On the WLF Legal Pulse

Timely commentary from WLF's blog

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

February 12, 2021

Regulatory Enforcement Policy—What To Expect from a Biden Department of Justice: A Q&A with Barry Boss

Background: Enforcement of environmental, health care, and many other regulatory statutes is left to the discretion of prosecutors to use administrative, civil, or criminal remedies. All too often, that discretion is abused when criminal sanctions are sought when more reasonable administrative or civil remedies would be appropriate, considering the vagueness of agency regulations and lack of criminal intent.

Over the last four years, the Trump Administration sought to implement fairer enforcement practices, such as the Department of Justice's policy that agency informal "guidance" not be used as a basis for enforcement and OMB's Office of Information and Regulatory Affairs, issuance of a set of "best practices" that federal agencies should use for enforcing the law. WLF authors have written about these issues and WLF has commented on those developments and how the absence of such policies have resulted in the unfair prosecution of companies and their executives, such as Todd Farha, former CEO of WellCare, and courts' refusal to hold prosecutors' to a higher standard of proving criminal intent (here and here).

Below, Barry Boss answers our questions on what we can expect from a Biden Adminstration's enforcement of regulatory statutes and regulations.

WLF: One of Washington Legal Foundation's long-standing concerns with white-collar enforcement is government's pursuit of criminal charges for infractions that could instead be civilly enforced. This blog has published quite a few posts over the past four years on enforcement policies issued by DOJ and other federal agencies on enforcement discretion and corporate compliance. Which among these documents did you find most welcome?

Boss: Associate Attorney General Rachel Brand issued a memo in January 2018 that provided guidance that the Department of Justice should not use its civil enforcement authority to prosecute violations of informal guidance issued by a government agency, where there was no statute or published regulation that clarified the ambiguity. In December 2018, the DOJ later applied that policy to criminal prosecutions and incorporated the policy into its Justice Manual for federal prosecutors. More recently, in the fall of 2020, the Office of Management and Budget similarly issued guidance to the executive agencies on regulatory enforcement reform and best practices, which included guidance that liability should only be imposed by agencies for violations of statutes and issued regulations. These policies go a long way toward limiting the risks of overcriminalization of reasonable business decisions in the absence of clear published regulatory guidance.

Barry Boss is co-chair of Cozen O'Connor's Commercial Litigation Department and co-chair of the White Collar Defense & Investigations Practice Group. Barry focuses his practice on advising companies and individuals confronting potential criminal exposure.

WLF: Is there a particular example of a criminal action that prosecutors would have likely declined to pursue had these policies been in effect at that time?

Boss: One example that immediately comes to mind is a case in which I have been personally involved for many years—the prosecution of WellCare executives in the Middle District of Florida. The executives prosecuted in that case had reported Medicaid expenditures to a state agency under a state statutory provision that was ambiguous, and no formal regulation or law clarified that ambiguity. Despite the absence of formal agency guidance providing clarity, the defendants were convicted because their reasonable interpretation of the state statute differed from the state agency's informal interpretation, which was never codified into law. All of the defendants in that case, including CEO Todd Farha, recently received pardons. The official statement accompanying those pardons noted that that this case was a core example of overcriminalization. I agree with that, and think this is precisely the kind of case that the DOJ would have declined to pursue under the amended Department of Justice policy. WLF has also published several pieces on this case.

WLF: What should American businesses and entrepreneurs expect from the incoming administration on white-collar enforcement? Do you expect that they will reverse or ignore the enforcement policies you mentioned before?

Boss: Obviously, we don't have a crystal ball on what the Biden Administration's DOJ will look like under the leadership of Attorney General nominee Merrick Garland and his team. My personal take, however, is that there's been a tremendous shift in perspective on criminal justice issues across the aisle over the last few years. Democrats have tended to focus on non-white-collar crimes in their reform efforts, namely drug crimes. That said, the hope is that the focus on criminal justice issues will be broad enough to cover the whole spectrum of necessary reforms to the criminal justice system, including the problem of overcriminalization, which applies not only to drug crimes, but also to white-collar crimes. The hope is that the progress made in criminal justice reform generally, including reducing overcriminalization, will be continued by the Biden Administration. But I do think we'll see more emphasis on white-collar prosecutions particularly involving securities, environmental crimes, and PPP and healthcare fraud. I also expect a focus on political corruption, but these prosecutions have become more challenging after the Supreme Court's "Bridgegate" decision (*Kelly v. United States*).

WLF: Do you expect that a new DOJ will increase the use of Deferred and Non-Prosecution Agreements for companies? Do you expect an increase in prosecuting corporate executives?

Boss: Yes. One of President Biden's first acts in office was to change the executive policy governing fines collected by the Government in settlements with private parties, including deferred-prosecution agreements, to allow the Government to direct those payments, or a portion of them, to third parties and charities. That suggests to me that President Biden sees deferred-prosecution agreements as an important tool in the Government's belt and that the administration intends to use this tool actively, with an intent to direct proceeds to organizations working to redress the injuries caused by the conduct at issue. I think Biden specifically has an eye on using these proceeds to tackle climate change by directing fines collected from violations of environmental laws to organizations working to combat climate change and other environmental harms.

With regard to prosecutions of individuals, there is no doubt that we will see a return to something akin to the Yates Memorandum, which directed prosecutors to hold individual executives criminally responsible for a corporation's criminal conduct. While I understand the theory behind this policy, I think in practice it is problematic because of the incentives it creates for a company as part of its internal investigation to identify one or more sacrificial lambs to be served up to the DOJ alter in exchange for corporate leniency.

WLF: Do you see the courts becoming less deferential to agency's interpretations of their organic law by limiting the scope of the *Chevron* doctrine?

Boss: President Trump filled 25 percent of the seats in the federal judiciary. The remainder are filled by judges who have been sitting for several years. As to the more established members of the bench, their approach to *Chevron* isn't likely to dramatically shift in the coming years. So the question is really how these Trump appointees are likely to apply the *Chevron* doctrine. There certainly are some prominent conservative jurists, such as Justice Gorsuch, who have signaled a willingness to significantly curb *Chevron* deference. It's the natural extension of the overcriminalization movement. However, conservative jurists don't seem to take a uniform approach to *Chevron* and there is vigorous debate within the Federalist Society and related conservative groups on the merits of *Chevron* deference. So, in the absence of an oracle, I think it's hard to say at this point how the addition of these conservative jurists will influence the scope of this doctrine in the coming years.

WLF: What areas of criminal-enforcement focus have emerged over the past few years, and do you expect those areas continue to be prominent for the new leadership at DOJ and the federal agencies or are there other areas you see that might have priority?

Boss: Over the last few years, prosecuting human and drug trafficking offenses, immigration offenses, Foreign Corrupt Practice Act cases, as well as reinstating capital punishment, have been clear priorities for DOJ criminal enforcement under the Trump Administration. Another priority has been enforcing fraud and abuse of funds distributed under the Paycheck Protection Program (PPP). I think the Biden Administration will continue to prioritize prosecuting PPP fraud. But I think you'll see a shift in the Administration's other enforcement priorities to prosecuting domestic terrorism, political corruption, healthcare fraud, and environmental violations. I expect DOJ to de-emphasize immigration offenses and capital cases due to President Biden's immediate moratorium on federal executions.

WLF: As someone who's devoted a lot of time and attention to criminal sentencing, what conclusions can you draw on how prosecutors and judges have addressed sentencing in the past several years? Are there any trends or developments that trouble you?

Boss: There have been both positive and negative developments. The positive developments come from the recognition that people were being sentenced to too much time. The First Step Act and amendments to the Sentencing Guidelines have started to bring a bit of rationality into sentencing decisions, particularly the length of incarceration. On the negative side, prosecutors today have more control than ever and have used the threat of more severe sentences to get targets to plead guilty and punish those who exercise their right to go to trial more severely. There needs to be a shift so that a defendant can contest their guilt through the constitutionally enshrined right to a trial without a severe sentence necessarily being held over their head if they lose at trial. There also needs to be a political reckoning. The way we've long dealt with national crises is, in their wake, to increase the penalties for existing crimes. Until we stop that cycle, we will never achieve meaningful sentencing reform.

Federal legislators and the Sentencing Commission have come to recognize that sentences for drug crimes set in the 1990s were out of proportion to the crimes themselves, and they've started to change the sentencing guidelines for those offenses. But what they failed to realize was that when those sentences were increased in the 1990s, there was a countervailing effort to make sure white-collar sentences were correspondingly increased in proportion to the increases in the drug sentences. We've now started to scale back punishments for those drug crimes, but we haven't made the same reductions on the white-collar side. In my view, there needs to be a recognition of that and a corresponding adjustment on the white-collar side.

