

## The RMBS Working Group: Is There Life After Eric Holder?

*Law360, New York (October 28, 2014, 10:06 AM ET) --*

Financial institutions are asking what Attorney General Eric Holder's resignation means for the future of the U.S. Department of Justice's financial fraud enforcement program generally, and the Residential Mortgage-Backed Securities (RMBS) Working Group specifically.

Launched in 2012 "to investigate those responsible for misconduct contributing to the financial crisis through the pooling and sale of residential mortgage-backed securities,"[1] the RMBS Working Group was criticized early on by some members of Congress for moving too slowly or not at all.[2] But the group's efforts have recently led to a string of historic, multibillion-dollar settlements.[3]

Does the attorney general's exit, coming on the heels of these settlements, suggest that these investigations have run their course and that the department's new leadership will turn the page? Notably, the enforcement chief of the U.S. Securities and Exchange Commission(a Working Group member) recently stated that the SEC has "completed nearly all of our financial crisis cases" and is moving on to "different areas."<sup>[4]</sup> While only time (and the new attorney general) will tell, there is evidence to suggest that the RMBS Working Group may in fact be ramping up rather than winding down.

### Leadership Turnover

Although the attorney general's resignation is certainly the most significant personnel change at the Justice Department, it is only the latest in a series of recent, high-level departures at Justice of some of the key players involved in the department's focus on financial fraud.

For example, Deputy Attorney General James M. Cole, the number 2 official at DOJ, has announced that he too will leave Justice, reportedly by the end of the year.<sup>[5]</sup> The announcements of the departures of the attorney general and deputy attorney general follow that of Associate Attorney General Tony West, who had led the department's negotiations of billions of dollars in RMBS settlements with financial institutions. Michael Bresnick, who led the Financial Fraud Enforcement Task Force as its first executive director, left the DOJ in 2013,<sup>[6]</sup> and Thomas J. Perrelli, the associate attorney general before West who led the negotiations on the department's \$25 billion settlement with the nation's largest mortgage



Andrew W. Schilling

servicers, left in 2012.

This string of high-level departures could lead some to believe that the department's aggressive pursuit of financial fraud cases may be behind us, or at least that the machinery is winding down. But all other evidence is to the contrary.

### **New People**

While the departures at the Justice Department in Washington, D.C., have been significant, it would be a mistake to overlook DOJ hiring activity throughout the rest of the country. Indeed, while multibillion-dollar cases are announced from podiums in D.C., local U.S. Attorney's Offices have investigated and prosecuted many of the most significant financial fraud cases. And those offices appear to be quietly gearing up for more.

Most notably, the United States Attorney's Office in Brooklyn, New York, recently posted on its website an announcement that it is looking to hire as many as seven new civil prosecutors to be "part of a fraud-fighting unit that will investigate conduct that led to the 2008 financial crisis, including pursuing those responsible for misconduct relating to residential mortgage-backed securities."<sup>[7]</sup> That office has been particularly active in the efforts of the RMBS Working Group, including having led the government's recovery of a \$7 billion settlement.<sup>[8]</sup> United States Attorney's Offices in New Jersey and North Carolina also are hiring prosecutors dedicated specifically to the pursuit of RMBS cases.

This aggressive — and focused — new hiring of financial fraud prosecutors is significant, particularly because the Justice Department has pursued financial fraud cases aggressively during the attorney general's six-year tenure despite operating under a hiring freeze for fully half of that time period. That freeze has ended, and the department has been hiring aggressively to add new troops specifically to the fight against financial fraud.

### **New Initiatives**

In addition to hiring more prosecutors, the Justice Department also is moving forward aggressively with new initiatives designed to increase the number of cases it can investigate. To that end, the attorney general announced just last month that whistleblower bounties should be increased to encourage more cooperation in financial fraud investigations.<sup>[9]</sup> That same day, the department's top criminal prosecutor publicly invited whistleblowers to bring their civil False Claims Act complaints to the Criminal Division, and announced a new policy at Justice under which the department's civil side now will share all new False Claims Act complaints filed with it with the Criminal Division.<sup>[10]</sup> Again, the department's message appears to be that its appetite for new cases — particularly new financial fraud and RMBS cases — is only increasing.

### **More Money**

To be sure, hiring more prosecutors and pursuing more investigations requires more money. But the Justice Department should not have any trouble funding these new efforts.

When the department recovers a large financial fraud judgment or settlement, some of that money goes to compensating victims, and some of it flows into the U.S. Treasury. But the Justice Department itself also keeps a portion. In fact, the Justice Department retains up to 3 percent of its civil enforcement recoveries, and it uses this "three percent fund" to support the pursuit of even more affirmative civil

enforcement cases.[11]

While it may represent a small percentage of the total recovery, 3 percent of several multibillion-dollar settlements adds up quickly. Indeed, in connection with the government's recent \$16.7 billion RMBS settlement, DOJ likely will retain hundreds of millions of dollars.[12] Don't be surprised to see part of that money used to hire more prosecutors to pursue more financial fraud cases, which in turn will fund more financial fraud prosecutors.

## **Conclusion**

It remains to be seen whether the Justice Department will continue to pursue financial fraud and RMBS cases with the same vigor under the next attorney general. But by all indications, the government appears to be gearing up to continue the fight.

—By Andrew W. Schilling and Ross E. Morrison, BuckleySandler LLP

*Andrew Schilling is a partner at BuckleySandler and heads its New York office. He is also a leader of the firm's False Claims Act and Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) practice.*

*Ross Morrison is counsel in the firm's New York office and a former assistant United States 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.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] <http://www.stopfraud.gov/iso/opa/stopfraud/2012/12-ag-120.html>

[2] <https://www.scribd.com/doc/91439797/RMBS-Task-Force-Ltr>

[3] <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>; <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement>; <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>

[4] <http://online.wsj.com/articles/as-sec-enforcement-cases-rise-big-actions-are-sparse-1412028262>

[5] <http://www.latimes.com/nation/la-na-james-cole-resigns-deputy-attorney-general-justice-20141016-story.html>

[6] <http://www.justice.gov/opa/pr/department-announces-departure-financial-fraud-enforcement-task-force-executive-director>

[7] Vacancy Announcement, USAO Eastern District of New York (Sept. 2014); see also <http://www.reuters.com/article/2014/06/11/us-us-mortgage-banks-investigation-idUSKBN0EM29820140611>

[8] <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>

[9] <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>

[10] <http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-140917.html>

[11] <http://www.justice.gov/jmd/working-capital-fund#law3>

[12] <http://www.hudoig.gov/sites/default/files/documents/2014-FW-1808.pdf>

---

All Content © 2003-2014, Portfolio Media, Inc.