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# White Collar Roundup - July/August 2020

*The District Attorney, the President and a Fine Kettle of Fish*

According to an old proverb, "give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime." In a 103-page decision filed on August 20 in *Trump v. Vance* dismissing a lawsuit filed by the president, Judge Victor Marrero of the Southern District of New York elects neither and instead seeks to explain what fishing is. In the civil action, Donald J. Trump, in his individual capacity, contested a subpoena issued by a New York County grand jury to an accounting firm seeking his tax returns and sought to enjoin Cyrus Vance, the New York County district attorney, from enforcing it. Although the relief requested in the action was, in effect, quashing the subpoena, the case was brought under the Civil Rights Act, 42 U.S.C. 1983. As Judge Marrero observed in his decision: "In short, the parties are litigating the validity of the subpoena through a procedural device not typically used for that purpose." While Trump made a number of arguments concerning why he believed enforcement of the grand jury subpoena would violate the Civil Rights Act, one of them was a rhetorical staple: "[T]he subpoena is overly broad because it seeks documents that have no relation to the grand jury's investigation, covers a time frame far exceeding that of the investigation and otherwise amounts to an arbitrary fishing expedition." Cries of "fishing expedition" are of course familiar to many lawyers. An early reported use of the term is found in a decision from the 1860s: "It is thus apparent that the law has always designed to protect a party against the artifice of an adversary, who, if possible, would indulge these fishing expeditions with the option to use or reject the spoils as *his* interest might dictate." *Barry v. Galvin*, 1867 WL 5890 (N.Y. Gen. Term. 1867). It then appears in numerous reported decisions in the nearly 150 years since the seminal (from a piscatorial point of view) *Barry* case. Indeed, a Westlaw search for "fishing expedition" yields more than 10,000 cases, although a number of the early ones are referring to actual fishing expeditions. E.g., *In re The John E. Clayton*, 13 F. Cas. 666, 667 (C.C.S.D.N.Y. 1859) ("The vessel was found some twelve or fifteen miles from the bay of New York, within two miles of the track of the salvors on their fishing expedition."). So what exactly does this maritime metaphor mean? As Judge Marrero notes in his decision, quoting earlier New York State case law, the fishing expedition argument has been "consistently misunderstood and misinterpreted." He then contrasts the metaphor in the grand jury context, explaining that "[w]hen a grand jury runs down every available clue to find if a crime has been committed, it fulfills its duty." (Quotation marks and alterations omitted.) Thus, Judge Marrero writes, a grand jury subpoena "is problematic if it seeks material clearly unrelated to a legitimate aim or calls for an unduly burdensome production, or if facts suggest improper motive." A key, in Judge Marrero's view, is relevance: The keystone of the analysis is not the quantity of the documents sought[,] but the potential connection between the materials requested and the investigation at the time the subpoena is issued. Courts reject claims of overbreadth where there is a reasonable possibility that the subpoenaed documents will be relevant to the grand jury's investigation. (Citation, alterations and quotation marks omitted.) While there are limits, of course, to the breadth and focus of grand jury subpoenas in both the state and federal contexts, Judge Marrero found that New York's grand jury statute, and the history of grand juries in the United States, gave Vance, in essence, a wide area in which to fish. Indeed, one takeaway from the decision is that the fishing expedition metaphor may be seen in the reverse sense in the grand jury context. Grand juries, in Judge Marrero's view, have, in effect, a broad fishing license to range far and wide over the seas of possible wrongdoing. The matter has been appealed to the U.S. Court of Appeals for the

Second Circuit. The Second Circuit has just granted a temporary stay in the case pending appellate argument, and of course may offer its own interpretation of fishing in the grand jury context. Still, practitioners should take heed and be prepared to explain the metaphor to their clients – grand juries may be an entirely different kettle of fish.

*The Second Act of the FCPA Resource Guide*

Last month, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) released the much anticipated FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition. While not breaking much new ground, the second edition of the guide incorporates new case law, enforcement practices and settlements, and helpfully synthesizes a lot of, well … guidance, on the Foreign Corrupt Practices Act (FCPA) from the past almost eight years. The original resource guide made its debut in the White Collar Roundup here, way back in 2012. In the spirit of other long-running productions, we borrow from the (late) *Late Show with David Letterman* and provide herewith our Top Ten list of points of interest. Without further ado, the Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition:

- Delineates a limitations period for criminal offenses under the FCPA's accounting provisions of six years, in contrast with offenses under the act's anti-bribery provisions of five years;
- Disaggregates the concepts of "internal controls" and "internal accounting controls," the latter reflecting the actual language of the FCPA, including by clarifying that "a company's internal accounting controls are not synonymous with a company's compliance program";
- Nonetheless, still ties together "internal controls" and "internal accounting controls," including by cautioning that "an effective compliance program contains a number of components that may overlap with a critical component of an issuer's internal accounting controls";
- Acknowledges the limitations on jurisdiction over foreign nationals set forth in *United States v. Hoskins*, a significant Second Circuit decision first described here, but describes the decision as, among other things, an exception rather than the rule;
- Extends that implicit critique of *Hoskins* by noting that the FCPA's accounting provisions apply to "any person," and thus argues that those provisions are not subject to the reasoning in *Hoskins* "limiting conspiracy and aiding and abetting liability under the FCPA anti-bribery provisions";
- Clarifies the mens rea requirement for criminal offenses under the act's accounting provisions, stating that "[c]riminal liability can be imposed on companies and individuals for knowingly and willfully failing to comply with the FCPA's books and records or internal controls provisions";
- Acknowledges that mergers and acquisitions may be beneficial in cases in which the acquirer implements a robust compliance program, and also that in some cases robust pre-acquisition due diligence may not be possible;
- Underscores the DOJ's policy of encouraging federal prosecutors to coordinate with other federal and state or other authorities investigating the same corrupt conduct in order to avoid the duplication of penalties from multiple sources;
- Ratchets back *not at all* the risks of vicarious liability under the act's anti-bribery provisions from doing business with agents and other third parties who themselves engage in bribery; and
- Retreats *not at all* from the importance of implementing a robust and tailored corporate compliance program in order to mitigate the risks of and remediate any violations of the FCPA, and indeed, emphasizing that programs must be "adequately resourced" and work "in practice."

As did the original back in 2012, the Resource Guide, Second Edition provides a great repository of insight into the current views of the DOJ and SEC, and the state of U.S. law on a marquee anticorruption statute. And if these authorities continue to produce updates to the Resource Guide, we're game to continue to report on them. After all, with eight years passed, there are only another 22 to go to equal Letterman's record-breaking run.

### *FCPA, Take Two*

One part of the second edition of the FCPA Resource Guide that failed entirely to make our Top Ten list is chapter nine, describing the advisory opinion process on whether a proposed payment or transaction is likely to run afoul of the anti-bribery provisions of the FCPA. There is a reason for that – namely, the paucity of FCPA advisory opinions issued in recent years. Indeed, according to the repository of such advisory opinions maintained by the Fraud Section, there were 27 opinions issued in the 20-year period from 2000 to early 2020, or roughly one per year, and none at all in the five-year period from 2015 to early 2020. Breaking its silence, however, on August 14, the DOJ issued its first Advisory Opinion in more than five years. As chapter nine of the Resource Guide describes, "under the opinion procedure process, parties submit information to DOJ, after which DOJ issues an opinion about whether the proposed conduct falls within its enforcement policy." The process is available to companies that are issuers or domestic concerns under the FCPA. Critically, the proposed conduct at issue must be specific, prospective and not hypothetical. In its Advisory Opinion, the DOJ considered a request from an investment advisor headquartered in the U.S. who manages private funds. The investment advisor had purchased assets valued at $47.5 million from a subsidiary of a foreign investment bank majority owned by a foreign government. An affiliate of the foreign bank helped the investment advisor with the acquisition and sought $237,500 in fees, or 0.5 percent of the value of the acquired assets, in return for its analytical and advisory services. In the Advisory Opinion, the DOJ concluded that the prospective payment would not prompt enforcement action, relying on the fact that the recipient was an entity rather than an individual, that there was no indicia that the payment was intended corruptly to influence a foreign official, and that it was for "specific, legitimate" services and commensurate in amount with them. While the investment advisor may have been pleased with the result, the time that elapsed before receipt of the Advisory Opinion suggests one significant reason why so few have been sought and issued in recent years. The investment advisor received the request from the foreign bank's affiliate in March 2019, petitioned the DOJ for an opinion in November 2019 and provided four rounds of additional information prior to receipt of the Advisory Opinion in August 2020. Many investment and other transactions, of course, proceed much more quickly. Moreover, some companies remain reticent to invite the scrutiny of the DOJ implicit in the advisory opinion process. And finally, perhaps the advisory opinion process may in some part be a victim of the DOJ's (and the SEC's) success in disseminating other sources of information on the FCPA. These include, among others, numerous enforcement actions, the FCPA Corporate Enforcement Policy and, last but not least, the now newly updated Resource Guide itself.

### *New Jersey Protects PPE at a Crossroads in the Pandemic*

Recently announced criminal charges against two New Jersey companies serve as a timely reminder that, although the initial frenzy to secure personal protective equipment (PPE) may have waned, those who have taken advantage of the crisis to sell PPE at inflated prices, or do so in the future, face significant repercussions. The two cases at issue involve companies that imported some 11 million items of scarce PPE, including N-95 respirator face masks, some of which they then sold at prices exceeding market rates. As part of their deferred prosecution agreements, the companies will sell the remaining PPE at cost, in addition to compensating those who bought PPE at inflated prices. The charges out of the U.S. Attorney's Office for the District of New Jersey are one manifestation of the DOJ's efforts to crack down on price gouging and hoarding under the authority of the Defense Production Act (DPA). The recent use of the DPA – initially enacted at the time of the Korean War to promote the national defense – to combat price gouging and hoarding in a public health crisis is fairly novel. Under 50 U.S.C. § 4512, the president can publish a notice of designation of scarce materials in the Federal Register to prevent hoarding. Early in the pandemic, the Department of Health & Human Services did just that on behalf of the president, designating

items, including N-95 respirator face masks like the ones seized in New Jersey, as scarce or threatened materials. As an earlier Day Pitney release explains, price gouging and hoarding are more commonly targeted at the state level by laws like New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-107-109, which prohibits the sale or offer of any merchandise that is consumed or used "as a direct result of an emergency" or "to preserve, protect or sustain the life, health, safety or comfort of persons or their property" … "for a price that constitutes an excessive price increase" during and for 30 days following a declared state of emergency. New Jersey state authorities have used the Consumer Fraud Act during the pandemic to great effect, earlier announcing, for example, that they had taken more than 200 actions to combat price gouging in one week in April alone. The involvement of New Jersey state and federal law enforcement in preventing predatory pricing was undoubtedly welcome in the early days of the pandemic as healthcare providers struggled to procure PPE and the number of patients often seemed to outpace the capacity of many hospitals. Now, as cases of COVID-19 are sharply on the rise in other parts of the country and medical providers in the tristate area brace for a potential second wave, the most recent federal charges in New Jersey are once again welcome and provide a timely cautionary tale against any renewed price gouging and hoarding of PPE.

*Fraudsters Bet the U.S. Banking Industry Is Going to Pot*

You may have heard the one about the foreign IT consultant, the U.S. banks, and the phony websites for dog food and face cream used to trick them into processing marijuana transactions. Except in this case, it's no joke. Earlier this year in the Southern District of New York, federal prosecutors charged Ruben Weigand and Hakim "Ray" Akhavan with conspiracy to commit bank fraud for their alleged participation in a scheme to defraud U.S. banks by disguising orders for marijuana products through the use of fake businesses. As those who follow the cannabis industry are aware, many U.S. banks remain reticent to be involved in transactions involving the sale of marijuana in light of the U.S. government's continued classification of pot as an illegal drug. Over the summer, Weigand and Akhavan moved to dismiss the indictment, arguing, among other things, that it failed to allege a violation of the bank fraud statute, 18 U.S.C. § 1344, and ran counter to a congressional amendment, known as the Rohrabacher-Farr Amendment, directing that the DOJ may not use federal funds to prevent the implementation of state law authorizing the use and distribution of medical marijuana. This week, Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York disagreed with defendants in an Opinion and Order permitting the case to proceed. As reflected in Judge Rakoff's opinion, the government alleges that Weigand and Akhavan "set up fictitious businesses, complete with websites and bank accounts, purporting to sell a host of products like dog food, face creams, green tea, carbonated drinks and diving gear" and "used these fictitious businesses to fool the banks into approving marijuana credit card and debit card sales by disguising those transactions as sales of dog food and the like." Further, this was no small operation, as the banks are alleged to have "processed more than $100 million worth of transactions that they otherwise would have declined." Weigand and Akhavan moved to dismiss, arguing, among other things, that the indictment did not allege a requisite element of the crime of bank fraud, namely, an intent to inflict harm on a financial institution. Judge Rakoff explained that recent U.S. Supreme Court precedent on the harms that qualify under the bank fraud statute, including *Shaw v. United States*, 137 S. Ct. 462 (2016), and *Loughrin v. United States*, 573 U.S. 351 (2014), "cast a wide net," and that the government "need not allege harm in the sense of pecuniary loss." Because the indictment alleged that Weigand and Akhavan intended to deprive the banks of property rights – in the case of credit card transactions, the transfer of their own funds to merchant banks, and in the case of debit card transactions, the transfer of funds from cardholder accounts in which the banks nonetheless had a property interest – and to obtain money under bank control, Judge Rakoff held that the government had adequately alleged harm under 18 U.S.C. §§ 1344(1) and (2). Moreover, he rejected defendants' argument that the "only bank property at stake here is 'the ethereal right to accurate information.'" Distinguishing the case from others in which no money had actually changed hands, Judge Rakoff found that the banks "had concrete property interests in these funds, and defendants allegedly sought to injure those interests by causing the banks to relinquish those funds through

deception." Judge Rakoff also rebuffed arguments made by Weigand and Akhavan that the prosecution ran afoul of the Rohrabacher-Farr Amendment. Contrasting the case with *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), which had held that the amendment limited the authority of the DOJ to bring marijuana-related charges under the Controlled Substances Act, Judge Rakoff explained that "the indictment in this case does not charge defendants for behavior that is legal under the state medical marijuana laws. It charges conspiracy to commit bank fraud." As a result, both the Rohrabacher-Farr Amendment and *McIntosh* were inapplicable. As a result, a prosecution that implicates the DOJ's ability to charge crimes related to the sale of marijuana as well as the breadth of the bank fraud statute will now expeditiously proceed. And notwithstanding the defendants' alleged deployment of phony dog food and face cream companies to trick the U.S. banking industry, that is not a laughing matter.

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For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center. COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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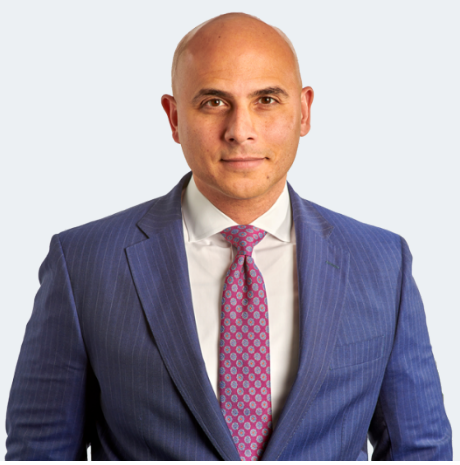

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