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Catching Up (Virtually) With the Regulators

The white collar bar "got together" for a virtual discussion on the current landscape of the practice on September 23, 2020. Hosted by Practising Law Institute (PLI), the *White Collar Crime 2020: Prosecutors and Regulators Speak* program featured prosecutors from the U.S. Department of Justice (DOJ), joined at times by their counterparts at the U.S. Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), who provided updates on agency priorities and trends this year. Not surprisingly, procedural adjustments required in the face of COVID-19 pervaded the talks, though speakers confirmed that enforcement efforts generally continue full-speed ahead.

The Usual Suspects: Long-Standing Enforcement Priorities

DOJ. The DOJ continues to focus on bread-and-butter white collar criminal activity, including fraud, insider trading, and cybercrime. In the cryptocurrency space, the DOJ continues to prosecute gatekeepers. This [includes attorneys](#) who take advantage of the evolving nature of the market, as well as spoofing cases. With the settlement of cases such as [IMDB](#), involving the misappropriation of billions of dollars from a Malaysian investment development fund, the DOJ continues to use its oft-overlooked civil asset forfeiture arsenal to recover ill-gotten gains for the benefit of those harmed by acts of corruption.

On corruption, the DOJ touted recent cases such as [Sargeant Marine](#) and [Airbus](#)^[1] to demonstrate the robustness of its FCPA enforcement program, which continues to value corporate cooperation and increased coordination with foreign law enforcement, and hold individuals accountable for illegal conduct. The DOJ expects to meet or even exceed the number of corporate FCPA resolutions reached last year (14 cases). And where FCPA jurisdiction may be lacking (for instance, as a result of the U.S. Court of Appeals for the Second Circuit's 2018 [Hoskins](#) decision), the DOJ has stepped up international anti-corruption enforcement, including against bribe recipients, such as [Donville Inniss](#) (the former Minister of Industry of Barbados and member of the Barbados Parliament), through use of money laundering regulations instead.^[2] (For more detailed tracking of the recent expansion of money laundering prosecutions to punish bribery falling outside the FCPA, see [here](#).)

In terms of anti-corruption guidance moving forward, speakers from the DOJ (and SEC) referred program attendees to the July 2020 release of the [Second Edition of the Resource Guide to the FCPA](#), which was prompted by changes in the law due to FCPA cases in the past decade and highlighted the DOJ's expectations regarding the preservation and analysis of ever-growing amounts of data (e.g., texting applications).^[3] Speakers noted a shift in their expectations for cooperation, indicating that prosecutors now preferred companies to self-report early in their internal investigation process, rather than waiting the months or even years that it may take to fully complete an investigation.

SEC. SEC staff were clear that the SEC's enforcement priorities have remained fairly consistent over time. They noted that the SEC continues to bring cases involving traditional Ponzi schemes, offering frauds, the FCPA, accounting and disclosure abnormalities, and insider trading in service of its tripartite mission of protecting investors, ensuring market integrity, and facilitating capital formation. This year also saw the SEC's Enforcement Division allocation of more resources to its [Teachers and Military Service Members Initiatives](#) to stem the growth of affinity frauds promising unrealistically high rates of return to certain groups of prospective investors as well as large-scale retirement plan disclosure failures. The SEC also continues to develop standards for application of the securities regulations to cryptocurrency ICOs. (Be on the lookout next week for Perkins Coie's detailed update on SEC enforcement trends and priorities discussed during this year's annual SEC Speaks

conference. For last year's update, see [here](#).)

CFTC. For their part, the CFTC continues to focus on preserving market integrity and holding individuals accountable by filing (and resolving) a large number of actions involving market manipulation, fraud, inaccurate reporting, and substandard record keeping. Like the DOJ and the SEC, the CFTC continues to encourage registrants and intermediaries to cooperate with enforcement inquiries and self-report compliance issues through application of its own [cooperation credit program](#). The CFTC issued its own guidance just weeks ago on factors the agency will consider in [evaluating the effectiveness of corporate compliance programs](#) in connection with enforcement actions.

Protecting the Public From COVID-19: Literally and Figuratively

New Areas for Enforcement. As noted above, enforcement priorities remain relatively consistent with those of years past. However, the DOJ, SEC, and CFTC have added a slew of COVID-19-related actions to the enforcement catalogue. Noting that financial instability often leads to an increase in white collar crime, speakers predicted that investigations into and prosecutions of COVID-19-related misconduct will likely continue for months and years into the future. Cases already brought include prosecutions for fraud involving the CARES Act and Paycheck Protection Program funds.

The SEC established a Coronavirus Steering Committee to identify areas of market risk and coordinate enforcement efforts between the Commission and its regulatory partners. The SEC also issued an alert urging investors to be wary of possible microcap and pump-and-dump investment schemes claiming availability of or access to medical testing supplies and personal protective equipment. The SEC has suspended trading in the stock of 36 issuers, citing questions regarding the adequacy and accuracy of COVID-19-related public disclosures. And moving forward, the SEC has expressed concern that issuers could attempt to disguise previously undisclosed issues as being caused by COVID-19. Finally, the SEC noted that investment advisor failures to honor redemption requests could signal undisclosed underlying issues.

Practical Changes. Speakers confirmed that although all three agencies have been working remotely since mid-March, they all remain fully-operational. The familiar "ritual" of defense counsel coming in to meet with senior staff or the front office is, for now, a thing of the past. Speakers described several procedural adjustments that are allowing cases to move forward despite the inability of parties to meet in-person, noting that documents are easily transmitted and reviewed electronically. And although they would prefer to look witnesses in the eye, the agencies have started interviewing witnesses and taking testimonies virtually. Speakers even noted some benefits to conducting interviews remotely, including putting sensitive or vulnerable witnesses more at ease, and more flexibility in scheduling. Returning briefly to the FCPA, speakers said that companies would likely be forgiven for foregoing in-person compliance trainings and investigation site visits, but are still expected to use the technology available to them to keep compliance programs on-track as much possible.

Finally, speakers discussed the resumption of in-court proceedings. Because not that many courtrooms around the country have been outfitted for COVID-19 safety, there are limited venues in which to hold jury trials. And even where trials are happening, the usual COVID-19 safety precautions have been only marginally effective in reducing panic. For instance, even though everyone other than witnesses was required to wear masks during a mid-September [criminal spoofing trial in Chicago](#), one juror became seriously ill with COVID-19 symptoms, and two other jurors were ultimately excused due to related health concerns. Speakers and members of the audience alike expressed concern about a potential increase in speedy trial, confrontation clause, and ineffective assistance claims stemming from the inability to meet with clients and gather in courtrooms. But some noted that moving forward with sentencings now may actually benefit defendants, as judges and juries appear to be reevaluating whether they are comfortable incarcerating people in crowded, confined prisons.

In the end, although the full-day program left some questions unanswered regarding the contours of the white collar practice in the months and years to come, one reality remains free from doubt—enforcement efforts by the DOJ, SEC, and CFTC will continue unabated.

Endnotes

[1] The *Airbus* settlement also highlights application of the [Anti-Piling-On](#) policy the DOJ announced just a couple years ago, as it includes giving companies credit to offset penalties they agree to pay in connection with enforcement actions brought in England and France.

[2] Although *Hoskins* was filed outside the 5-year statute of limitations applicable to the FCPA, DOJ speakers explained that the case was able to proceed due to a [3-year statutory extension](#) to the limitations period to account for use of the MLAT process to obtain evidence overseas.

[3] In addition to *Hoskins*, speakers pointed to new FCPA case law arising from [Esquenazi](#) and [Kokesh](#). In addition to the Anti Piling-On policy, the revised Resource Guide accounts for the DOJ's [Corporate Enforcement Policy](#) and updated 2020 guidance on the [Evaluation of Corporate Compliance Programs](#). (For a robust discussion of, and practice tips arising from, the 2020 corporate compliance guidance, see [here](#).)

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