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White Collar Roundup - February 2022 Edition

DOJ Charts a New Course on China Initiative

In the last administration, the Department of Justice's National Security Division kicked off the high-profile "China Initiative," an effort to address concerns that the Chinese government's aggressive economic and intellectual espionage efforts had focused on American academics and that a forceful response was necessary. Some of the resulting prosecutions addressed what to a layperson were clear issues of national security concern. But a number of critics also noted that many prosecutions addressed ancillary issues—specifically, false statements or omissions on forms that required disclosure of foreign ties and support.

The theory of these prosecutions echoed approaches used in the obscure world of counterespionage and counterintelligence in the U.S. defense and intelligence communities, approaches most commonly associated with the security clearance process. In that context, false, misleading or omitted information often contributes to a decision-making process that presumes against granting security clearances. The participants (applicants and current employees of the federal government and its contractors) are seen as witting and voluntary participants in a system that does not adhere to the touchstone of criminal prosecutions—the presumption of innocence.

One spinoff of the national security clearance process has been a small number of criminal prosecutions for false statements made in the context of security clearance applications. In particular, the notorious complexity of Form SF86 (now renamed, in our digital age, "eQip") has resulted in false statements, an explicit violation of 18 U.S.C. Section 1001, which criminalizes false statements made in government proceedings. Such prosecutions, however, were relatively rare and, when they did happen, were usually linked to an administrative proceeding involving an underlying denial or revocation of security clearances.

The China Initiative was different from this precedent in several respects. Rather than employees of the intelligence community, most of whom had experience in (or wanted to join) the worlds of intelligence and defense, the targets in the China Initiative were often senior academics, such as scientists and researchers. These were people who usually had little or no experience in the national security world and came from a scientific culture that embraced openness, sharing and internationalism in the pursuit of knowledge. To make things more complicated, there were increasingly significant financial concerns, as Chinese institutions began to offer meaningful research grants in an era of shrinking U.S. support for scientific research.

The result was a series of high-profile prosecutions of prominent professors, with charges based on failures to accurately report foreign affiliations, specifically with China, but with no allegations of espionage or intellectual property theft. Some felt this was taking the adage "It's not the crime, it's the cover-up" to an absurd extreme—a cover-up with nothing to cover up. These criticisms included a perception of ethnic profiling, with targets often of Chinese descent—including, for example, the charges against Gang Chen, an MIT professor, which were subsequently dropped. In addition to these civil liberties concerns, some also feared that the program inadvertently could contribute to Chinese government propaganda, which characterized the program as racism.

More recently, with Assistant Attorney General Matthew Olsen taking the helm at the National Security Division, the DOJ undertook a formal review of the program. In extensive remarks delivered last week, Olsen addressed the results of the review, along with the National Security Division's broader objectives. Olsen said that the DOJ had concluded the China Initiative was "not the right approach" to addressing the national security risks posed by the Chinese government, and he

announced the launch of a new and broader Strategy for Countering Nation-State Threats, which will address threats from nations such as China, Russia, Iran and North Korea. In broad strokes, Olsen said the new strategy would be informed by three strategic imperatives: to defend core national security interests and sensitive information and resources; to protect economic security and prosperity from economic espionage, hostile manipulation and cyber-enabled malicious activity; and to defend U.S. democratic institutions and values.

In the coming months, we will see how this broad framework is applied in practice to the nation's research universities and institutions, among others. Counsel for such institutions should continue to scrutinize the processes involving grant applications and the disclosure of foreign affiliations. In the near term, they can look to recent guidance from the administration on research and development here. In the longer term, time will tell exactly how the DOJ charts its course away from the China Initiative and toward its broader national security strategy.

SCOTUS Confronts Restrictions on Cross-Examination

In a recent 8-to-1 decision, the United States Supreme Court fortified criminal defendants' constitutional right to cross-examination, in *Hemphill v. New York*. The case arose out of a tragic incident in 2006, when a shot fired during a Bronx street fight struck and killed a 2-year-old child. Prosecutors originally charged Nicholas Morris with the crime after finding 9 mm ammunition—the same caliber as the fatal bullet—in his nightstand. However, Morris was later allowed to plead guilty only to the unlawful possession of a .357 magnum revolver, which was also found in his nightstand. Years later, prosecutors charged another man, Darrell Hemphill, with the murder of the child.

At his trial, Hemphill blamed Morris for the crime, arguing that the police had recovered 9 mm ammunition from his home after the shooting. The prosecution posited that this argument was misleading to the jury, given that Morris had pleaded guilty only to possessing the .357 handgun, and on that basis, they sought to introduce at trial parts of the transcript of Morris' plea allocution. Morris was out of the country and unavailable to testify.

Over the objection of Hemphill's counsel, the trial court permitted the state to introduce such evidence, reasoning that although Morris' out-of-court statement was not subject to cross-examination, it was admissible because Hemphill had "opened the door" to it under a New York state case called *People v. Reid.* In that case, the court had held that a criminal defendant could "ope[n] the door" to evidence that would otherwise be inadmissible under the Confrontation Clause of the Sixth Amendment, if the evidence was "reasonably necessary to correct [a] misleading impression made by the defense's evidence or argument."

The Supreme Court reversed the trial court's decision for violating the Confrontation Clause, which provides that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." The Court determined that the application of *Reid* was improper because it required the trial court to determine whether one party's evidence and arguments created a "misleading impression" on the jury that required correction with out-of-court materials from the other party. Justice Sotomayor explained

> [I]t was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the [Confrontation] Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression.

The Supreme Court's opinion acknowledged that the Sixth Amendment gives states the flexibility to adopt reasonable procedural rules related to a defendant's right to confrontation—such as contemporaneous objection requirements and removal of defendants from the courtroom for disorderly, disruptive or disrespectful conduct. It continued, however, that New York's "open the door" policy was a substantive evidentiary principle that unconstitutionally restricted the defendant's right to cross-examination and, in this case, led to an impermissible hearsay statement contributing to Hemphill's conviction.

Hemphill clarifies and reinforces the requirement under the Confrontation Clause that the reliability of evidence against a criminal defendant must be tested by cross-examination and not determined by a trial judge. As a result, the decision provides further ammunition for defendants and their counsel to challenge incriminating hearsay statements and insist on the cross-examination of prosecution witnesses.

Focusing on the False Claims Act, for the Good of Your Health

In a February release, the DOJ announced a banner year for recoveries under the federal False Claims Act (FCA), which represents the U.S. government's primary tool to obtain civil recoveries from companies and individuals for the misuse of public funds. In the last fiscal year, the DOJ secured more than $5.6 billion in civil settlements and judgments for fraud and false claims against the government, which was the second-largest annual haul in the history of the FCA. Perhaps as notable as this headline-grabbing figure, however, was the implicit subtitle of the announcement, which might have been "It's almost all about healthcare." Of the $5.6 billion recovered, more than $5 billion involved the healthcare industry.

Healthcare fraud involving the government's Medicare, Medicaid and healthcare program for service members again led the field in FCA recoveries, including from drug and medical device manufacturers, managed care providers, hospitals, pharmacies, labs, and physicians. Within this field, the DOJ confirmed its focus on several areas of concern, including its continued use of the FCA to bring cases against opioid manufacturers complicit in the opioid epidemic. In addition, the DOJ described its investigation of and litigation over a growing number of matters related to the Medicare Part C program, through which the government pays healthcare insurers for the managed care of each patient rather than for individual services. The DOJ pointed to its claims against providers that manipulate the risk adjustment process to cause their patients to appear sicker than they actually are. In addition to Medicare Part C matters, the DOJ continued to focus on the long-standing (and ever-present) issues of unlawful kickbacks to drug manufacturers and medical device and other vendors, and of billing for medically unnecessary services or services that were never provided.

As the DOJ described, a substantial fraction of its FCA recoveries arose under the *qui tam* provisions of that Act, in which individuals may file lawsuits against companies and individuals alleging false claims on behalf of the government. In such cases, if the government eventually prevails, qualifying individuals, referred to as relators or whistleblowers, may receive up to 30% of the monies recovered. The DOJ pointed out that, in the last fiscal year, individuals filed almost 600 *qui tam* lawsuits—an average of 11 cases every week—and more than $1.6 billion of the $5.6 billion recovered by the DOJ was attributable to *qui tam* litigation.

There is no doubt that government investigations under the FCA will continue to ensnare companies across many sectors of the economy. By the same token, the numbers reflecting the predominance of healthcare-related recoveries and the growing influence of *qui tam* lawsuits don't lie. They tell many participants in the healthcare industry to buckle up for a bumpy ride.

Whistle While You Work: SEC's Latest Whistleblower Proposals

Late last year, the Securities and Exchange Commission celebrated the billionth dollar disbursed through its own whistleblower program since the program's inception in 2012. The Commission now proposes to modify the rules of the SEC program to remove certain limitations on future payouts—which may remove disincentives to whistleblower reporting and enable even larger awards in the future.

In mid-February, the SEC proposed two amendments to the rules governing the whistleblower program. The first proposed amendment would make it easier for the SEC to pay whistleblower awards for actions brought by certain federal agencies and other entities, even if those awards could otherwise be paid through the other entity's whistleblower program. The proposed rule would allow the SEC to designate an action brought under another agency's whistleblower program as a "related action" eligible for the SEC's often-higher compensation levels, even if the SEC does not have a more direct connection than the other agency to the action.

The second proposed amendment would alter the criteria the SEC may consider in determining the appropriate award amount—specifically, how the dollar amount of a potential award may factor into the SEC's calculation. The new amendment would prohibit the SEC from considering the total dollar amount of a potential award in a way that would lower the award amount. Put more simply, the dollar amount of the potential award would become a one-way ratchet that could increase, but not decrease, whistleblower recoveries.

The proposed amendments come at a time when whistleblower award activity has already reached historic levels. The SEC recently reported that its whistleblower awards in fiscal year 2021 exceeded the total award disbursements from all previous years combined, with more than $564 million awarded to 108 individuals.

Whether or not the proposed rule changes are adopted in full, the SEC shows no signs of abating its largesse. The most recent flurry of whistleblower award activity—including more than $40 million awarded to four individuals in late January—may put 2022 on track to become another record-breaking year, full of incentives for more whistleblower reports.

New Russia Sanctions Demand Compliance Review

In the aftermath of Russia's invasion of Ukraine, the United States and many of its allies have imposed new or enhanced sanctions and economic restrictions on a growing list of Russia-related persons and entities. Sanctions are generally administered by the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC), and OFAC's enforcement regime is aggressive and comprehensive. In the coming months, OFAC's attention will likely focus on Russia-related sanctions, and the U.S. government's Ukraine/Russia-Related Sanctions program may expand even further or otherwise change from its current form. As some may be aware, even unintentional violations of the sanctions program can result in significant penalties and reputational harm.

Many companies have compliance programs, sometimes managed in-house and sometimes outsourced, to address sanctions. The basic method often employed has been relatively simple—comparing clients, customers or counterparties against the OFAC lists, which are generally available online or through commercial vendors. In light of the unprecedented scope of the new wave of Russia sanctions, companies must review their sanctions compliance against the government's expanded sanctions program.

If your organization does not have a sanctions compliance program, it should reassess whether one is needed. Factors militating in favor of such a program include having overseas customers, purchasing materials from overseas, hiring overseas contractors or other vendors, and comparing the sectors in which your company operates against the OFAC regime. If your organization does have a program, it should evaluate, among other things, whether the program is structured to capture individuals or entities that have been added to sanctions lists since the program and the entity's commercial relationships began.

In general, many sanctions compliance programs are not particularly expensive or time-consuming to operate. On the other hand, investing in a solid program can be important because sanctions violations can result in significant fines, and even unintentional violations have resulted in penalties in the millions of dollars. As a result, and particularly at this moment in time, sanctions are an area where an ounce of protection is worth a pound of cure.

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