December 30, 2021

Day Pitney White Collar Roundup - December 2021 Edition

A Sound 'Strategy' for the New Year: Reduce Corruption Risk

Earlier this month, the White House issued a first-of-its-kind road map of its global priorities for combating the ill effects of corruption. The far-reaching plan, captured in a 38-page tome titled United States Strategy on Countering Corruption (the Strategy), are the fruits of a review conducted by a number of federal agencies, including the Department of Justice, commissioned by President Joe Biden this past summer.

As summarized in a related Fact Sheet, the Strategy "outlines a whole-of-government approach" to the fight against corruption, placing "particular emphasis on better understanding and responding to the threat's transnational dimensions, including by taking additional steps to reduce the ability of corrupt actors to use the U.S. and international financial systems to hide assets and launder the proceeds of corrupt acts."

While the Strategy articulates five pillars of the administration's anti-corruption efforts, two of particular interest directly address the perennial issues of misuse of the U.S. financial system and accountability for corrupt activities.

The first such pillar focuses on curbing illicit finance, wherein "corrupt actors and their facilitators rely on vulnerabilities in the United States and international financial systems to obscure ownership of assets and launder the proceeds of their illicit activities." To better combat this deep-seated problem, the government intends, among other things, to issue "beneficial ownership transparency regulations that help identify bad actors hiding behind opaque corporate structures." In this way, the Strategy will build in part on recent legislation, covered here earlier this year, modernizing and strengthening the anti-money laundering laws. In addition, the Strategy contemplates training the government's attention on real estate transactions, by enacting "first-of-their-kind regulations that target those closest to real estate transactions to reveal when real estate is used to hide ill-gotten cash or to launder criminal proceeds." Further, in a salvo across the bow of accounting firms, law firms and other professional service providers, the Strategy contemplates working with lawmakers and with existing regulations "to make it harder for certain gatekeepers to the financial system—including lawyers, accountants, and trust and company service providers—to evade scrutiny."

The second pillar of particular interest focuses on holding more accountable those bad actors who engage in corruption. To do so, the Strategy includes plans to launch a new initiative to work with the governments of foreign countries to better detect and disrupt foreign bribery. It also plans to establish an asset recovery program designed to better "identify and recover stolen assets linked to foreign government corruption that are held at U.S. financial institutions." And, among other initiatives, it promises the government will work closely with the private sector to encourage "the adoption and enforcement of anti-corruption compliance programs by U.S. and international companies."

The Strategy further outlines the government's ambitions to combat the use of the U.S. financial system to conceal ownership and launder ill-gotten gains, and to hold corrupt individuals and entities accountable. Given the breadth of these ambitions, the devil may be in the details. But the many constituencies called out in the Strategy's sweeping plans—including domestic and international financial institutions, real estate companies and others involved in real estate transactions, many of their professional advisors, and other companies exposed to international corruption risks—would do very well to understand these ambitions and begin preparations for them now.

Slack SPAC Practices Attract SEC Flak

As last reported here, the U.S. Securities and Exchange Commission (SEC) has been setting its sights on special purpose acquisition companies (SPACs). Recent remarks from the SEC chair and the SEC's inquiry into a high-profile SPAC bolster the point.

SEC Chair Gary Gensler's remarks on December 9, 2021, posited that SPAC investors should receive the same level of protection they would receive from a traditional initial public offering (IPO). His remarks targeted three key issues: disclosure, marketing practices and gatekeeper obligations.

- *Disclosure*. Gensler is concerned that certain classes of SPAC investors have access to information that retail investors haven't seen yet, including about how some shares may become diluted later in the SPAC process depending on decisions the SPAC sponsor makes. As a result, Gensler asked his staff to make "recommendations about how investors might be better informed about the fees, projections, dilution, and conflicts that may exist during all stages of SPACs, and how investors can receive those disclosures at the time they're deciding whether to invest."
- *Marketing Practices.* Gensler noted that IPOs for SPAC targets often are announced with incomplete information issued via press releases and celebrity endorsements, with the SPAC sponsor arguably "priming the market" before making adequate disclosures. Gensler has "asked staff to make recommendations around how to guard against what effectively may be improper conditioning of the SPAC target IPO market."
- *Gatekeeper Obligations.* Investment "gatekeepers," which may include directors, officers, SPAC sponsors, financial advisors and accountants, may be failing to appreciate their due diligence responsibilities (and accompanying liability exposure) in connection with SPAC transactions. Accordingly, Gensler asked his staff for recommendations about how to "better align incentives between gatekeepers and investors" and "address the status of gatekeepers' liability obligations."

Gensler's remarks came within days after it was revealed that the SEC is investigating a SPAC that plans to merge with former President Donald Trump's new social media company. The inquiry, broadly speaking, seems to focus on the SPAC's disclosure and marketing practices. The SEC has requested documents relating to meetings of the SPAC's board of directors, "policies and procedures relating to trading, the identification of banking, telephone, and email addresses, the identities of certain investors, and certain documents and communications between" the SPAC and the Trump entity. The SPAC announced that it was cooperating with the information request and noted in its SEC filing that "the investigation does not mean that the SEC has concluded that anyone violated the law or that the SEC has a negative opinion of DWAC [the SPAC] or any person, event, or security."

Expect the coming months to bring more news of the SEC taking a heavier hand with SPACs, along with a continuing trend of private litigation by SPAC investors.

Federal Court in Texas Reins In Another FCPA Prosecution of Foreign National

In the latest illustration of pushback against the government's aggressive application of the Foreign Corrupt Practices Act (FCPA), a Texas court recently dismissed charges against a Swiss citizen based on the government's failure to sufficiently allege that the defendant was subject to the FCPA's anti-bribery provisions.

The FCPA prosecution at issue involved kickbacks that employees of PDVSA, a Venezuelan state-owned oil company, allegedly solicited from vendors. The government alleged that these same employees hired Daisy Rafoi-Bleuler, a Swiss citizen and wealth manager, to set up bank accounts around the world to hide their ill-gotten proceeds. Rafoi-Bleuler was initially arrested while vacationing in Italy, but the extradition proceedings were later dismissed after she left Italy and returned to Switzerland.

From Switzerland, Rafoi-Bleuler moved to dismiss the charges against her for lack of jurisdiction. The government argued that Rafoi-Bleuler could be prosecuted for violations of the FCPA because she acted as an "agent" of a "domestic concern," in this case a U.S.-based affiliate of PDVSA.

The District Court rejected this argument, concluding that the government had failed to allege any direct evidence of an agency relationship that could be distinguished from an arm's-length "professional relationship." While the government cited

various communications with Rafoi-Bleuler sent through interstate commerce, the District Court found these to be insufficient evidence of a principal-agent relationship. In addition, the District Court concluded that the government's agency theory was such a "novel application" of the FCPA that it rendered the statute unconstitutionally vague as applied to Rafoi-Bleuler.

The District Court's decision to dismiss the FCPA charges against Rafoi-Bleuler represents another setback for the government's reliance on an agency theory to establish jurisdiction over foreign nationals with minimal ties to the United States. Readers of the White Collar Roundup will recall the case of Lawrence Hoskins, a British citizen who was prosecuted under a similar agency theory in Connecticut and had his conviction set aside by the District Court after trial last year, now on appeal. These cases are an important reminder that the government's theories of jurisdiction in the prosecution of non-U.S. citizens are subject to challenge and, sometimes, even prove to be fallible.

Doctoring the Telemedicine System Can Be Costly

The U.S. Attorney's Office for the District of New Jersey recently indicted four individuals in connection with a telemedicine prescription fraud and kickback scheme. The two-count indictment charges David Woroboff, George Willard, Randall Mills and Dr. Le Thu with conspiracy to commit health care fraud and conspiracy to violate the federal Anti-Kickback Statute.

The indictment alleges that from the spring of 2014 to the spring of 2017, the Nevada-based telemedicine company executives ran a fraudulent scheme that led to approximately $37 million in losses to, among others, Medicare and TRICARE, a U.S. Department of Defense health care program. Specifically, Woroboff, Willard and Mills were high-level employees of the telemedicine company who allegedly orchestrated a scheme to generate prescriptions for compounded medication and orders for durable medical equipment that were not medically necessary and that were not the result of a doctor-patient relationship, in exchange for kickbacks.

According to the government, Woroboff and Mills would encourage doctors to generate prescriptions by telling them that nurses had already consulted with patients and determined that prescriptions for compounded medication or orders for equipment were medically necessary. The indictment alleges that, in reality, the "nurses" not only were unregistered to practice medicine in the United States but also did not talk to patients at all. In addition, the defendants reportedly paid kickbacks to health care providers for writing the prescriptions and equipment orders without talking to the patients. For example, the defendants allegedly paid Dr. Thu $35 per prescription or order as a kickback. The government alleges that to facilitate the scheme, the defendants set up local mailing addresses and local phone numbers to avoid suspicion from pharmacists receiving prescriptions and equipment orders from out-of-state providers.

If convicted, the defendants face substantial fines and up to 10 years in prison for the conspiracy to commit health care fraud and up to five years for the conspiracy to violate the federal Anti-Kickback Statute. If there were any doubt that health care crime still doesn't pay, these potential penalties remove it.

In other important District of New Jersey news, the district recently swore in new U.S. Attorney Philip R. Sellinger. Sellinger had served as an Assistant U.S. Attorney in the District of New Jersey from 1981 to 1984, before entering private practice, where he remained until he was nominated by Biden to fill the role of chief federal prosecutor for the District of New Jersey.

We look forward to covering the office's activities under his leadership in the new year. Happy holidays to all!

Authors



Helen Harris
Partner

Stamford, CT | (203) 977-7418

hharris@daypitney.com



Stanley A. Twardy, Jr.
Of Counsel

Stamford, CT | (203) 977-7368

satwardy@daypitney.com