

Impact of COVID-19 on White Collar Enforcement

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While enforcement agencies have yet to indicate that they intend to put their pens down in response to COVID-19, there is anecdotal evidence that some agencies have slowed their investigations as remote working impacts matter management. Enforcement agencies are pursuing work-arounds to handle active investigations while maintaining social distancing, such as requesting remote interviews. Where enforcement agencies have allowed, document production has moved to purely electronic means. Internal interviews, meetings and court hearings are progressing by video and teleconference. However, disruptions from remote working will make it difficult for enforcement agencies to embark on new large-scale investigations given potential difficulties in fact finding, particularly with respect to cross-border matters. The French Anti-Corruption Agency, for example, has indicated that it will not conduct new examinations during the COVID-19 lockdown period.¹ We also anticipate some carryover delay as enforcement agencies come back on line following potentially extended periods of remote working.

Once working conditions return to normal, enforcement activity is likely to return to pre-crisis levels, with increased focus on any misconduct that occurred during the period of market disruption related to COVID-19. There also may be increased activity as investigators look to compensate for the slowdown. The following are potential areas of heightened COVID-19-related enforcement activity for corporate clients. In-house legal and compliance officers should remain appropriately diligent as the crisis unfolds.

Trading Risk

Increased volatility in debt and equity markets likely will cause enforcement agencies to focus on various forms of market abuse. For example, there may be scrutiny of financial products and trading strategies that have proliferated over the last decade, such as exchange traded funds and algorithmic trading. If such products and strategies are shown to have amplified the impact of market swings, particularly downward swings, this may be an area of interest, particularly because of the impact that market declines have on “main street” investors who have passively invested their retirement funds. The Department of Justice (DOJ) and Commodity Futures Trading Commission’s (CFTC) focus on spoofing and other manipulative behavior is also likely to continue.

There almost certainly will be a focus on any trading activity that could be viewed as having inappropriately sought to take advantage of the market disruption from COVID-19. On March 17, 2020, the U.K. Financial Conduct Authority (FCA) released guidance noting that “[f]irms should continue to take all steps to prevent market abuse risks,”

¹ See the French Anti-Corruption Agency release [here](#).

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which “could include enhanced monitoring, or retrospective reviews.”² The reference to retrospective reviews suggests that the FCA is already encouraging regulated entities to not only prevent misconduct but also to identify for future enforcement action internal misconduct that has already occurred.

Tax Risk

With governments facing bills for large-scale bailouts and social support programs, there may be increased focus on preventing and punishing tax evasion. European regulators already are focused on cum-ex trading, a course of dealing whereby multiple parties claim tax benefits from a single block of securities around dividend dates. Given reports of how widespread cum-ex trading was, it will likely be further scrutinized. European governments may continue to look to large technology companies as potential targets for tax enforcement. The U.K. may look to relatively new legislation that has not yet been widely deployed, the offense of failing to prevent facilitation of tax evasion, to amplify recoveries for tax offenses when they have been identified. As with the U.K. Bribery Act, a corporate can be liable for this offense unless it can prove that it had adequate preventative measures in place. U.K. prosecutors have had success obtaining deferred prosecution agreements in connection with “failing to prevent” offenses in the bribery context, and that trend also may emerge in tax cases.

Sanctions and Anti-Money Laundering (AML) Risk

Even prior to the COVID-19 crisis, sanctions were seeing increased enforcement activity. That is unlikely to change. Likewise, as market disruptions generate flight to safe haven assets and currencies, banks should focus on ensuring the continuity of critical operations in their AML and sanctions programs. However, regulators have acknowledged the strain on operations presented by the COVID-19 pandemic. For example, on March 24, 2020, the Board of Governors of the Federal Reserve System issued guidance on how its supervisory approach is adjusting in light of COVID-19. The guidance stated that the Board recognizes the current situation’s significant and varied impact on its regulated institutions and will work with them to understand the specific issues. The Board also announced that, to permit firms to focus on heightened risks in this environment and assist consumers, it is allowing institutions additional time to resolve non-critical existing supervisory findings. Specifically, the Federal Reserve is extending the time periods for institutions to remediate existing supervisory findings by 90 days, unless the Federal Reserve notifies the institution that a more timely

² See the FCA release [here](#).

remediation is needed to address a heightened risk or to help consumers. Supervisory findings include matters requiring attention, matters requiring immediate attention, and provisions in formal or informal enforcement actions.

Corruption Risk

The combination of stretched management and pressure to generate revenue may create issues from an anti-bribery and corruption standpoint. For example, remote working may lead sales personnel to feel as though there is less oversight over their activities, in turn leading to the payment of bribes in connection with winning contracts. Additionally, governmental actors will be more involved in supply chain and procurement activity during the COVID-19 crisis than they were in periods of normalcy. The greater the number of government touchpoints, the greater the possibility that improper payments or benefits may be delivered to government officials. Enforcement agencies are unlikely to be sympathetic to bribery related to the response to COVID-19, especially if the perpetrators have benefitted financially from their misconduct, and there will be significant political pressure on agencies to identify and punish any instances of corruption that could arguably have impacted governmental responses to COVID-19.

Competition Risk

Although the COVID-19 crisis presents opportunities for legitimate collaboration among businesses, enforcement authorities are remaining watchful for potentially anticompetitive activity. In early March 2020, the U.S. Department of Justice announced its intention to hold accountable violators of federal antitrust laws in connection with the manufacture, distribution or sale of public health products such as face masks, respirators and diagnostics.³ Last week, the DOJ’s Antitrust Division and the Federal Trade Commission (FTC) issued a joint statement announcing expedition of COVID-19-related requests for guidance to the Division’s Business Review Process and the FTC’s Advisory Opinion Process. And while the two agencies indicated that they would “account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath,” they also would not hesitate to pursue enforcement actions against those perceived to be taking advantage of the crisis to engage in anticompetitive conduct.⁴ Price gouging is also likely to become a target of enforcement and has been a particular focus of state attorneys general.

³ See the DOJ release [here](#).

⁴ See the DOJ and FTC release [here](#).

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Disclosure and Accounting Risk

Periods of economic strain historically have revealed and sometimes caused accounting misconduct. Companies will face decisions regarding how to describe COVID-19's impact on their performance and operations, and understating or misstating the impact of the crisis could lead to enforcement problems in the future. For example, following the 2008 financial crisis, the CFTC, DOJ, FCA and U.K. Serious Fraud Office obtained settlements from banks that had understated LIBOR submissions in order to avoid publishing that they were facing liquidity issues. Financial institutions and insurers should update disclosures on nonperforming loans and claims, respectively. All issuers should ensure that they appropriately disclose COVID-19 related impacts and uncertainty.

Additionally, in a declining stock market, management may face increased pressure to show earnings resilience. Auditors, compliance groups, boards of directors and other supervisors should be particularly diligent in this period, ensuring that the companies they oversee are not engaging in accounting misconduct in order to hide the impact of the crisis.

Accounting and disclosure misconduct is often coupled with trading misconduct, and trading by corporate insiders will continue to be an area of focus for enforcement agencies. Indeed, on March 23, 2020, the SEC's Co-Directors of the Division of Enforcement issued a public statement noting that the COVID-19 crisis will lead corporate insiders to have access to "new material nonpublic information that may hold an even greater value than under normal circumstances."⁵ The statement reminds corporate insiders and asset managers and other market participants of their duties to maintain this information in confidence and that "[t]rading in a company's securities on the basis of inside information may violate the antifraud provisions of the federal securities laws."⁶

Conclusion

Although there will be impacts to enforcement activity from the COVID-19 crisis, there may be a post-crisis uptick in enforcement activity focused on how companies reacted to the market displacement. Companies should remain vigilant over their compliance and governance processes in the face of COVID-19's severe disruptions.

⁵ See additional information [here](#).

⁶ *Id.*

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