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White Collar Roundup - March/April Edition

DOJ Expands and Further Expands Enforcement Priorities During Pandemic

In a series of pointed memoranda, the Department of Justice (DOJ) has made crystal clear that enforcement of federal law is an essential function even in these unprecedented times of the COVID-19 crisis. For more than a month now, Attorney General William Barr and Deputy Attorney General Jeff Rosen have identified and directed all U.S. Attorneys and other departments within DOJ to prioritize new pandemic-related criminal and civil enforcement activities.

Early in the pandemic, the Attorney General cited, in a March 16 memorandum, reports of fraudulent and opportunistic schemes tied to COVID-19, such as individuals and businesses selling fake cures, "phishing" e-mails from entities posing as health organizations, and malware being installed on cellphones under the guise of mobile apps that would track the spread of the virus. The Attorney General directed U.S. Attorneys to prioritize the investigation of this and other types of criminal conduct related to the pandemic. Just a few days later, Deputy Attorney General Rosen followed up in a March 19 memorandum directing each U.S. Attorney to appoint a coronavirus fraud coordinator whose role includes prosecuting COVID-19-related crimes.

The Deputy Attorney General addressed DOJ's enforcement priorities again in a March 24 memorandum. These priorities extended the earlier directive to additional crimes, such as robocalls offering to sell nonexistent masks, social media scams fraudulently seeking donations or falsely claiming to provide stimulus funds, and the submission of false medical claims. They also included violent crimes, such as threats to intentionally infect others with the virus. Rosen reiterated that U.S. Attorneys should prioritize the investigation of these crimes and encouraged coordination with state and local law enforcement.

A related concern for DOJ is that some may use the pandemic as an opportunity for price gouging by hoarding essential medical supplies and selling them at steep markups. The Attorney General issued a further memorandum on March 24 explaining that a recent executive order made it a crime for persons to accumulate such items in excess of a reasonable need or to sell the items at higher than prevailing market prices. *See, e.g.,* 50 U.S.C. §§ 4512, 4513.

Last week, the Attorney General in an April 27 memorandum directed all U.S. Attorneys, among others at DOJ, to "be on the lookout for state and local directives that could be violating the constitutional rights and civil liberties of individual citizens." While recognizing that stay-at-home orders are necessary to combat the spread of COVID-19, the Attorney General cautioned DOJ could view such measures as crossing the line into unconstitutional restrictions on religious freedom, speech and interstate commerce. To date, DOJ has not pursued any enforcement actions along these lines, but it has shown its support for some civil lawsuits brought by private plaintiffs, as in for example this Statement of Interest involving drive-in religious services.

If there had been any doubts DOJ would pay close attention to all forms of potential criminal activities arising from the pandemic as well as possible civil implications, its own memoranda and releases quickly resolved them. As with many other government authorities and regulators, DOJ's recent statements presage months and years to come of active prosecution and enforcement action against wrongdoing related to the COVID-19 crisis.

FIFA Probe Nets Former Sports News Executives

According to an indictment unsealed in April in the sweeping FIFA corruption investigation, two former television sports executives allegedly paid millions of dollars in bribes in order to win lucrative broadcast rights for the world's most popular

sport. As described in a release issued by federal prosecutors in the Eastern District of New York, the indictment alleges that Hernan Lopez and Carlos Martinez, former high-ranking executives of 21st Century Fox subsidiaries responsible for the media company's sports broadcasting business in Latin America, participated in an alleged scheme to bribe officials at CONMEBOL, the soccer confederation in South America, in exchange for broadcast rights for South American soccer tournaments, including the Copa Libertadores, a premier South American tournament. The bribes paid in the scheme are also alleged to have gained Fox Sports access to confidential bidding information that helped it secure certain broadcast rights for the 2018 and 2022 World Cups.

The charges against Lopez and Martinez come more than two years after Fox Sports' business was first linked to the sprawling FIFA scandal. During the trial of former FIFA executives in Brooklyn in 2017, a government witness testified the Fox Sports business had a role in facilitating bribes to the embattled international soccer organization. But it was not until the latest indictment was unsealed that the nature of the allegations was revealed.

In addition to the wire fraud and money laundering charges against Lopez and Martinez, the indictment implicates a high-ranking executive of another media conglomerate based in Spain and a sports marketing company based in Argentina in schemes to pay millions of dollars to various soccer federation officials to obtain media and marketing rights to tournaments and matches. Moreover, the indictment reveals further details on alleged bribes paid to FIFA officials in connection with the selection of the highly-coveted host countries for the last and next World Cups, Russia in 2018 and Qatar in 2022.

The yearslong investigation into corruption in organized soccer has already scored dozens of guilty pleas and the convictions of former FIFA officials. If convicted, Lopez and Martinez could face up to 20 years' imprisonment and financial penalties. The unsealed charges, moreover, signal that media companies heavily involved in the broadcast of major soccer and other sports tournaments may, for years to come, face scrutiny of their bids for and receipt of lucrative sports broadcasting rights.

SEC Also on High Alert for Financial Statement and Other COVID-19 Fraud

In addition to the steady drip of memoranda from the DOJ underscoring its focus on enforcement in the COVID-19 era, the Securities and Exchange Commission (SEC) is also plainly attuned to possible misconduct by public companies and their representatives. From early in the crisis, the SEC's Division of Enforcement underscored to all market participants the need to "emphasize the importance of maintaining market integrity and following corporate controls and procedures."

Indeed, the depths of the economic impact of the pandemic impose strong pressures and risks on public companies small and large in a number of areas, including with regard to their financial statements and accounting practices. Likewise, the magnitude of the money flowing from historic stimulus packages, including the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, and more recent Paycheck Protection Program and Health Care Enforcement Act (PPP), (Pub. L. 116-139), magnifies the risks. The combination of these forces ensures that, as the crisis continues and eventually abates, the SEC will be watching, just as it was after the meltdown in the financial markets in 2008. Then, the SEC brought numerous civil suits and administrative actions against public companies and their officers, estimating in one report that penalties from fraud and other misconduct that led to or arose from the financial crisis had amounted to $1.93 billion in disgorgement and interest, another $1.47 billion in penalties and another $418 million in other forms of monetary relief.

Among the issues facing public companies during the COVID-19 pandemic and prior crises alike is, of course, ensuring that financial performance is accurately accounted for and accurately reported. Recognizing the challenges in these areas, the SEC announced early on that it had extended deadlines to file certain financial disclosure reports and that through its Division of Corporation Finance, had issued new guidance concerning companies' disclosure and other securities law obligations with respect to COVID-19-related disruptions.

In this environment, as in prior crises, the risks related to accurate accounting and financial statements are many. For example, areas of particular risk on the financial statements may include, among many others, (i) a lack of adequate disclosures, in that some companies may be hesitant to describe the uncertainties, contingencies and other risks that the pandemic brings to their business and operations; (ii) the manipulation or overstatement of revenues, in that some businesses may be tempted to distort or create new revenue figures as customer spending contracts throughout the economy; (iii) the manipulation of expenses, in that some companies may seek to spread out huge expenses prompted by the current health crisis in lieu of expensing them

as they are incurred; and (iv) management of allowances and reserves, in that some businesses may have incentives to manipulate certain accounts, allowances and reserves to limit or eliminate charges and thus artificially inflate income.

Such risks for financial statement and accounting fraud now are not academic. Immediately after the financial crisis, the SEC pursued numerous actions for such wrongdoing. As the SEC's recent statements suggest, the coming months and years are also likely to see enhanced scrutiny of the decisions being made by public companies in their accounting practices and financial reporting decisions. As a result, while corporate officers and managers work overtime to lead in these difficult days, it is critical to also ensure the vitality of their accounting and reporting resources and controls.

Case Testing FCPA's Global Reach Proceeds to Sentencing

Just as the pandemic began disrupting court proceedings in Connecticut and beyond, Lawrence Hoskins, a former executive of a French power and transportation company, was sentenced in March in the U.S. District Court in New Haven on money laundering and other charges. According to its press release, the government presented evidence at Hoskins's trial that he had helped direct improper payments to Indonesian officials in pursuit of a contract with an Indonesian state-owned utility. At his trial, the jury had returned a verdict against Hoskins for violations of the Foreign Corrupt Practices Act (FCPA), which U.S. District Judge Janet Bond Arterton overturned.

The anti-bribery provisions of the FCPA generally prohibit classes of persons from making corrupt payments to foreign officials in order to obtain or retain business. While the range of prohibited conduct is very broad, the anti-bribery provisions apply to enumerated categories of defendants and their agents, officers and other representatives. Hoskins, it appears, did not fit neatly into them. The District Court had originally dismissed certain counts related to Hoskins' alleged FCPA violations, but those counts were reinstated on appeal to the U.S. Court of Appeals for the Second Circuit. The Second Circuit summarized the complex proceedings. The District Court's original dismissal relied on the *Gebardi* principle, from *Gebardi v. United States*, 287 U.S. 112 (1932), to determine that Hoskins could not be held liable for conspiracy to violate the FCPA if he could not be subject to liability for the underlying FCPA offense. At the relevant time, Hoskins was a British citizen, a resident of France and an officer of a foreign subsidiary of a French company with no obvious nexus to its U.S. operations. He never set foot on U.S. territory during the applicable period. He was charged with conspiracy to violate the FCPA provisions that apply only to persons within U.S. territory. The Second Circuit explained the general *Gebardi* principle that the government may not use conspiracy rules to circumvent congressional intent to exclude certain classes of defendants from criminal liability. However, it held that Hoskins would be outside the scope of the principle and could thus be charged, if the government first proved his membership in any of the FCPA enumerated classes, such as an "agent of a domestic concern."

At Hoskins' trial, the jury was persuaded such an agency relationship existed. Judge Arterton, however, found that conclusion to be against the weight of the evidence and granted Hoskins' motion for acquittal on that point. This result, and the path that led to it, is likely to have future implications in other FCPA cases. In particular, the burden of proof imposed on the government in *United States v. Hoskins* may complicate future efforts to apply the FCPA to foreign nationals who lack a U.S. nexus.

Potential Peril in PPP and Other COVID-19 Relief Proceeds

If your business obtained a loan under the Paycheck Protection Program (PPP) of the sprawling CARES Act or applied for other COVID-19-related relief, you may have noticed some fine print, which includes, among other things:

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000 ...

The certification continues on to identify additional liabilities. You may have seen similar language referring to Section 1001 in other U.S. government documents, including at the bottom, usually in small print, of many tax forms. Is this boilerplate that can get lost in the shuffle of completing complex documentation under short time constraints? The answer is absolutely not.

While Section 1001 is plainly only one form of a range of potential liabilities implicit in participating in the PPP and other COVID-19 relief programs, it can be a potent one.

18 U.S.C. Section 1001 is the broadest federal statute that criminalizes making false statements on documents used in many federal applications and transactions. Some of its uses and the federal criminal law in this area are outlined by the Congressional Research Service here. Section 1001 is beloved by investigators and prosecutors, who may affectionately refer to a "1001 violation," while critics of the law may unhappily call it a "prosecutor's best friend," since some think it may be used to charge a crime when no others are likely to be proved. Love it or hate it, Section 1001 is a powerful tool of which you should be aware. This is particularly so now, since many businesses have submitted, some for the first time, applications to the federal government for relief funds.

So what does the statute mean? Section 1001 makes it a crime to make a false statement in writing regarding a material fact in many documents submitted to the federal government. While the statute requires that the fact be material and the false statement knowing or willful, it has a very long reach. It can be easily susceptible to violation, including in applying for COVID-19 relief, where businesses are moving fast in a pressure-filled environment. In the PPP application (and other similar applications), the scope of material facts is likely to be broad, and while the statute requires willfulness for a violation, the defense of "I didn't focus on the question" is a position to avoid. One answer, for example, is to understand that the government is serious, so be accurate and tell the truth. Review the form carefully, research your responses and avoid shading even just a bit. Others, for example, are to consult with your finance department and accountants and, as necessary, your attorneys, and to keep records supporting the way in which you answered difficult questions. Significantly, remember and adhere to your responses as your business moves forward. These and other similar measures may help reduce the risk of a later visit from a "prosecutor's best friend."

Even so, the PPP presents many other risks to businesses apart from Section 1001. The legislation, along with a stream of interim rule making, agency-issued guidance and other pronouncements, leaves more ambiguous other provisions of the program. These ambiguities and heightened public scrutiny ensure that the government will examine and investigate a number of PPP loans and the way in which they were used to assess potential administrative and in some cases criminal actions for months and years ahead.

Fraud Prosecutions Continue in Closed New Jersey Courthouses

The shuttering of courthouse doors in the District of New Jersey has not deterred the delivery of justice. As recently as last week, for example, the U.S. Attorney's Office for the District of New Jersey announced that Jennie Frias pleaded guilty to information charging her with conspiracy to commit bank fraud. In light of closures, the plea was taken via telephone conference by U.S. District Judge Kevin McNulty.

According to the release, Frias admitted participating in a scheme dating back several years that involved the creation of false documentation to secure more than $4 million in bank loans. Her plea comes on the heels of that of a co-conspirator, Raymundo Torres. According to the information in Torres' case, between March 2016 and May 2017, an outfit called Cash Flow advertised on the Internet and held seminars offering to assist low-income customers in obtaining loans. After customers submitted materials to Cash Flow in order to obtain the loans, Torres and his co-conspirators generated documentation to make the loan applications appear more financially viable by falsifying financial and employment information. The fraudulent applications were submitted to banks, which would approve and pay out the loans in reliance on the falsified information.

In the turbulent world of a viral pandemic and economic decline that have seriously disrupted the normal functioning of our courthouses, criminal justice continues.

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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