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Where DOJ's Focus On Criminal Corporate Trade May Lead

By **Eric Sandberg-Zakian and Robert Casty** (March 24, 2023, 4:19 PM EDT)

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In remarks at the ABA National Institute on White Collar Crime on March 1, Principal Associate Deputy Attorney General Marshall Miller announced a significant upswing in hiring at the U.S. Department of Justice's National Security Division, including the hiring of a chief counsel for corporate enforcement, as part of an increased focus on bringing corporate criminal cases with a national security nexus.

Miller said that national security risks, such as export controls and sanctions enforcement, should be "vaulting up the corporate compliance risk chart" and would be a subject of increasing attention from the DOJ.

These new announcements and enforcement priorities are part of a broader trend of enhanced export controls and sanctions enforcement that intensified in the wake of the Russian invasion of Ukraine. In a June 2022 speech, Deputy Attorney General Lisa O. Monaco remarked that she had advised of a "sea change by describing sanctions as 'the new [Foreign Corrupt Practices Act].'"[1]

The attorney general formed the well-publicized KleptoCapture Task Force to pursue Russian oligarch-related cases.[2] The U.S. Department of Commerce revamped its export controls enforcement program to pursue cases more aggressively.[3]

And just one day after Miller's remarks, the DOJ, the Commerce Department and the U.S. Department of the Treasury issued joint guidance cracking down on third-party intermediaries used to evade Russia-related sanctions and export controls in particular.[4] All indications are that the DOJ is setting out to bring more criminal trade controls cases against companies.

Of course, the DOJ already has a well-established history of bringing corporate criminal trade controls cases. Historically, the department has been most interested in bringing cases it views as having several key characteristics: involvement of senior corporate personnel; long-running, systemic conduct; and serious implications for national security, such as the financing of terrorist groups or unfriendly regimes, or the provision of advanced technology to adversaries.

Examples of this type of case have involved banks accused of circumventing U.S. sanctions programs or Chinese companies perceived to be acting against U.S. foreign policy interests.

Perhaps the department's increased investment in pursuing corporate trade controls prosecutions will result in more of these cases.

However, as with any effort to surge resources, success likely will turn on whether the expanded resources result in the department ferreting out cases that have eluded detection in the past, and of course it is possible the department will use the additional resources to bring new kinds of cases, as well.

If the DOJ looks to use its additional resources focused on national security to expand the kind of cases it brings, where might that expansion lead? One possibility is that the department will pursue criminal resolutions in less consequential cases that have traditionally been resolved civilly through settlements with primary regulators at the U.S. Department of State, and at the Commerce and Treasury Departments.

In particular, companies often voluntarily disclose to those primary regulators — but not to the DOJ — trade controls violations resulting from the conduct of low-level employees who circumvented internal controls in order to obtain or continue business for the company.

In the past, primary regulators have resolved many of these cases civilly without referring them to the DOJ for criminal investigation, presumably because the companies disclosing them have demonstrated a corporate commitment to compliance and persuaded the regulators the employees were acting contrary to company policy.

However, these cases often involve precisely the kind of evidence prosecutors need to support a criminal charge – emails, texts, chats or witness recollections showing employees acting with an intent to violate company compliance measures and possibly the law. These cases thus might present a natural opportunity for the DOJ to use increased resources in pursuit of criminal actions against big companies.

The increased cooperation between the DOJ and primary regulatory agencies that both sides have been emphasizing in recent announcements might well lead to increased prosecutorial scrutiny of cases previously resolved civilly. And perhaps when Monaco describes trade controls enforcement as the new FCPA, she has in mind high-dollar corporate settlements punishing companies for conduct of relatively low-level employees.

If the DOJ devotes increased attention to cases initiated through voluntary disclosures to primary regulators, we may well see an increased number of criminal corporate trade controls resolutions. After all, it is easier to reach a settlement with a large company in a conference room than it is to win a conviction of an individual in a courtroom.

But a trend of administrative voluntary disclosures increasingly ending up in criminal investigations and resolutions might change companies' strategic analysis of when to initiate voluntary disclosures to the State, Treasury and Commerce Departments. Compliant companies with a commitment to transparency and cooperation will no doubt still consider disclosing, but they will have to factor in the increased risk of criminal fines and costly collateral consequences of criminal resolutions.

If risk at the DOJ begins to weigh heavily in the corporate calculus, primary regulators may see a degradation in the number and quality of voluntary disclosures they receive over time. Such a degradation could harm key regulatory objectives – limiting regulatory insight into violation trends and

patterns, eroding corporate norms favoring disclosure and cooperation, and reducing the frequency of the large-scale compliance overhauls that often accompany voluntary disclosures.

It also could disadvantage the DOJ in the long term. Fewer voluntary disclosures involving bad employee behavior would mean fewer cases for the DOJ to evaluate for possible criminal investigation and prosecution.

This dynamic could be particularly problematic for the most compliant companies. Corporations that monitor compliance, spot possible violations, preserve evidence, investigate thoroughly and examine employee conduct through a critical lens might rethink disclosing internal investigatory findings to primary regulators if they anticipate back-end DOJ action.

In particular, companies that currently initiate voluntary disclosures as matter of course upon learning of a possible violation may wait to investigate, gather facts and assess the nature of employee conduct before deciding whether to disclose.

The DOJ and the primary regulatory agencies will have to work carefully to manage this dynamic. The government faces a vexing tradeoff between deterrence and compliance, between a commitment to increasing enforcement in the short term and the need to encourage disclosure in the long run. Companies will need to monitor how the government strikes the balance.

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[1] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-keynote-remarks-2022-gir-live-women.

[2] https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announceslaunch-task-force-kleptocapture.

[3] https://bis.doc.gov/index.php/documents/enforcement/3062-administrative-enforcementmemo/file.

[4] https://www.justice.gov/file/1571336/download.