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DOJ's Pursuit Of Admissions — And The Risks Of Settling

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Matthew P. Previn

On March 19, 2015, the U.S. Attorney's Office for the Southern District of New York announced a proposed settlement of a civil fraud lawsuit against a large financial institution (bank).[1] As with many of the U.S. Department of Justice's recent settlements, the proposed settlement includes a significant monetary penalty. However, the proposed settlement also includes two additional elements traditionally more associated with resolutions of criminal matters, but which the DOJ has increasingly sought in civil fraud cases: namely, admissions of misconduct, as well as sanctions against corporate executives involved in the alleged misconduct.

The government's proposed settlement with the bank marks the latest, and the clearest indication yet, that the DOJ will increasingly require such nonmonetary relief in resolving civil fraud actions — and thereby make the decision whether to settle such cases extremely challenging for defendants.

The SDNY filed its case against the bank in 2011 under the Financial Institutions Reform, Recovery and Enforcement Act of 1989, a statute that authorizes the federal government to recover civil penalties for frauds involving or affecting financial institutions, and which the DOJ has aggressively used to target alleged financial fraud. The government's complaint, which arose in part from a whistleblower who filed a declaration pursuant to FIRREA, alleged that the bank had made misrepresentations to its clients concerning the foreign exchange rates it provided them.

Admissions of Misconduct

Historically, the DOJ most commonly settled civil fraud cases by allowing defendants to pay money, while simultaneously denying any fault or liability. However, under the terms of the proposed settlement — which also resolves a parallel lawsuit brought by the New York state attorney general and investigations by the Department of Laborand the U.S. Securities and Exchange Commission, as well as private class action lawsuits brought by several bank customers — the bank would "admit, acknowledge and accept responsibility for" certain conduct alleged in the SDNY's complaint against the bank.

The SDNY has been a leader among U.S. attorney's offices in requiring such admissions in civil fraud settlements. Preet Bharara, the U.S. attorney in Manhattan, stated in March 2012 at the American Bar

Association's 26th Annual National Institute on White Collar Crime that his office did not view civil fraud settlements in monetary terms alone, and that it would insist on nonmonetary relief that furthers the public interest, including admissions, in most civil fraud settlements. And the Manhattan U.S. attorney's office in fact has obtained admissions of wrongdoing in recent civil fraud cases brought against financial institutions, mortgage lenders and exporters, among others.[2]

DOJ also has increasingly insisted on admissions in civil fraud settlements — typically in the form of a written "statement of facts" acknowledged by the defendant — albeit not with the same frequency or consistency as the SDNY. For example, in a number of recent cases brought under FIRREA or the False Claims Act, the DOJ sought and obtained admissions concerning the defendants' residential mortgage-backed securities and mortgage lending practices.[3] By contrast, however, when the DOJ recently settled civil fraud cases with two banks as part of its "Operation Choke Point," which targets the payment processing and payday lending industry, it did not require the banks to admit to any alleged misconduct.[4]

Despite the DOJ's varied approach, there is little question that defendants in DOJ civil fraud actions now face the prospect that the DOJ will insist that they admit to alleged misconduct as a precondition to any potential settlement.

Individual Accountability

Second, the proposed settlement also includes another trend seen increasingly in DOJ civil fraud settlements that also has largely been imported from the criminal prosecution context: holding individuals accountable for alleged misconduct. Indeed, Bharara has stated that, in pursuing civil financial fraud cases, U.S. attorneys "are guided by the same principles that govern criminal prosecution," which, in the context of corporate crime, prioritizes the prosecution of culpable corporate employees in addition to the corporation itself.[5] As a result, the DOJ has increasingly named corporate executives as defendants in civil fraud actions, and, in a number of prominent cases involving executives at mortgage lenders and financial institutions, among others, has recovered significant monetary penalties from the executives, separate and apart from any such penalties imposed on the corporate employer.[6]

In the SDNY's complaint against the bank, it also named as a defendant a bank executive, and while the proposed settlement does not impose monetary penalties against the executive, it requires him to admit to certain conduct alleged in the SDNY's complaint. Further, the proposed settlement requires the bank to "effectuate the separation of certain employees involved in the conduct at issue from further employment" with the bank, including the executive.

The DOJ's insistence on such a sanction is, like a monetary penalty, intended both to punish the employees, and to deter other individuals who might be tempted to commit alleged wrongdoing in other cases. Indeed, as Mary Jo White, the current head of the SEC and former U.S. attorney in Manhattan has stated, "[w]hen people fear for their own reputations, careers or pocketbooks, they tend to stay in line."[7]

Deciding Whether to Settle

Given the likelihood that DOJ will increasingly seek admissions of misconduct and individual accountability in civil fraud cases — and therefore will less frequently allow defendants to settle them by simply paying money while denying liability — defendants have a more complicated decision to make

about whether and how to resolve such cases.

The potential collateral consequences of admissions can be significant: among other things, both corporate and individual defendants could face increased exposure to criminal charges, something that is no small risk in a FIRREA case, given that its underlying predicate acts are violations of criminal statutes.

Similarly, defendants such as health care providers that admit to wrongdoing run the risk of administrative sanctions or even debarment from federal programs. Admissions of fault likewise incentivize private lawsuits and may hinder a defendant's ability to defend such suits. Indeed, in this case, the proposed settlement provides for monetary payments to resolve several class action lawsuits filed by customers of the bank that covered much of the same conduct as the SDNY's complaint.

For individuals, the risk of monetary penalties coupled with admissions of misconduct and a potential job loss is a very real threat, making the calculus of whether to settle much more complicated given the potential negative effects of such provisions.

If, as seems to be the case, the DOJ will continue to seek admissions of misconduct and individual accountability in civil fraud cases, both corporate and individual defendants now more than ever need to weigh the possible consequences of a settlement incorporating those elements against the risks of litigating against the government.

—By Matthew P. Previn, Michelle L. Rogers and Ross E. Morrison, BuckleySandler LLP

Matthew Previn, a partner at BuckleySandler, leads the firm's consumer class action practice in New York. He is a former senior counsel at HSBC Finance Corp.

Michelle Rogers is a partner in BuckleySandler's Washington, D.C., office.

Ross Morrison is a counsel in the firm's New York office and a former assistant U.S. attorney for the Southern District of New York, where he held the supervisory positions of acting chief appellate attorney and deputy chief appellate attorney in the Civil Division. He is also an adjunct professor at Fordham Law School.

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[1] United States v. The Bank of New York Mellon, 11 Civ. 6969 (LAK) (S.D.N.Y.).

[2] See, e.g., Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Settles Civil Fraud Claims Against HSBC Bank for Failure to Monitor Fees Submitted for Foreclosure-Related Services (Jul. 1, 2014); Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Settles Civil Fraud Claims Against Exporter for Fraudulently Obtaining a Loan Guaranteed by the Export-Import Bank (Sept. 18, 2014).

[3] See, e.g., Press Release, U.S. Dep't of Justice, MetLife Home Loans LLC, Successor to MetLife Bank NA, to Pay $123.5 Million to Resolve Alleged Federal Housing Administration Mortgage Lending Violations (Feb. 25, 2015); Press Release, U.S. Dep't of Justice, Bank of America to Pay $16.65 Billion in

Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014); Press Release, U.S. Dep't of Justice, Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages (Jul. 14, 2014); Press Release, U.S. Dep't of Justice, U.S. Bank to Pay $200 Million to Resolve Alleged FHA Mortgage Lending Violations (Jun. 30, 2014).

[4] See, e.g., U.S. v. CommerceWest Bank, 15 Civ. 00379 (C.D. Cal.) (March 10, 2015 Consent Decree); U.S. v. Plaza Bank, 15 Civ. 00394 (C.D. Cal.) (March 12, 2015 Consent Decree).

[5] See Preet Bharara, BNA White Collar Crime Report, 7 WCR 218; United States Attorneys' Manual, Principles of Prosecution of Business Organizations, 9-28.200.

[6] See, e.g., U.S. v. Countrywide Home Loans, Inc., et al., 12 Civ. 1422 (S.D.N.Y.); Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Settles Civil Mortgage Fraud Lawsuit Against Golden First Mortgage Corp. and its Owner, David Movtady (Dec. 31, 2014); Press Release, U.S. Attorney's Office, N. Dist. of Cal., Reunion Mortgage, Inc. to Pay $1.04 Million to Resolve Allegations of Defrauding the Federal Housing Administration Program (May 16, 2014).

[7] See Mary Jo White, Chairwoman, SEC, Address at the Council of Institutional Investors Conference: Deploying the Full Enforcement Arsenal (Sept. 26, 2013).

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