

WHITE COLLAR ENFORCEMENT UNDER THE BIDEN ADMINISTRATION

By Alison Preece | April 25, 2023 | News & Features, Lawyer Limelights



John Fagg, Jr. and Jim McLoughlin, Jr., partners at Moore & Van Allen who focus on white-collar criminal defense and regulatory investigations.

The Biden administration has been following through on campaign promises to pursue more white-collar crime. Regulators have been pursuing Covid-related frauds, giving the agencies significant trial experience and wins. Tougher enforcement policies over corporate wrongdoing have included a renewed attempt to hold more executives accountable. Antitrust enforcement remains strong, with expansion into new territory such as no-poach agreements, and the government is seizing the crypto downturns to pursue fraud in that area. The Russia conflict is also sparking enforcement actions, including asset seizures.

We sat down with **Jim McLoughlin, Jr.**, and **John Fagg, Jr.**, partners at Moore & Van Allen who focus on white-collar criminal defense and regulatory investigations, to get their take on the administration's

enforcement efforts so far, and what might be coming down the pipeline.

McLoughlin and Fagg, both **Lawdragon 500 Leading Litigators**, represent clients under investigation across the spectrum of government actions, including antitrust violations, securities fraud and public corruption. They recently represented the former CEO of Pilgrim's Pride in a criminal price-fixing case brought by the Antitrust Division, which went to trial an astounding three times. The case was against ten individuals, and the first two trials ended in a hung jury. The third trial was against just half the individuals, and all five were acquitted.

"If you did a survey of white-collar defense lawyers, I don't think many, if any, could remember the Justice Department trying an antitrust case three times," says McLoughlin. "It's a significant signal."

Lawdragon: The Biden administration promised to get aggressive on white-collar crime enforcement. How have you seen that play out?

John Fagg: We've seen a few things. They've also put in place several task forces and working groups that have been aggressively prosecuting white collar crime. In 2020 there was really a big push, particularly by Main Justice, both in the fraud section and in the Antitrust Division, to charge cases and take them to trial. With the fraud section, we saw all these prosecutions around Covid-related fraud, particularly PPP and EIDL, the government assistance programs. And they were very successful.

LD: Why were the PPP fraud cases significant for the administration?

JF: It gave those prosecutors significant trial experience across the unit, which sends the message that they're prepared to take more cases to trial. It's the same unit that is typically investigating our corporate clients for white collar crimes, the Markey Integrity and Major Frauds Unit, so I imagine we'll see a redeployment of resources by the fraud section into investigations in other areas.

Jim McLoughlin: And I'm sure the Justice Department was thinking, we have to send a message that we are going after people who cheat these programs. You see it in a variety of the government's other big spends, like infrastructure, and the Inflation Reduction Act. They simply can't have hundreds of millions of dollars going out the door as the result of fraud. That's just terrible for the policy.

JF: And those cases had a lot of jury appeal. They're alleging that these individuals stole from the United States government, and therefore from the American people, during a global emergency. A case for market manipulation in some obscure corner of the market doesn't have that same appeal. The PPP cases were also typically shorter and could be brought to a verdict quicker. So they'll be looking for more cases to bring to trial that they believe are meritorious, important and accessible to the public at large, so they can make the case to the general public the administration's more aggressive strategy is punishing and deterring criminal behavior that affects their quality of life.

LD: And the regulators has been going after individuals more?

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JM: Yes, and you see that in the Justice Department's recent announcement encouraging corporations to come in and report where they identify wrongdoing. [Deputy Attorney General] Lisa Monaco released updated guidance on how companies can expect to obtain full cooperation credit from the Department of Justice in an investigation, with an emphasis on individual accountability. The Yates Memo is still alive and that involves identifying individuals. And we're seeing that. The **head of the CFPB recently said** that, with respect to financial services companies, prior administrations' strategies haven't worked. That fines have just become a cost of doing business, and they're going to have to come up with new ways to discourage what they believe is a significant amount of misconduct. That's going to include a pursuit of individuals as well as trying out other penalties against corporations to increase deterrence.

We can also expect to see this approach from the SEC, the CFTC – from all the regulators. The strategy is likely also to be adopted by state regulators. Look at the recent cryptocurrency meltdowns. The idea that the government can accomplish very much by bringing a proceeding against the cryptocurrency company is really meaningless when the company is in bankruptcy, with billions of dollars in debts that it can't pay and innocent customers are facing losses they cannot afford. A corporate fine only compounds that harm, so regulators perceive their only choice to be going after the individuals.

If you look at the case that the DOJ brought against Google, for example, the perception is that companies have gotten too big. It's hard to come up with a penalty that's significant enough given the statutory fine calculations. So, DOJ will continue going after individuals.

If you look at the Antitrust Division, and the cases they brought involving manipulation of the labor markets, for example, to date they failed in those cases against individuals. But the Antitrust Division has said, "We don't care. We're prepared to lose cases to go after ." That's a bold announcement.

The Swiss Army knife of the Department of Justice is the wire fraud and mail fraud statutes. But the Justice Department is talking about bringing Sherman Act Section 2 cases instead of Sherman Act Section 1 for the first time in 50 years. They are talking much more aggressively, and they're starting to look at other statutes, like racketeering. You allege a trading desk is a RICO enterprise, and that's a much more significant charge, for both the companies and the individuals. I think you're going to continue to see the government trying to find new ways to bring cases and using different statutes to try to support its policies.

LD: Crypto seems like a hot enforcement area at the moment.

JM: Yes, it's a fertile area and will be for a while. The federal government has been forced into taking a regulation-by-enforcement approach when it comes to crypto.

JF: Agreed. The FTX prosecutions are a prime example of their efforts. The DOJ, SEC and CFTC all filed simultaneous coordinated enforcement actions against Sam Bankman-Fried, obviously working closely with or aided by two cooperating witnesses. They're reinforcing the benefits, the carrots, for individuals to come in and cooperate with them. The first person in the door is going to get the most benefit of that cooperation.

They're still trying to figure out who is best suited to regulate crypto products. But it seems to me that the FTX case is a good one for the Department of Justice because it involves allegations of fraud and bribery that the American public understands. And DOJ looks for those types of cases where they can take bad facts and use them to really springboard into an enforcement initiative. I think we see that here.

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The SEC and others have filed complaints against individuals who were backing or supporting crypto platforms and technologies without disclosing they were compensated, and I think we'll continue to see further scrutiny around that. I think the government is targeting high profile individuals in crypto, because when they do, that substantially increases the media coverage and the profile of those cases.

LD: Right, they're going after celebrities that were hawking the coins, right? That seems unusual.

JM: They're being investigated, yes. You may see the SEC bringing civil proceedings against them, but I doubt the Justice Department will pursue them criminally. It is unusual; you don't typically have celebrity endorsements in the securities space. Celebrities don't really endorse G by IBM, right? This is the other issue that the Biden administration is facing, new behaviors, new models. Social media and new technologies have created a kind of ecosphere around creating and marketing investments and that you traditionally didn't have, or haven't had in decades for securities, so they have to figure out ways to identify problems and deter folks quickly. Enforcement is faster than enacting regulation.

LD: What are you seeing in the antitrust space?

JM: The regulators remain very aggressive there. The Antitrust Division has been marching through the protein manufacturers, for example. Chicken, beef, pork, tuna. They started with price-fixing with tuna manufacturers. The president of StarKist was convicted, and others pled guilty. Then they started rolling through the other protein markets, because now they have that blueprint. It's not an irrational

approach. Same happened in financial services in trading: It was LIBOR, then it was FX, then it was precious metals. They see a behavior, then go looking for it in other markets. But it depends on how aggressive they are, and what thresholds they use, if they're going to come up with a lot more misbehavior or not.

The FTC's Alvaro Bedoya is talking about bringing the Robinson Patman Act back from the grave to bring back market "fairness" and to support people "living paycheck to paycheck". The administration is looking for every tool possible to send the message it is on the side of the public. And there is an absolute follow-on effect. We've seen threats made of private Robinson Patman Act claims we would not have seen two years ago.

JF: The Antitrust Division has also made it very clear that they intend to aggressively use their criminal enforcement authority to reset how antitrust violations are addressed from an enforcement standpoint. They're expanding into areas that had previously not been treated as criminal violations, like no-poach agreements, wage-fixing agreements. And they have obtained some guilty pleas in that, but they have not yet convicted anyone at trial of those charges.

The *Patel* case related to no-poach agreements in the aerospace industry went to trial in late March. The lawyers for the executives argue vigorously, not just that the no-poach agreements are not a per se violation subject to criminal prosecution, but also that these agreements were part of legitimate collaboration between companies in a particular industry permitted under the Sherman Act. But, the government is showing no signs of letting up on its position no-poach agreements are an antitrust violation even after losing several trials. DOJ continues to push forward with this and other initiatives. And again, in statements that antitrust officials continue to make, they're trying to present these indictments and the trials in a way that will resonate with the general public.

It remains to be seen whether or not they're going to be successful in those efforts. But that's another good example of legislating through enforcement.

The Department of Justice recently withdrew some important guidance that had been in place for decades about information sharing in the healthcare industry related to joint ventures. And while that guidance is specific to the healthcare industry, I think it's very telling and is instructive in terms of the Antitrust Division's view of information sharing among competitors, which is very aggressive. It will be heavily scrutinized, at the very least. It's a stark change and signals a much more skeptical view of information sharing.

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LD: Are you seeing enforcement actions coming out of the Russia/Ukraine conflict? Like sanctions evasions cases?

JM: Absolutely. DOJ leads the government's Task Force KleptoCapture targeting Russian elites trying to evade sanctions. In 2022 charges were brought against dozens of individuals and entities, and in April this year we've seen the continuing, coordinated U.S. and U.K. effort to go after those they call the "enablers" of Russian oligarchs' efforts to hide assets in offshore havens and structures, as well as those obtaining dual-use technology for Russia, with OFAC imposing sanctions on 54 people and entities connected to over 20 jurisdictions in just this one move.

DOJ and Treasury's OFAC continue to investigate aggressively, but those cases are complex. The financial accounting evidence and international evidence gathering aspects require a lot of expertise and inter-government cooperation, so, those cases take time to put together. Preventing Russian evasion of sanctions to support Ukraine is a huge government policy interest, so we will surely see more cases and sanctions.

JF: The government has seized a significant amount of assets from Russian individuals which the government believes were improperly obtained. They've also charged a number of individuals for that. That's a show of force by the DOJ, and there's a real return on those efforts when the actual assets are seized.

They're also unsealing indictments against individuals who they don't have the ability to arrest either domestically or through our international partners. They're attempting to demonstrate that they're taking these efforts seriously. They're throwing a significant amount of resources at that.

One of the other things that we have certainly seen and has been repeated over and over again, including as recently as last month by very senior DOJ officials, is DOJ's efforts to expand coordination with peer law enforcement agencies around the world. That will no doubt continue to increase.

LD: With all this activity from the government, what are companies doing to help strength their compliance proactively?

JF: They're putting into place more sophisticated technology. The way people use technology to communicate these days has outpaced the compliance systems meant to monitor them. So companies are investing significantly in resources to better surveil the conduct and the communications of their employees, across industries.

JM: You're also seeing improvement in governance. How are structures being created and administered to make sure that the right people see problems? Improving escalation paths, getting committees structured, or other things so that on a regular basis, these kinds of issues are vetted in more senior management.

JF: Companies are also taking to heart the guidance from Lisa Monaco and other senior officials about what it means to fully cooperate with a DOJ investigation. If companies are going to get cooperation credit, they have to provide what has been described as extraordinary cooperation, and that individual accountability is DOJ's number one priority. "Corporate entities don't commit crimes, individuals do." DOJ has increased its focus on very senior executives. It's at least partly because they believe the publicity will lead to deterrence. It was not an accident that in what started as a ten defendant criminal antitrust case, three of the five defendants that remained for the third trial after DOJ dismissed five others were the C suite executives.

So, this initiative by the Department of Justice to hold individuals accountable does inevitably create tension between representation of the individuals and representation of the corporate entity. We will continue to see more strain on that dynamic, including more individuals having their own counsel earlier in investigations.

In a case involving Allianz Global Investors, the individual indicted is making an argument that the case against him should be dismissed because that the company, which pleaded guilty to securities fraud pursuant to an agreement with DOJ, went too far in trying to place the blame on him, when presumably it was trying to meet or exceed DOJ's expectation regarding cooperation and individual accountability to reduce the penalties it was facing. Somewhat similar allegations led to extensive proceedings in *U.S. v. Connolly* in 2017, also in the SDNY. This is a case to watch.



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