallouts Will Affect Business

On November 1, then-Attorney General Jeff Sessions announced an initiative targeting Chinese companies as part of the DOJ's strategic priority to respond to Chinese national security threats stemming from China's purported engagement in trade secret theft, hacking and economic espionage.[22] Known as the "China Initiative," the DOJ has stated it is delegating resources to identify cases of violations, such as trade theft and FCPA violations, involving Chinese companies competing with American businesses. AAG Benczkowski noted, "To counter the threat of Chinese malign economic aggression, prosecutors in the Criminal Division are redoubling our efforts to aggressively investigate Chinese companies and individuals for theft of trade secrets." Benczkowski is part of leadership group charged with implementing the China Initiative.

The Need for an Initiative

Following the August 18, 2017 Memorandum from the President requesting investigation into Chinese trade practices that might be harming American businesses, the US Trade Representative (USTR) initiated an investigation under Section 301 of the Trade Act of 1974.[23] The request was part of the Trump Administration's highly publicized efforts to combat perceived inequalities in the US-China trade relationship. The USTR was tasked with determining whether "China's acts, policies, and practices related to technology transfer, intellectual property, and innovation are unreasonable, unjustifiable or discriminatory and burden or restrict US commerce." In March, the USTR announced the results of its investigation and concluded China's practices were unreasonable, particularly the outbound investment policies and sponsorship of unauthorized computer intrusions.

22 U.S. Dept. of Justice, *Attorney General Jeff Session's [sic] China Initiative Fact Sheet*, November 1, 2018, https://www.justice.gov/opa/speech/file/1107256/download.

23 Office of the U.S. Trade Representative, *USTR Announces Initiation of Section 301 Investigation of China*, Aug, 18, 2017, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section.

Recent Enforcement Actions Against Chinese Companies and Individuals

During his announcement of the China Initiative, then-Attorney General Sessions claimed China "is notorious around the world for intellectual property theft" and further remarked "the United States is standing up to the deliberate, systematic, and calculated threats" allegedly posed by the Chinese government. He went on to provide an example highlighting recent enforcement actions for economic espionage. Also on November 1, the DOJ indicted a Chinese state-owned company, a Taiwan company and three Taiwanese individuals alleging theft of trade secrets from Micron.[24] The US Commerce Department added the Chinese company to the Entity List to prevent it from buying goods and services in the US, and the DOJ is filing a civil action to seek an injunction that would prevent the Chinese and Taiwan companies from transferring the stolen technology, or exporting products based on it, to the US.

Additional examples of enforcement actions include the arrest of Huawei CFO Meng Wanzhou on December 1. Ms. Meng was arrested while on layover in Vancouver for allegedly violating US trade sanction on Iran, and faces extradition to New York.

On December 20, the DOJ unsealed an indictment charging Chinese nationals Zhu Hua and Zhang Shilong with conspiracy to commit computer intrusions, conspiracy to commit wire fraud and aggravated identify theft.[25] The indictment alleged Zhu and Zhang were members of a hacking group operating in China and acted in association with the Chinese Ministry of State Security's Tianjin State Security Bureau. The defendants allegedly conducted global campaigns of computer intrusions targeting, among other data, intellectual property and confidential business and technological information at managed service providers, more than 45 technology companies in at least a dozen US states, and US government agencies.

On December 21, the DOJ announced the arrest of Hongjin Tan, a Chinese national and US legal permanent resident.[26] Tan was charged with theft of trade secrets related to a product worth more than US$1 billion from his US-based petroleum company employer, to use for the benefit of a Chinese company where he was offered employment. In its announcement, the DOJ noted "[t]he theft of intellectual property harms American companies and American workers. As our recent cases show, all too often these thefts involve the Chinese government or Chinese companies. The Department recently launched an initiative to protect our economy from such illegal practices emanating from China, and we continue to make this a top priority."

24 U.S. Dept. of Justice, *PRC State-Owned Company, Taiwan Company, and Three Individuals Charged With Economic Espionage*, Nov. 1, 2018, https://www.justice.gov/opa/pr/prc-state-owned-company-taiwan-company-and-three-individuals-charged-economic-espionage.

25 U.S. Dept. of Justice, *Two Chinese Hackers Associated With the Ministry of State Security Charged with Global Computer Intrusion Campaigns Targeting Intellectual Property and Confidential Business Information*, December 20, 2018, https://www.justice.gov/opa/pr/two-chinese-hackers-associated-ministry-state-security-charged-global-computer-intrusion.

26 U.S. Dept. of Justice, *Chinese National Charged with Committing Theft of Trade Secrets*, December 21, 2018, https://www.justice.gov/opa/pr/chinese-national-charged-committing-theft-trade-secrets.

The Chinese Counterpart

Enacted on October 26, China's International Criminal Judicial Assistance Law (ICJA) prevents individuals and entities based in China, including subsidiaries of non-Chinese companies, from providing certain assistance in criminal proceedings outside of China. The ICJA applies only to criminal matters and exceptions are permitted with approval from the Chinese government or a "competent authority." Due to the timing of the law, it is unlikely to be a response to the China Initiative; however, the ICJA does limit extraterritorial application of foreign laws in China making it difficult, for example, for US criminal enforcement authorities to obtain evidence or assistance from Chinese subsidiaries of US companies. It remains to be seen how the ICJA will impact subsidiaries based in China from providing information to a foreign parent in situations where a foreign criminal enforcement authority has yet to get involved.

Effect on Companies in China

With the introduction of the China Initiative, Chinese companies that are subject to US regulations, particularly those competing with US businesses, will face increased attention from US enforcement authorities. Additionally, the enactment of the ICJA further complicates the international enforcement landscape and navigating compliance may be challenging.

Companies based in or with operations in China will benefit from reevaluating existing compliance programs to ensure internal controls and processes do not run afoul of the ICJA. Similarly, Chinese companies subject to US regulations should implement or modify existing compliance programs to address the DOJ's China Initiative.

Conclusion

The full practical implications of the policies and plans described herein remain to be seen. Of course, their impact also may be affected by the new Attorney General replacing Sessions and the new DAG replacing Rosenstein, who recently announced he will soon be leaving the DOJ.

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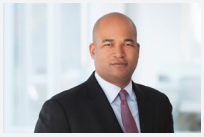

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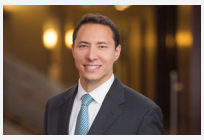

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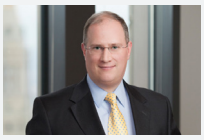

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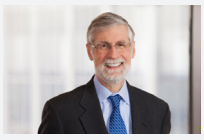

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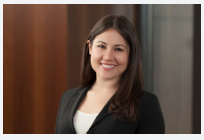

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