

How SDNY US Atty Nom May Shape Enforcement Priorities

By **Christian Everdell and Sri Kuehnlenz** (February 13, 2025)

A new presidential administration means turnover in top leadership roles throughout the government.

Jay Clayton, President Donald Trump's pick to lead the U.S. Attorney's Office for the Southern District of New York, will be a particularly interesting nominee to watch.

Clayton has bona fide enforcement credentials, serving as the chair of the U.S. Securities and Exchange Commission during 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 Southern District of New York, under his leadership, to refine the pilot whistleblower program that the office debuted last year.

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 this year.

Refinement of Southern District of New York'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 U.S. Department of Justice and individual U.S. attorney's offices, including the Southern District of New York.

In January 2024, the district's newly announced whistleblower program prioritized encouraging early and voluntary self-disclosure by individual participants in certain nonviolent criminal conduct in exchange for nonprosecution agreements.[1]

The program, which was amended last 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.

We expect Clayton to take a hard look at whether the 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]



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For example, the SEC whistleblower program under Clayton saw a significant uptick in financial rewards paid to whistleblowers — a benefit not offered to potential whistleblowers under the current Southern District of New York program.

In fact, the current policy — as amended last 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 individuals 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 nonprosecution agreement offered by the district 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.

Finally, recent directives from the Trump administration may affect the scope of the whistleblower program. For example, on Feb. 10, the DOJ ordered the Southern District of New York to dismiss the indictment charging New York City Mayor Eric Adams with bribery offenses.

It remains to be seen whether this decree, and others from the Trump administration, will cause the office to limit or stop actively soliciting information about bribery offenses as part of its whistleblower program.

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 believes is something better left to Congress.

For example, during his remarks at a June 2024 U.S. 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 criminal cases that may stifle nascent industries and growth.[8]

Clayton's approach appears consistent with the Trump's Feb. 10 Executive Order No. 14209 on ceasing the initiation of any new investigations or enforcement actions under the Foreign Corrupt Practices Act. In that order, he asserted that the statute has been "stretched beyond proper bounds and abused in a manner that harms the interests of the United States."

If Clayton applies this same mindset at the Southern District of New York, 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 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 the office 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. Last 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 nonpublic 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 the Southern District of New York, particularly given the still-novel nature of the theory and the heavier burden of proof — i.e., beyond a reasonable doubt versus preponderance of the evidence — prosecutors must meet.

The U.S. Supreme Court's ongoing efforts to pare back what constitutes fraud under the federal fraud statutes may also affect the office's prosecution of other traditional crimes, like wire fraud.

In 2020, the Supreme Court ruled in *Kelly v. U.S.* that the public officials involved in the "Bridgagate" 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, the court's 2023 decision in *Ciminelli v. U.S.* invalidated the U.S. Court of Appeals for 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. U.S.*, which was argued before the court in December 2024.

The question before the court in that case 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. In the underlying case, a government contractor — Alpha Painting and Construction Co., and its project manager, Stamatis Kousisis — provided quality repair work at a competitive price, but falsely represented its compliance with regulations aimed at

increasing diversity in government contracting.[14]

A decision in Kousisis is expected before the court's term ends in June. 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 office.

Potential Focus on Crimes Implicating National Security and Foreign Influence

Clayton may also shift the Southern District of New York's enforcement focus toward 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 Trump's pick for the office in November 2024, he highlighted how, given its location in the financial capital of the world, the Southern District of New York 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, particularly against Russian entities and individuals.

The DOJ has clearly developed a successful blueprint for pursuing these types of cases. However, with last week's disbanding of Task Force KleptoCapture — the interagency task force focused largely on enforcing sanctions against Russian oligarchs — it seems likely that the focus of sanctions enforcement will shift to other countries.

Takeaways

While it may be a few months before Clayton is confirmed, looking ahead to the office'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 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 the Southern District of New York under 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 Southern District of New York under Clayton would continue this 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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[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.

[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.

[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).

[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>.