

# DoJ puts corporate America on notice



**Andrew Mizner - 07/02/2022 ([CDR](#))**

**The DoJ will be more proactive about prosecuting corporate crime this year, capitalising on co-operation and political will. Accordingly, US white-collar lawyers expect to be kept busy for 2022 and beyond.**

Late in 2021, the United States **Department of Justice** (DoJ) indicated that it intends to be more vigorous in pursuit of white-collar crime, ending a period, during the Trump administration and the transitional first year of the Biden presidency, when it seemed less willing or able to do so.

Accordingly, US white-collar lawyers are expecting an increase in investigations and prosecutions that will occupy them at least until the end of this presidential term.

That should strike a contrast with 2021, which “was a little slower” according to Washington, DC-based **Laura Perkins**, a partner with **Hughes Hubbard & Reed**, due to a combination of the pandemic and the DoJ handover.

Her fellow partner **Kevin Abikoff** agrees, rejecting “a counter-narrative that emerged through the pandemic from the DoJ” that justice was moving at the same speed as before. Travel and in-person meetings were restricted, making it difficult for prosecutors and investigators to carry out their work. “I can understand the need for the narrative, lest they let loose the gates of hell, but the reality was quite different,” he says.

The number of non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) entered into during 2021 was more than 25% lower than in 2020, while the amount of money recovered was down by more than half, according to data published by **Gibson, Dunn & Crutcher** last week.

Late 2021, however, signalled what is to come, explains Perkins: “The year ended with a bang, as far as policy pronouncements in late October and November, as the new administration was really coming into place at the DoJ and setting the new tone for how this administration and group at the DoJ is going to be looking at white-collar criminal enforcement.”

## **POLITICAL WILL**

In October, Deputy Attorney General **Lisa Monaco** told the American Bar Association National Institute on

White Collar Crime that “corporate crime has an increasing national security dimension”, introducing a geopolitical urgency to the matter and explicitly referencing cybersecurity, sanctions and export control.

With tensions running high between the US, China and Russia, Abikoff believes “the national security challenges that we face will definitely ripple their way through into potential investigations and enhanced activity with respect to those countries”.

Monaco also announced that “accountability starts with the individuals responsible for criminal conduct”, restoring the attitude of Obama-era predecessor **Sally Yates** in her famous 2015 memo on the topic.

Trump administration Deputy Attorney General **Rod Rosenstein** [had rejected the Yates memo](#) in 2018, signalling that the DoJ was less inclined to pursue individuals for corporate wrongdoing.

Since Monaco’s speech, however, there have been increased demands for companies to name individuals involved in misconduct, and while some are concerned that it slows down investigations by involving fringe and junior participants, DoJ supporters point out that important information can be gleaned from talking to those witnesses.

More tools will be provided to back this approach. Monaco announced the creation of a Corporate Crime Advisory Group, reviewing monitorships, compliance with NPAs and DPAs, company co-operation, and reoffending.

A “surge” of resources for the investigation and prosecution of white-collar crime, including a new **Federal Bureau of Investigation** (FBI) team focusing on fraud, was announced in a separate October speech by Principal Associate Deputy Attorney General **John Carlin**.

Abikoff warns against overhyping any outcome from this new zeal, noting that “the more you look the more you find”, but acknowledges that a change in culture should result, “due to companies having the ability to self-police and self-disclose, which has a knock-on effect on opening investigations”.

## CASTING THE NET

Authored by Perkins and Abikoff the *Hughes Hubbard & Reed FCPA & Anti-Bribery 2022 Alert*, published at the end of 2021, identified “a new FCPA enforcement focus” on commodities traders, with ongoing Foreign Corrupt Practices Act (FCPA) investigations against **Glencore** and **Trafigura Group**, following the 2021 settlement with **Deutsche Bank**.

Elsewhere in the corporate sector, Abikoff predicts closer attention to transactions involving special purpose acquisition companies (SPACs), [especially transactions and businesses that collapse](#). “When you look at the de-SPAC transactions space, there is already a lot of private civil litigation,” he says. The electric vehicle sector should be particularly prone: “There are a ton of class actions already there, and supply chain vulnerability. Almost always it leads to the kinds of challenges that tempt people to do things they shouldn’t do.”

More broadly, the report identified increasing corruption investigations in non-corporate sectors, such as advertising, retail, software and the drinks industry, as a sign that investigators are casting a wider net.

One sector in particular is catching the eye of regulators around the world. Perkins says the DoJ “is ramping up its efforts to better understand cryptocurrency” and determine whether, from its perspective, there are legitimate uses or it is solely an avenue for money laundering: “There will be a strong emphasis on crypto enforcement efforts.”

There is already a greater onus on companies to take responsibility for cybersecurity breaches and co-operate with investigations, although pundits are split on whether this makes companies more or less likely to comply.

Increased attention on environmental, social and governance (ESG) issues is also on the agenda, particularly enforcement and disclosure relating to reporting obligations. Formal action may not emerge this year though, and that is a recurring theme; even with plenty of new investigations, progress in terms of prosecutions, fines and settlements will take time.

“I don’t know that we will see a huge uptick in resolutions [this year],” says Abikoff “just because there is a lag between opening and closing these cases because they tend to be complex and take time”.

## **SPIRIT OF CO-OPERATION**

What is certain is that US regulators will be demanding more of companies when it comes to compliance.

The Hughes Hubbard report identified [a renewed emphasis on use of monitorships](#), which had declined under the previous regime, but Monaco’s speech was explicit that she had withdrawn this guidance and emphasised a fresh look at how they are administered.

Perkins further hypothesises that the DoJ had been deferring monitorships to foreign anticorruption authorities, such as France’s **Agence Française Anti-corruption (AFA)**. But following Monaco’s speech, “there is the possibility of increased monitors being put in place at companies. But that is an individual prosecutor case-by-case determination”.

Despite the DoJ taking a stronger hand, that spirit of co-operation is here to stay. Perkins says: “We will see a growing number of other countries coming into not just the anti-corruption space, but corporate criminal liability more generally. Once that happens, there will be increased cooperation in anti-corruption cases and corporate criminal cases more generally.”

[Where the US leads](#), foreign prosecutors follow, and there is clearly an international appetite for the authorities to be more proactive once again.

The Hughes Hubbard report picked out international co-operation in the enforcement actions against **Goldman Sachs, Airbus, J&F Investmentos, Vitol, Amec Foster Wheeler Energy and Credit Suisse** during 2020 and 2021, and reported that the DoJ has interacted with prosecutors and investigators in dozens more countries in recent years.

There has been closer inter-agency assistance within the US too, with the DoJ and **Securities and Exchange Commission** having worked with a wide range of law enforcement bodies and regulators in recent years. With the proposed surge in resources, that is set to continue.

Achieving that high degree of co-ordination, both domestically and internationally, will go a long way to determining the success of this administration’s objectives.