

Holder To Leave DOJ Emboldened To Tackle Corporate Crime

By **Stephanie Russell-Kraft**

Law360, New York (September 25, 2014, 7:59 PM ET) -- When he steps down after nearly six years as attorney general, Eric Holder will leave behind a renewed commitment to prosecuting white collar and corporate crime, having dusted off two old statutes to turn the Department of Justice into a global corruption cop and secure billions of dollars in recoveries from major financial institutions.

Although the outgoing attorney general will also be remembered for reducing sentences for small-time drug users, cracking down on health care fraud and being the first attorney general to be held in contempt of Congress, his mark on the corporate world has been deep.

One of Holder's most significant initiatives was the renewed use of the Foreign Corrupt Practices Act, a 1977 statute that prohibits U.S. persons and certain foreign securities issuers from making bribes to foreign officials for the purpose of obtaining business. The DOJ's use of the law has skyrocketed since 2009, when Holder took office, spawning specialized legal practice groups and anti-bribery compliance programs around the world.

After lying dormant for decades, the law now seems to have woken up — permanently, according to Trace Schmeltz, a partner at Barnes & Thornburg LLP.

"There's no question that the FCPA is here to stay," Schmeltz said. "It's such a far-reaching tool. You can make an FCPA claim because someone has a tax filing in a foreign country, and then you find out about the smallest bribes and smack down on it with a full investigation."

Unlike many categories of enforcement, in which U.S. attorney's offices can be autonomous, the FCPA depends on the involvement of the DOJ main office, according to former Assistant U.S. Attorney David Miller, now a partner at Bingham McCutchen LLP.

"The fraud section in the last years has been very aggressive in enforcement and has issued a public manual on FCPA compliance," he said.

There are few other laws so heavily monitored by the DOJ, added Miller, who expects FCPA enforcement to remain a priority even after Holder leaves.

Another law that saw limited play until recently — the Financial Institutions Reform, Recovery and Enforcement Act — is also unlikely to fade away anytime soon, attorneys say.

In the past several months, the DOJ has used the 1989 statute, passed in the wake of the so-called savings and loan crisis, to ink record-breaking deals with the world's largest banks over their sale of toxic mortgage-backed securities leading up to the financial crisis.

In the largest settlement related to the crisis so far, Bank of America Corp. in August said it had agreed to a \$16.65 billion settlement with the Justice Department, including \$5 billion to address FIRREA claims. The announcement came on the heels of similar deals with Citigroup Inc. and JPMorgan Chase & Co.

Holder, who stepped into his current role just months after the collapse of Lehman Brothers Holdings Inc. sent shockwaves through the financial markets, has faced sharp criticism for not doing enough to hold financial institutions and their employees accountable for what many consider to be their criminal behavior in the run-up to the financial meltdown.

"Until three months ago, you would have said the handling of the financial crisis was a disaster, and now you've got tens of billions of dollars that have been collected from these banks," Schmeltz said.

While it's fair to criticize him for not having done more, the attorney general deserves credit for what he has been able to accomplish, according to Lisa Noller, a former assistant U.S. attorney in Chicago.

"The conventional wisdom is that there should have been more criminal charges, but it is very difficult to bring criminal charges, especially since a lot of the companies that were and are under investigation don't exist anymore," said Noller, now vice chair of Foley & Lardner's white collar practice.

And Holder has indicated that his work isn't yet over.

Just over a week ago, the attorney general called on Congress to increase the FIRREA whistleblower provision — providing tipsters with as much as a third of the funds recovered by the government — to "realistically" incentivize members of Wall Street to come forward with information about potential wrongdoing.

He also said the DOJ is building criminal cases against individuals as it continues probes into financial fraud in the foreign exchange and residential mortgage-backed securities spheres. And given the 10-year statute of limitations on FIRREA, additional prosecutions under that law might still exit the pipeline in the coming year.

Despite heavy criticism, the DOJ under Holder has seen increased civil enforcement of financial institutions related to the 2008 financial crisis, according to Lathrop B. Nelson III of Montgomery McCracken Walker & Rhoads LLP, who also doesn't expect FIRREA to go away anytime soon.

"The allure of pursuing financial institutions and other entities under a civil statute, with a lower burden of proof, will likely be continued under the next attorney general both in this administration and subsequent ones," he said.

The question that remains to be answered, according to Andrew W. Schilling of BuckleySandler LLP, is how much the tone and direction of the Justice Department will change under its next leader. While the next attorney general may continue to use FIRREA, he or she may move on to prosecuting conduct that has taken place since the financial crisis, said Schilling, a former assistant U.S. attorney in Manhattan.

“That said, the Justice Department has spent the last several years devoting significant resources and attention to the pursuit of financial fraud cases, and we can expect financial fraud generally to remain a top enforcement priority for some time, as big institutions like DOJ don’t change direction overnight,” he added.

--Editing by Jeremy Barker and Philip Shea.

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