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White-Collar Enforcement Priorities in the Wake of COVID-19

In the wake of the COVID-19 pandemic, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) each have signaled an intention to focus, at least temporarily, on misconduct related specifically to the coronavirus. That focus, combined with the practical limitations imposed on government agencies and the courts by the pandemic, has resulted in a slowdown of traditional white-collar enforcement activity. That slowdown, however, may well be short-lived, and there is reason to expect robust investigative activity by the SEC, DOJ, state Attorneys General and newly created oversight bodies (such as the Special Inspector General for Pandemic Recovery) as the pandemic recedes. We identify below potential areas of focus for future investigative and enforcement activity.

The Current Enforcement Environment: Shift in Priorities and Practical Challenges

On March 16, 2020, United States Attorney General William Barr issued a memorandum directing all United States Attorneys to “prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.”¹ As examples of unlawful conduct “seeking to profit from public panic,” the memorandum referenced the sale of fake cures for COVID-19, phishing emails from entities posing as the WHO or CDC and malware being inserted onto mobile apps designed to track the spread of the virus.

In a follow-up memorandum issued on March 19, 2020, Deputy Attorney General Jeffrey Rosen further directed each United States Attorney to appoint a Coronavirus Fraud Coordinator to, among other things, direct the prosecution of coronavirus-related crimes, including medical providers obtaining patient information for COVID-19 testing, and then using that information to fraudulently bill for other tests and procedures, and individuals and businesses fraudulently seeking donations for illegitimate or non-existent charitable organizations.²

The SEC likewise has signaled an enforcement focus on investment and market activity relating to the coronavirus. The SEC has stated that the Division of Enforcement and the Office of Compliance Inspections and Examinations (“OCIE”) “remain fully operational” and that the agency “is actively monitoring our markets for frauds, illicit schemes and other misconduct affecting U.S. investors relating to COVID-19.”³

Certain practical limitations stemming from the COVID-19 pandemic may make it more challenging for the SEC and DOJ to carry out their traditional investigative roles. The SEC has announced that it “has transitioned to a full telework posture with limited exceptions.”⁴ On March 17, the Executive Office of the President issued a memorandum mandating that all agencies “immediately adjust operations and services to minimize face-to-face interactions, especially at those offices or sites where people may be gathering in close proximity or where highly vulnerable populations obtain services.”⁵ Because of these and other social

distancing guidelines affecting courts, government employees, potential witnesses and counsel, these agencies are more limited in their ability to conduct standard investigative techniques, such as interviewing witnesses or, in the case of the SEC, taking investigative testimony. Criminal authorities reportedly are facing difficulty convening grand juries in certain jurisdictions, and courthouses across the country have drastically limited their operations, in many cases allowing only emergency proceedings.⁶

The Enforcement Horizon

New Oversight Bodies Created by the CARES Act

The recently enacted Coronavirus Aid Relief and Economic Security Act (the “CARES Act”) establishes new oversight bodies with respect to the use of relief funds disbursed pursuant to the Act.⁷ If history guides, these oversight bodies could take an active role in investigations focused on recipients of relief funds well after the COVID-19 pandemic abates.

In particular, the CARES Act provides for a Pandemic Response Accountability Committee with subpoena power staffed by Inspectors General of other agencies, a Congressional Oversight Commission, and a Special Inspector General for Pandemic Recovery.⁸ This three-body structure is modeled after provisions within the Troubled Asset Relief Program (“TARP”) enacted after the 2008 financial crisis and, based on that precedent, could have a significant impact on future enforcement of financial crimes.⁹

So, for example, the Special Inspector General for Pandemic Recovery (“SIGPR”) appears to be modeled after the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”).¹⁰ The CARES Act makes it SIGPR’s duty to “conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees and other investments” made by the Treasury pursuant to the Act.¹¹ While this statutory mandate appears narrowly focused on oversight of fraud in the administration and receipt of stimulus funds, the Act’s language closely mirrors the statutory mandate of SIGTARP.¹² In the decade-plus since it was created, SIGTARP has relied on an analogous jurisdictional mandate to conduct a wide range of investigations of businesses (and their employees) that received TARP funds, including a number of cases focusing on conduct post-dating and unrelated to the financial crisis and stimulus bill.¹³ By way of example, SIGTARP participated in a multi-agency investigation into allegations that a large automobile manufacturer that received TARP funds failed to disclose an ignition switch defect. SIGTARP has collected over \$11 billion in penalties, and its investigations have led to more than 381 criminal convictions.¹⁴

While it remains likely that SIGPR will, at least initially, focus its investigative resources on fraud related to the procurement of relief funds made available under the CARES Act, the precedent provided by SIGTARP—coupled with the enormous sums being made available to recipients through the CARES Act—suggests that over time SIGPR may pursue a much broader range of investigations focused on recipients of relief funds.

The Oversight Commission established by the CARES Act is charged with overseeing whether private entities receiving funds under the Act have acted in accordance with the obligations set out by the Act and is empowered to conduct investigations and hold hearings. Again, and by analogy, in the three years that the Congressional Oversight Panel created by TARP was active, it held dozens of hearings. While it is too early to predict the role of the Oversight Commission created by the CARES Act, the precedent created by TARP suggests significant activity from the Commission in the wake of the COVID-19 pandemic.

The Misuse or Selective Disclosure of Material Nonpublic Information

The effects of the COVID-19 pandemic have led to rapid market swings, with record losses sometimes followed days later by record gains. This volatility may result in a focus by the SEC, DOJ and other enforcement agencies on trading by public companies and corporate insiders—as well as by external advisors being provided access to material nonpublic information—during the COVID-19 pandemic. Similarly, the SEC may scrutinize public companies' compliance with their obligations under Regulation FD. And, in addition to issues involving material nonpublic information, other traditional market abuses like spoofing may also generate particular attention.

As noted [here](#), on March 23, 2020, the Co-Directors of the Enforcement Division of the SEC issued a [statement](#) in which they reminded market participants to be especially vigilant about the potential misuse of material nonpublic information in the current environment and urged public companies to follow established disclosure controls and procedures. The Co-Directors noted that as market conditions change quickly, corporate insiders (and their advisors) regularly learn material nonpublic information that may be even more valuable than in ordinary circumstances. They also noted that the unique circumstances of the day may lead to more people than usual having access to material nonpublic information.

As a result, public companies, their advisors and other market participants should be particularly mindful of using or selectively disclosing material nonpublic information during the COVID-19 pandemic and should continue to stringently enforce relevant controls and procedures.

Public Company Disclosures

Pronounced market volatility while the effects of the virus remain acute may also ultimately result in an increased enforcement focus on public company disclosures made during the pandemic, even after the effects of COVID-19 abate. While SEC Chairman Jay Clayton has acknowledged that the effects of the coronavirus may be difficult for a company to assess with precision, the Chairman has likewise cautioned that “how issuers plan for that uncertainty and how they choose to respond to events as they unfold can nevertheless be material to an investment decision.”¹⁵

Although the SEC has granted conditional regulatory relief from certain disclosure requirements for public companies affected by the coronavirus outbreak¹⁶ and recently extended this relief to cover filings due as late as July 1, 2020,¹⁷ this conditional relief should not be read to portend that any “free-pass” will be given

to companies that fail to disclose material information (or fail to revisit, refresh or update previous disclosures that have become materially inaccurate). Indeed, as recently as March 25, the SEC's Division of Corporation Finance released guidance on disclosure and other securities law obligations that specifically cautioned that "a number of existing rules and regulations require disclosure about the known or reasonably likely effects of and the types of risks presented by COVID-19."¹⁸

Thus, while the SEC may have granted certain forms of conditional regulatory relief in response to the outbreak and has acknowledged the difficulty that companies will face in predicting the effects of the coronavirus on their businesses, public companies should not expect that the SEC will turn a blind eye to perceived public disclosure shortcomings in the months to come. To the contrary, recent guidance suggests that in future months the SEC may apply particular scrutiny to company disclosures (or purported omissions) made during the pandemic. Additional guidance on these issues and relevant considerations for public filers can be found [here](#) and [here](#).

Similarly, while the Attorneys General of states severely impacted by the COVID-19 outbreak have recently focused their resources on protection efforts,¹⁹ it is reasonable to expect a shift to *investor* protection following the pandemic, particularly in those jurisdictions that have previously identified investor protection as a priority. These efforts may be buttressed by the broad statutory authority provided in certain states. The Martin Act, for example, gives New York's Attorney General broad powers to investigate and combat securities fraud²⁰ and has been utilized in the past to investigate and file enforcement actions against public companies for allegedly making false or materially incomplete public statements.²¹

Investment Advisers

The COVID-19 pandemic has caused unprecedented interruptions to the ordinary operations of businesses throughout the United States and elsewhere. While OCIE recently announced that it had moved to conducting all examinations remotely, it remains operational and active.²² And, recent experience following events such as Hurricane Sandy suggest that the COVID-19 outbreak may trigger heightened scrutiny of how investment advisers fulfilled their obligations during periods of market disruption, including business continuity plans ("BCPs"). In the wake of Hurricane Sandy, for example, OCIE examined the BCPs of roughly 40 investment advisers "to assess their compliance with applicable laws, rules and regulations relating to BCP plans."²³ Subsequently, the SEC proposed a rule requiring investment advisers to adopt and implement written BCPs to mitigate "natural disaster, cyber-attack, technology failures, the departure of key personnel, and similar events."²⁴ Given recent volatility in the market and potential losses incurred by investment advisers, it is also reasonable to expect regulatory focus on disclosures to investors concerning risk and liquidity, as well as valuation issues. Additional guidance regarding these issues can be found [here](#).

Conclusion

Like almost all organizations, public and private, federal enforcement agencies are confronting unique practical challenges presented by the COVID-19 pandemic. To combat unlawful attempts to exploit the

pandemic for financial gain, the DOJ, SEC and state Attorneys General are dedicating their strained resources to coronavirus-related frauds. The result has been a slowdown in traditional forms of white-collar enforcement. Nonetheless, recent DOJ and SEC pronouncements, unprecedented market volatility and the creation of new oversight bodies established by the CARES Act all suggest a possible uptick in investigative and enforcement activity as the pandemic recedes.

In these fraught times, when so many aspects of corporate and business life have been upended and as businesses face unprecedented challenges, it nonetheless will be important for companies to adhere to their communications and securities trading policies, to continue to comply with their obligations to maintain disclosure controls and procedures and internal controls, and to be mindful of their disclosure obligations generally.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ See Memorandum from the Attorney Gen., *COVID-19 – Department of Justice Priorities* (Mar. 16, 2020), available [here](#).

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- ² See U.S. Dep't of Just., *Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud* (Mar. 20, 2020), available [here](#). A public version of the memorandum is not currently available.
- ³ See U.S. Sec. and Exch. Comm'n, *SEC Coronavirus (COVID-19) Response*, available [here](#).
- ⁴ See *id.*
- ⁵ See Memorandum for the Heads of Departments and Agencies, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19* (Mar. 17, 2020), available [here](#).
- ⁶ See Andrew Kragie, *COVID-19 Relief Bill Would Expand Remote Court Hearings*, Law360 (Mar. 25, 2020), available [here](#).
- ⁷ See H.R. 748. For additional details on the CARES Act, see Paul, Weiss Client Memorandum, *Key Provisions of the "Phase Three" COVID-19 Stimulus Package* (Mar. 27, 2020), available [here](#).
- ⁸ See H.R. 748 §§ 4018, 4020, 15010.
- ⁹ See, e.g., Alan Rappaport and Jeanna Smialek, *The Oversight Playbook From 2008 Returns as Bailout Swells*, N.Y. Times (Mar. 24, 2020), available [here](#).
- ¹⁰ See 12 U.S.C. § 5231.
- ¹¹ See H.R. 748 § 4018(c)(1).
- ¹² See 12 U.S.C. § 5231(c)(1)(A).
- ¹³ See Office of the Special Inspector Gen. for the Troubled Asset Relief Program, *SIGTARP Investigative Efforts Lead to Criminal Charges against General Motors and Deferred Prosecution Agreement With \$900 Million Financial Penalty* (Sept. 17, 2015), available [here](#).
- ¹⁴ See Office of the Special Inspector Gen. for the Troubled Asset Relief Program, *SIGTARP Launches Financial Institution Crimes & Fines Database* (Dec. 18, 2019), available [here](#).
- ¹⁵ U.S. Sec. and Exch. Comm'n, *Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure* (Jan. 30, 2020), available [here](#).
- ¹⁶ U.S. Sec. and Exch. Comm'n, *SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19)* (Mar. 4, 2020), available [here](#).
- ¹⁷ U.S. Sec. and Exch. Comm'n, *SEC Extends Conditional Exemptions From Reporting and Proxy Delivery Requirements for Public Companies, Funds, and Investment Advisers Affected By Coronavirus Disease 2019 (COVID-19)* (Mar. 25, 2020), available [here](#).
- ¹⁸ See U.S. Sec. and Exch. Comm'n, Div. of Corp. Fin., *CF Disclosure Guidance: Topic No. 9* (Mar. 25, 2020), available [here](#).
- ¹⁹ See, e.g., N.Y. State Office of the Attorney Gen., *Attorney General James Orders Companies to Stop Selling Fake Treatments for Coronavirus* (Mar. 11, 2020), available [here](#); Cal. Dep't. of Just., *Attorney General Becerra Issues Consumer Alert Regarding False Advertising Related to Coronavirus* (Mar. 23, 2020), available [here](#).
- ²⁰ See N.Y. Gen. Bus. Law §§ 352–59.

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- ²¹ See, e.g., *In re Investigation by Eric T. Schneiderman, Attorney Gen. of N.Y., of Peabody Energy Corp.*, Assurance No. 15-242 (Nov. 9, 2015), available [here](#); Kate Kelly, Amir Efrati and Ruth Simon, *State Subprime Probe Takes a New Tack* (Jan. 31, 2008), Wall St. J., available [here](#).
- ²² See U.S. Sec. and Exch. Comm'n, *OCIE Statement on Operations and Exams – Health, Safety, Investor Protection and Continued Operations are our Priorities* (Mar. 20, 2020; modified Mar. 23, 2020), available [here](#).
- ²³ U.S. Sec. and Exch. Comm'n, Office of Compliance Inspections and Examinations, Nat'l Exam Program Risk Alert, Volume II, Issue 3, *SEC Examinations of Business Continuity Plans of Certain Advisers Following Operational Disruptions Caused by Weather Related Events Last Year* (Aug. 27, 2013).
- ²⁴ U.S. Sec. and Exch. Comm'n, *SEC Proposes Rule Requiring Investment Advisers to Adopt Business Continuity and Transition Plans* (June 28, 2016), available [here](#).