

White Collar Group Of The Year: Sullivan & Cromwell

By Jody Godoy

Law360 (February 7, 2019, 2:19 PM EST) -- Sullivan & Cromwell LLP's trailblazing work for Barclays saw the bank fight a financial crisis-era case and avoid criminal charges in a foreign currency investigation at the same time the group helped Wells Fargo weather fallout over retail sales practices, putting the firm among Law360's White Collar Groups of the Year.

The firm is known for handling big problems for large corporations. Nicolas Bourtin, who leads the white collar practice group from New York, said the firm's capacity to handle large crises comes from the way it fosters broad practices for individuals and collaboration across practice groups.

"It's a combination of thinking like a generalist and applying expertise where necessary. It's in the culture of the firm not to overspecialize in a way that doesn't let you pull back and see the big picture," Bourtin said.

Bourtin said the firm used that approach in helping Wells Fargo deal with multiple investigations into its sales practices after regulators accused the bank of opening thousands of accounts without customers' knowledge.

A host of federal and state regulators got involved, and the bank brought in multiple law firms to handle different aspects. Sullivan & Cromwell took point in coordinating those efforts. The firm also helped Wells Fargo settle with the Treasury Department and Consumer Financial Protection Bureau over allegedly deceptive loan practices for \$1 billion in April and resolve the New York Attorney General's claims over the unauthorized accounts for \$65 million in October.

Sullivan & Cromwell also represented Barclays in a resolution that marked the U.S. Department of Justice taking yet another step away from harsh penalties for cooperative companies involved in alleged crimes.

Barclays was under investigation for defrauding Hewlett-Packard Co. in a foreign currency options transaction by trading aggressively to move prices in a direction that benefited the bank. The DOJ declined to bring charges against the bank itself in February 2018, citing its decision to take the initiative and report the trading conduct which prosecutors refer to as front-running.



Corporate criminal cases typically end with deferred or non-prosecution deals carrying fines and laying out lengthy allegations of wrongdoing. In 2016, the DOJ added a new option in foreign bribery cases for companies that self-report, cooperate and remediate the problem.

In those cases, prosecutors publicly decline to bring otherwise viable charges with a letter that focuses less on the crime and more on the company's actions afterwards. Declinations effectively end a matter, unlike NPAs and DPAs that require companies to meet conditions for years and dangle the possibility of prosecution.

Barclays was the first company to get a declination letter in a non-bribery case. The settlement required the bank to pay a total of \$12.9 million to repay HP for its loss and to hand over what the bank made off the deal to the government.

Sullivan & Cromwell partner Alex Willscher represented Barclays. Willscher said the declination shows how the DOJ is seeking to reward self-disclosure.

"It's never an easy decision and there are a lot of factors that go into it, but the DOJ seems to be expanding the tangible benefits," Willscher said.

The firm also went to bat for Barclays in a different matter last year that marked another kind of shift in DOJ enforcement.

When the DOJ settled with banks over risky mortgage-backed securities during the Obama administration, the deals involved admissions of wrongdoing and multibillion-dollar payments.

Barclays broke the mold and turned down a settlement, letting the DOJ sue in late 2016 instead. The move pushed the case into President Donald Trump's administration. In March, the bank reached a \$2 billion settlement that did not require the bank to admit to the facts behind the claims. Multiple banks that settled after Barclays also got similarly worded deals.

The Barclays case also gave Sullivan & Cromwell the chance attack prosecutors' use of the Financial Institutions Reform, Recovery and Enforcement Act as an overreach in a motion to dismiss the case. There was no ruling on that motion before the settlement.

UBS AG, another Sullivan & Cromwell client, recently took up that quest in its own mortgage-backed securities case.

Not all of the firm's accomplishments are in corporate matters. Bourtin also represented former SBM Offshore CEO Anthony Mace in the DOJ's investigation into decades of overseas bribery at the company.

Bourtin bargained to get Mace an unusual deal where he pled guilty to conspiracy to violate the FCPA out of willful blindness. Prosecutors recognized that while Mace had been at the helm of the company during the last few years of the long-running scheme, the crux of his crime was turning a blind eye to payments he should have known were bribes.

When Mace was sentenced in September, the firm gave U.S. District Judge David Hittner charts showing the sentences of scores of other FCPA defendants. The few who had admitted to violating the FCPA out of willful blindness had not been sent to prison.

Those sentences contrasted with the maximum sentence of five years that prosecutors called for, and more so with the life sentence that the sentencing guidelines would have called for given the massive dollar amounts involved. Prosecutors had alleged in the case against SBM itself that the firm bribed foreign officials in multiple countries in an attempt to secure \$2.8 billion in contracts.

“Justice here has to be more than a simple math exercise,” Bourtin told the judge at sentencing, according to a transcript.

Judge Hittner, who has handed down tough sentences in other cases, ultimately sentenced Mace to three years. The U.K. national is applying to be transferred to a prison in his home country.

While the firm has had several high-profile wins in the past year, much of its work is in nonpublic investigations. All told, the firm’s criminal defense and investigations practice group has more than 70 lawyers, including over 30 partners, in multiple offices. Two of the practice group’s newest partners are Nicole Friedlander in New York and Aisling O’Shea in Washington, D.C.

Both have specific areas of expertise. Friedlander led the cybercrime unit at the U.S. Attorney’s Office in Manhattan, where she was a prosecutor for nine years. O’Shea was a trial lawyer at the DOJ’s Foreign Corrupt Practices Act unit for five years before rejoining the firm. But like other partners within the group, neither considers herself a specialist.

“That’s by design,” said Friedlander. “Having a more generalist approach to the white collar practice is very helpful for clients like ours that are large institutions. There can be all kinds of collateral implications, and I think we appreciate that right from the beginning.”

--Editing by Alyssa Miller.