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White Collar Roundup - December 2017

DOJ Further Strengthens FCPA Self-Disclosure Program

In a speech at the 34th International Conference on the Foreign Corrupt Practices Act, U.S. Deputy Attorney General Rod Rosenstein announced an updated FCPA enforcement policy to provide organizations with an incentive to voluntarily disclose organizational wrongdoing. He began by acknowledging that "it is not for the Department of Justice to say whether the FCPA reflects sound policymaking. The United States Congress made that judgment. Our mission is to detect, deter, and punish violations of the laws of the United States." He also reemphasized the DOJ's continued focus on individuals, noting, "Effective deterrence of corporate corruption requires prosecution of culpable individuals. We should not just announce large corporate fines and celebrate penalizing shareholders." Further, he lauded companies with robust compliance programs, saying, "a company with a robust compliance program can prevent corruption and reduce the need for enforcement." He then announced the revised FCPA Corporate Enforcement Policy and promised that it would be incorporated into the U.S. Attorneys' Manual. The highlights of the updated policy are as follows:

- First, "when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination."
- Second, if "aggravating circumstances" overcome that presumption, "the Department will recommend a 50% reduction off the low end of the Sentencing Guidelines fine range."
- Third, "the Policy provides details about how the Department evaluates an appropriate compliance program, which will vary depending on the size and resources of a business."

In closing, he noted that companies that choose not to participate in the voluntary-disclosure program would be dealt with in line with the Principles of Federal Prosecution of Business Organizations.

A Christmas Carol: SEC FCPA Edition

Not to be outdone, at New York University's Program on Corporate Compliance and Enforcement, Steven R. Peikin, Co-Director, Enforcement Division, spoke about the 40th anniversary of the Foreign Corrupt Practices Act (FCPA). In his remarks, Peikin echoed Charles Dickens by reflecting "on the past, present, and future of SEC enforcement of the FCPA." As to the past, Peikin noted that "enforcement of the FCPA has been a fundamental part of the SEC's enforcement mission." Presently, the SEC's specialized unit that focuses on FCPA enforcement "has approximately three dozen attorneys and forensic accountants in various of the SEC's offices around the country." For the future, Peikin stressed the importance of international cooperation in anti-bribery enforcement and of holding individual wrongdoers responsible for their misconduct. He noted that the SEC "considers individual liability in every case it investigates; it is a core principle of our enforcement program." He also acknowledged the challenges the SEC faces in fully investigating an FCPA matter and bringing an action within the applicable statute of limitations. That said, he stressed the SEC's redoubling of its efforts to bring cases as quickly as possible to avoid any statute-of-limitations bar.

Manhattan DA's Take on Cybersecurity Enforcement

At the Manhattan District Attorney's Office's 7th Annual Financial Crimes & Cybersecurity Symposium, New York District Attorney Cyrus R. Vance, Jr., used his opening remarks to discuss his office's efforts to combat cybersecurity incidents. Vance noted that cyberattacks used to be about stealing money, but appear now to "represent something far more sinister." He opined that "Cybercrime is second only to terrorism in its potential to disrupt the functioning of our society." He also

announced a partnership with the Procureur de la République de Paris to combat cybercrime, which will be modeled on his office's partnership with the City of London Police, which was set up in 2014. Vance also took the opportunity to lambast device encryption: "Default device encryption does not defend against these kinds of cyberattacks, nor does it protect users from phishing attempts on their devices. What it does do, is thwart law enforcement's ability to identify the perpetrators, and take them out of the game. That is the great irony at the heart of this debate. In their purported attempt to provide more cybersecurity, [device encryption has] empowered cybercriminals to act with impunity."

Guilty Pleas Abound in Medicare and Medicaid Fraud Prosecution

Joon H. Kim, the Acting U.S. Attorney for the Southern District of New York, reported that a doctor and four executives pleaded guilty to a $30 million scheme to defraud Medicare and Medicaid. The alleged scheme involved the operation of fraudulent clinics and a related ambulette company. As part of the scheme, the defendants paid cash kickbacks to elderly patients who were insured by Medicare or Medicaid and then billed those government payors for unnecessary medical services, tests, and supplies. As Kim said, "These five defendants bilked Medicare and Medicaid out of millions of dollars for unjustified medications, procedures, and supplies. Medicare and Medicaid were established to assist the elderly and economically disadvantaged, not to serve as cash cows for corrupt professionals." Kim noted that five additional defendants remain under indictment and are scheduled to go to trial before U.S. District Judge Lorna G. Schofield on April 23, 2018.

Another Guilty Plea in the Compounding Pharmacy Investigation in the Garden State

Timothy Frazer, a commercial construction estimator, admitted his role in a $50 million health care fraud conspiracy in New Jersey. In further confirmation that the principles of individual accountability continue to be vigorously pursued by the government, Frazer is the twelfth individual to plead guilty to this conspiracy. According to documents filed in federal court, Frazer was a recruiter in the conspiracy and persuaded individuals in New Jersey to obtain expensive and medically unnecessary compounded medications from an out-of-state pharmacy. Frazer admitted to submitting false claims, which caused New Jersey State benefit programs to pay approximately $800,000 in false claims. As part of his guilty plea, he agreed to forfeit over $145,000 and to pay over $800,000 in restitution. Frazer faces a maximum prison sentence of 10 years and a fine of $250,000 or twice the profits/losses of the fraud. For the government's press release, click here.

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