

New Year, New Sheriff in Town: Anticipated SDNY Priorities Under Jay Clayton

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A new presidential administration means turnover in top leadership roles throughout the government. Jay Clayton, President Trump's pick to lead the U.S. Attorney's Office for the Southern District of New York ("SDNY" or the "Office"), will be a particularly interesting nominee to watch. Clayton has bona fide enforcement credentials, serving as the Chair of the Securities and Exchange Commission (the "SEC") during President Trump's first term, but he is somewhat of an unknown quantity in the criminal arena due to his lack of prosecutorial experience.

Given the success of the SEC's whistleblower program during Clayton's tenure as Chair, we expect the Office, under his leadership, to refine the pilot whistleblower program SDNY debuted last January. We also anticipate that, once he is at the helm, the Office will focus on prosecuting more traditional, well-established crimes, with an emphasis on national security, rather than pursuing newer, less tested theories. As discussed below, these anticipated areas of focus will help to inform company counsel's priorities in the new year.

Refinement of SDNY's Whistleblower Pilot Program

One of the most notable trends among U.S. Attorney's offices in 2024 was the number of whistleblower programs created by the United States Department of Justice (the "DOJ") and individual U.S. Attorney's offices (including SDNY). In January 2024, SDNY announced a whistleblower program aimed at encouraging early and voluntary self-disclosure by individual participants in certain non-violent criminal conduct in exchange for non-prosecution agreements.¹ The SDNY program, which was amended earlier this month, seeks information regarding criminal conduct involving (1) fraud, corporate control failures, or harm to market integrity, (2) intellectual property theft, (3) bribery or fraudulent use of government funds, (4) obstruction of justice, perjury or false statements, (5) healthcare fraud, and (6) money laundering and unlicensed money transmitting businesses.² Notably, the program is styled as a "pilot" program to be reassessed by the Office at some point in the future.

¹ See Press Release, United States Attorney's Office for the Southern District of New York, U.S. Attorney Williams Announces Enforcement Priorities And SDNY Whistleblower Pilot Program (Jan. 10, 2024), <https://www.justice.gov/usao-sdny/pr/us-attorney-williams-announces-enforcement-priorities-and-sdny-whistleblower-pilot>.

² See SDNY Whistleblower Non-Prosecution Pilot Program, United States Attorney's Office Southern District of New York (Jan. 14, 2025), https://www.justice.gov/d9/2025-01/01.14.2025_wb_policy_for_sdny_website.pdf.

We expect Clayton to take a hard look at whether the SDNY program is working and amend it to make it more effective and transparent, as he did when he oversaw the SEC's whistleblower program.³ For example, the SEC whistleblower program under Clayton saw a significant uptick in financial rewards paid—a benefit not offered to potential whistleblowers under the current SDNY program. In fact, the current policy, as amended this month, requires whistleblowers “to forfeit the proceeds involved in the individual’s criminal misconduct and repay victims as determined by SDNY to be consistent with the individual’s role in the offense.” This may deter potential whistleblowers from participating in the program.⁴ Although payouts to whistleblowers in criminal cases may be incompatible with the policy goals of forfeiture and restitution to victims, this language does allow some discretion that Clayton may use to at least soften the financial impact on whistleblowers.

The policy also contains ambiguities that may make potential whistleblowers wary of participating. For example, the program is focused on disclosures of the crimes specified above, but it also requires an individual to disclose all criminal conduct in which they have participated.⁵ If an individual participated in criminal conduct outside of the categories covered by the program, and discloses such conduct to prosecutors, will the non-prosecution agreement offered by SDNY cover such conduct, or does the individual still face criminal liability?⁶ If Clayton is looking to increase participation in the program, these are some of the issues he may need to address.

Anticipated Reluctance to Prosecute Novel Theories or Industries

Clayton will likely rein in novel prosecutorial theories as well. Clayton has previously expressed a reluctance to engage in any regulatory activity entailing broad policymaking which he perceives as something better left to Congress. For example, during his remarks at a June 2024 Chamber of Commerce event, Clayton reportedly stated that the SEC should “stay in [its] lane” and “Congress should do its job” in developing corporate emissions disclosure rules.⁷ Clayton also left behind a market-friendly legacy at the SEC, suggesting he may be hesitant to pursue enforcement actions that may stifle nascent industries and growth.⁸

³ See Selected SEC Accomplishments: May 2017 – December 2020, U.S. Securities and Exchange Commission (Oct. 21, 2024), <https://www.sec.gov/about/sec-commissioners/sec-historical-summary-chairmen-commissioners/jay-clayton/selected-sec-accomplishments-may-2017-december-2020>.

⁴ See SDNY Whistleblower Non-Prosecution Pilot Program, note 2 *supra*.

⁵ *Id.*

⁶ The current program does allow anonymous reports in the first instance, which may partially address this concern. See SDNY Whistleblower Program Frequently Asked Questions (FAQs), United States Attorney's Office Southern District of New York (June 26, 2024), <https://www.justice.gov/usao-sdny/sdny-whistleblower-program-frequently-asked-questions-faqs>.

⁷ See Andrew Ramonas & Avani Kalra, *Ex-SEC Chair Calls on Congress to Lead Climate Policymaking*, Bloomberg Law (June 25, 2024), <https://news.bloomberglaw.com/esg/ex-sec-chair-calls-on-congress-to-lead-climate-policymaking>.

⁸ See Tom Zanki, *SEC's Clayton Leaves Behind Market-Friendly Legacy*, LAW360 (Nov. 20, 2020), https://www.law360.com/articles/1330352/sec-s-clayton-leaves-behind-market-friendly-legacy?ts_pk=b01098fc-8a4a-4e24-904b-0e0413268635&utm_source=user-alerts&utm_medium=email&utm_campaign=tracked-search-alert.

If Clayton applies this same mindset at SDNY, the Office will likely pursue fewer prosecutions in relatively new industries, such as digital assets and artificial intelligence, unless the conduct at issue clearly falls within the heartland of the criminal laws. This is particularly so given President Trump’s public embrace of cryptocurrency and AI in recent months.⁹ Indeed, there may not be many crypto prosecutions in progress once Clayton arrives, as SDNY has already signaled that it is shifting its focus from cryptocurrency prosecutions.¹⁰

The Office may also be disinclined to apply novel theories in prosecuting more traditional crimes. Earlier this year, the SEC secured its first victories in obtaining insider trading verdicts and settlements under a theory of “shadow trading.” In contrast to traditional insider trading, “shadow trading” involves using material non-public information of one company, not to trade in the stock of that company or an acquiring company, but to trade in the stock of a different company, such as a competitor. For instance, in *SEC v. Panuwat*, the SEC obtained an insider trading jury verdict in April 2024 against Matthew Panuwat, a pharmaceutical executive who, after learning about the imminent acquisition of his employer, Medivation, purchased call options of a competitor, Incyte, under the theory that the options would increase in value when the sale became public.¹¹ It was expected that criminal prosecutions under the same theory would soon follow. However, that may not happen with Clayton as head of SDNY, particularly given the still-novel nature of the theory and the heavier burden of proof (*i.e.*, “beyond a reasonable doubt” vs. “preponderance of the evidence”) prosecutors must meet.

The Supreme Court’s ongoing efforts to pare back what constitutes fraud under the federal fraud statutes may also impact the Office’s prosecution of other traditional crimes, like wire fraud. In 2020, the Supreme Court ruled in *Kelly v. United States* that the public officials involved in the “Bridgegate” scandal did not violate federal program fraud or wire fraud laws because taking control of the lanes on the George Washington Bridge did not constitute the taking of property.¹² Three years later, *Ciminelli v. United States* invalidated the Second Circuit’s long-standing theory that depriving a victim of information that would inform the victim’s economic decisions (*i.e.*, depriving them of a “right to control”) constitutes property for purposes of the federal wire fraud statute.¹³ This trend may continue at the Supreme Court with its forthcoming opinion in *Kousisis v. United States*, which was argued before the Court in December 2024. The question before the Court is whether a scheme to induce a commercial transaction through deception that does not seek to harm the victim’s economic interests constitutes wire fraud (there, a government contractor—Alpha Painting and Construction Co. and its project manager, Stamatios Kousisis—provided quality repair work at a competitive price but falsely represented its compliance with

⁹ See, e.g., Will Oremus, *Picking Sacks as ‘AI and crypto czar’ signals Trump’s pro-industry stance*, The Washington Post (Dec. 5, 2024), <https://www.washingtonpost.com/technology/2024/12/06/trump-david-sacks-crypto-ai-czar/>.

¹⁰ See Luc Cohen & Chris Prentice, *Crypto enforcement seen slowing as Trump shifts priorities*, Reuters (Nov. 15, 2024), <https://www.reuters.com/legal/manhattan-us-attorney-scale-back-crypto-cases-prosecutor-says-2024-11-15/>.

¹¹ Jury Returns Verdict Finding Defendant Matthew Panuwat Liable for Insider Trading, Litigation Release No. 25970, U.S. Securities and Exchange Commission (Apr. 8, 2024), <https://www.sec.gov/enforcement-litigation/litigation-releases/lr-25970>.

¹² *Kelly v. United States*, 590 U.S. 391, 400 (2020).

¹³ *Ciminelli v. United States*, 598 U.S. 306, 316 (2023).

regulations aimed at increasing diversity in government contracting).¹⁴ A decision in *Kousisis* is expected before Court's term ends in June 2025. A ruling in favor of the defendant-appellant, in conjunction with the prior Supreme Court precedents, may contribute to a narrowing of the fraud theories pursued by Clayton's SDNY.

Potential Focus on Crimes Implicating National Security and Foreign Influence

Clayton may also shift SDNY's enforcement focus towards cases that implicate national security or undue influence by foreign actors. This would fit within the Trump Administration's priorities and be consistent with Clayton's recent comments. According to *Reuters*, days after Clayton was announced as President Trump's pick for SDNY in November 2024, he highlighted how, given its location in the financial capital of the world, SDNY is well-positioned to prosecute crimes relating to national security, terrorism financing, and money laundering.¹⁵

Clayton might do so by continuing the Biden DOJ's use of sanctions enforcement as a tool for prosecuting conduct raising national security or foreign influence concerns. In the past four years, the DOJ has increased its commitment to sanctions enforcement, with then-Deputy Attorney General Lisa Monaco proclaiming sanctions "the new FCPA."¹⁶ For example, in 2022, the DOJ formed an inter-agency task force dubbed "Task Force KleptoCapture," dedicated to enforcing sanctions imposed against Russia. In the nearly three years since its formation, the Task Force has charged more than 70 individuals with sanctions or export controls violations and restricted nearly \$700 million in assets.¹⁷ The DOJ has clearly developed a successful blueprint for pursuing these types of cases, though whether the DOJ's focus, and likely the SDNY's focus, on Russian sanctions will shift to another country, in light of the new administration, remains to be seen.

Takeaways

While it may be a few months before Clayton is confirmed, looking ahead to SDNY's potential priorities once he is at the helm may help to inform company counsel's areas of focus in the new year.

Counsel may want to review their company's internal reporting program to ensure it enables employees to quickly inform the company of potential issues, so it can determine how to handle the alleged

¹⁴ Brief for Petitioner at i, *Stamatios Kousisis and Alpha Painting & Construction Co., Inc. v. United States*, No. 23-909 (Aug. 19, 2024).

¹⁵ See Chris Prentice & Echo Wang, *Trump pick for Manhattan's top federal prosecutor urges focus on national security, money laundering*, *Reuters* (Nov. 20, 2024), <https://www.reuters.com/world/us/trump-pick-manhattans-top-federal-prosecutor-urges-focus-national-security-money-2024-11-20/>.

¹⁶ *Deputy Attorney General Lisa O. Monaco Delivers Keynote Remarks at 2022 GIR Live: Women in Investigations*, Office of Public Affairs U.S. Department of Justice (June 16, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-keynote-remarks-2022-gir-live-women>.

¹⁷ *Principal Associate Deputy Attorney General Marshall Miller Delivers Keynote Address at the Practicing Law Institute's White Collar Crime 2024 Program*, Office of Public Affairs U.S. Department of Justice (Dec. 6, 2024), <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-keynote-address>.

violation, rather than risking the employee filing a whistleblower complaint resulting in an investigation and catching the company off guard.

While we do not expect SDNY under Jay Clayton to engage in “regulation by enforcement” when it comes to relatively new industries, such as digital assets and AI, companies should nevertheless understand the extent to which their operations implicate those new industries or technologies.

Finally, the DOJ’s focus on national security-related crimes and the likelihood that the SDNY under Clayton would continue such focus is a reminder that companies should continue to scrutinize their overseas business and relationships with foreign actors to ensure compliance with any applicable regulations and to detect potential violations.

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