Lessons From Historical Crises: Compliance Pitfalls To Avoid During The Coronavirus

I. Introduction

Although uncertainty swirls around many aspects of the Coronavirus (COVID-19) crisis and its impact, in the world of white collar criminal enforcement, some certainties do exist: opportunities for fraud—against vulnerable populations, consumers, shareholders, market participants, and the government, among others—always abound in unstable times. Government watchfulness will be infused with resources and vigor; and the surest way for companies to avoid repeating painful lessons from prior natural and human-caused crises is to remain laser-focused on compliance and the need for increased vigilance on the part of compliance professionals.

With a $2 trillion Coronavirus relief package that includes, among other things, $367 billion in aid for small businesses, $500 billion in loans to larger industries, and $100 billion of funds allocated to hospitals and health systems, likely to be approved by the legislature and signed into law imminently,[1] the government will quickly begin pumping money into the U.S. economy and will be keeping a close watch for potential misuse or corruption. As companies experience increased business pressure to adapt and survive in a world of teleworking and social distancing, their employees may also face increased pressure to meet business and client demands, which may tempt some to consider bribery, fraud, or other corruption. And while factors like a cash crunch of unprecedented scale, incredible anxiety over how long conditions affecting business operations will continue to play out, and unpredictability associated with what recovery will look like are all urgent issues at present, companies must resist the urge to push its compliance programs to the back burner. If history teaches anything, it is that uncertain times make good compliance practices more critical than ever.

The historical trend of enforcement actions in prior crises provides an effective signpost of what is to come. Now is the time for businesses, which have in recent years heeded the call of the Department of Justice ("DOJ"), among other law enforcement agencies and regulators, to take seriously the need for robust and not mere paper compliance initiatives with empowered personnel, to remain focused on enhanced compliance, to take preemptive measures to avoid any corporate governances failures, and to remind employees about the long-term consequences of cutting corners for immediate gain.

II. An Enforcement Roadmap From Prior Crises

Lessons of history teach us that whether a crisis is made by man or nature, there will be an uptick in government investigations and funding for those purposes. The government is primed to root out conduct aimed at taking advantage of vulnerable populations, unstable markets, or overwhelmed government agencies. While COVID-19 presents unique challenges for companies on a global scale, a look back at the government's response to prior catastrophes provides a roadmap for what activity individuals and businesses can expect the government to target.

A. Natural Disasters—Hurricane Katrina And The National Center For Disaster Fraud

After Hurricane Katrina ravaged the Gulf Coast in August 2005, billions of dollars in federal disaster relief poured into the region. In the days following the disaster, DOJ created the Hurricane Katrina Fraud Task Force to ensure that the money for victims of Hurricane Katrina reached the intended recipients.[2] In connection with Hurricane Katrina alone, federal prosecutors charged over 1,300 disaster fraud cases.[3] Separately, DOJ partnered with other law enforcement and regulatory agencies to form the National Center for Disaster Fraud ("NCDF") with a mission of combating all types of fraud relating to disasters and their

aftermath, including charity fraud, emergency-benefit fraud, identity theft, insurance fraud, and procurement fraud.[4] NCDF is currently spearheading DOJ's COVID-19 fraud monitoring.[5]

Federal prosecutions following Hurricane Katrina offer guidance on how the government may target fraud perpetrated by companies offering disaster relief services. For example, DOJ filed a False Claims Act case in 2006 against Lighthouse Disaster Relief ("Lighthouse"), a company paid to operate base camps for first responders, and its owners.[6] The complaint alleged that Lighthouse made false statements to FEMA employees in order to be paid prematurely and failed to build and staff a basecamp sufficient to house the number of first responders called for in the contract.[7] In 2009, Lighthouse accepted a $4 million judgment to resolve the matter.[8] Prosecutors familiar with the case emphasized that "the settlement demonstrates that the United States will aggressively pursue those who exploit the taxpayers in times of disaster" and that "[p]rotecting disaster relief funds from fraud, waste or abuse of any kind has been, and remains, a top priority" of the Task Force.[9]

We can expect similar vigilance for COVID-19 related fraud and misallocation of resources, especially for companies receiving government funds as prime and subcontractors.

B. Dot-com Bubble—WorldCom, Inc.

After the explosion of Internet-related companies in the late 1990s, the stock market grew in leaps only to tumble nearly 80% from its peak.[10] The decade following the burst of the dot-com bubble saw a flurry of accounting fraud cases. Perhaps the most infamous case is WorldCom, Inc., a telecommunications company, whose senior executives perpetrated an $11 billion accounting fraud by recording expenses as investments to hide falling profitability.

Apart from the scope of the fraud, what is particularly poignant about WorldCom's example is the lessons it teaches about how vital it is for companies to have robust compliance and control practices. In a report submitted to the Securities and Exchange Commission ("SEC"), the Special Investigative Committee of WorldCom's Board of Directors admitted that the fraud was a consequence of WorldCom's culture, "a lack of courage to blow the whistle on the part of others," inadequate audits, and a "financial system whose controls were sorely deficient."[11] This backdrop of severe corporate governance failures resulted in WorldCom's bankruptcy and multiple securities fraud charges as well as a 25-year prison sentence for WorldCom's CEO.

C. September 11 And Wartime Contracting—The Cockerham Bribery Cases

In the aftermath of the September 11, 2001 terrorist attacks, the government refocused its enforcement actions to prosecute fraud arising from disaster relief efforts. For example, in an investigation beginning as early as April 2002, a former FEMA disaster recovery and clean-up company, Kieger Enterprises, Inc., and three of its former employees were charged with engaging in a fraud scheme to enrich themselves by taking advantage of funds available for disaster relief efforts, including clean-up efforts related to the September 11 attack on the World Trade Center.[12] The indictment alleged that Kieger Enterprises inflated work performed, submitted bogus bills to contractors, paid bribes and kickbacks for contract awards, and destroyed records that detailed actual work performed.[13] The criminal case was resolved in 2005 and resulted in restitution orders for each and every defendant, home detention for one of its employees, as well as custodial sentences ranging from 42 months to 108 months for two other former employees that were charged in the case, among other restrictions.[14]

Likewise, the tragic events of September 11 triggered a U.S. military campaign that has spanned nearly two decades and been allocated an estimated $6.4 trillion in federal spending.[15] To oversee the resources devoted to wartime spending and reconstruction, Congress created the Special Inspector General for Afghanistan Reconstruction ("SIGAR") and its Iraqi counterpart, SIGIR, to conduct criminal and civil investigations of waste, fraud, and abuse relating to programs and operations supported with U.S. funds

allocated for the reconstruction of Afghanistan and Iraq.[16] Investigations and prosecutions stemming from SIGAR and SIGIR have ranged from False Claims Act cases to fraud and money laundering and have been used to "send[] a clear message of deterrence to anyone contemplating such an egregious breach of public trust."[17]

One of the most prominent strings of bribery-related enforcement actions arising from SIGAR/SIGIR investigations involved a U.S. Army contracting officer in Kuwait in 2004 and 2005, former Major John Cockerham, who, along with his family members, orchestrated a complex bribery scheme wherein Cockerham received more than $9 million in bribes in exchange for awarding contracts for services to be delivered to troops in Iraq, including bottled water.[18] In 2009, in addition to custodial sentences for his involved family members ranging from 12 months to 70 months in prison, Cockerham was sentenced to 210 months in prison along with a $9.6 million restitution order and other restrictions.[19] In January 2012, DOJ announced that 17 individuals had pled guilty or been convicted at trial based on information arising from the Cockerham corruption probe,[20] and several years later, DOJ finally signaled an end to the Cockerham investigation by announcing that two military contractors with whom Cockerham conspired, George and Justin Lee of Lee Dynamics International, were sentenced to 54 months and 12 months in prison respectively.[21]

D. Financial Crisis—Residential Mortgage Backed Securities And The Financial Fraud Enforcement Task Force

The 2008 financial crisis devastated the global economy. Falling housing prices, growing unemployment, and bankrupt financial services institutions crippled the stock market and led to the creation of the $700 billion Troubled Asset Relief Program ("TARP") to purchase distressed assets and inject capital into banks.[22]

As with prior government cash infusions, the bank bailouts came with intense government oversight. In 2009, President Obama created the Financial Fraud Enforcement Task Force, designed to "wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes."[23] In 2012 alone, DOJ, in connection with the U.S. Department of Housing and Urban Development and its Office of Inspector General, settled claims with banks for losses related to the mortgage crisis totaling over $2 billion, including recovering nearly $500 million from settlements with Deutsche Bank AG, CitiMortgage, and Flagstar Bank.[24]

In July 2014, Bank of America and DOJ reached a $16.65 billion settlement to resolve federal and state financial fraud claims before and during the financial crisis.[25] The bank acknowledged that it sold billions of dollars of residential mortgage-backed securities without disclosing key facts to investors about the quality of the securitized loans.[26] One U.S. Attorney remarked that the settlement "attests to the fact that fraud pervaded every level of the RMBS industry" and that "[e]ven reputable institutions like Bank of America caved to the pernicious forces of greed and cut corners, putting profits ahead of their customers."[27] It is clear from the government's aggressive approach to prosecuting companies that benefited from the TARP bailout that any company receiving government funds should be prepared for enhanced scrutiny on all fronts, not merely related to the specific monies at issue.

E. BP Oil Spill—The Deepwater Horizon Task Force

On April 20, 2010, the oil drilling rig *Deepwater Horizon* exploded and sank in the Gulf of Mexico, resulting in 11 deaths and 4 million barrels of oil flowing into the ocean over an 87-day period.[28] In response, DOJ created the Deepwater Horizon Task Force to investigate criminal wrongdoing connected to the oil spill.

In addition to achieving a historic settlement with BP to resolve civil environmental claims,[29] DOJ also targeted BP for criminal charges ranging from felony manslaughter and environmental crimes to obstruction

of Congress.[30] The company agreed to pay a record $4 billion in criminal fines and penalties, the largest criminal resolution in U.S. history.[31]

BP's example is telling not only because of its magnitude but also because of the obstruction charges stemming from the company's response to the disaster. Following the oil spill, the House Subcommittee on Energy and Environment commenced an investigation into its cause and impact and requested that BP provide information including about flow-rate estimates for leaking oil.[32] The government alleged, and BP pleaded guilty to, providing Congress with false and misleading information about the flow-rate, despite having evidence that contradicted the original estimates it supplied.[33] This cautionary tale demonstrates that compliance is critical both to curb any potential wrongdoing and also to avoid compounding fallout from government investigations.

F. Opioid Crisis—The Prescription Interdiction & Litigation Task Force And The Appalachian Regional Prescription Opioid Strike Force

Most recently, the government has turned a critical eye toward health care fraud schemes alleged to have contributed to America's opioid crisis. In February 2018, then-Attorney General Jeff Sessions announced the creation of the DOJ Prescription Interdiction & Litigation Task Force, with a mission to "aggressively deploy and coordinate all available criminal and civil law enforcement tools to reverse the tide of opioid overdoses in the United States, with a particular focus on opioid manufacturers and distributors."[34] In one recent case, DOJ targeted Miami-Luken, Inc., a pharmaceutical distributor, and four individuals, including Miami-Luken's former president and compliance officer.[35] According to the indictment, Miami-Luken "failed to maintain effective controls against diversion of controlled substances, failed to report suspicious orders to the DEA," and "failed to exercise due care in confirming the legitimacy of all orders by continuing to supply millions of dosage units of oxycodone and hydrocodone" to certain physicians and pharmacies.[36]

During congressional testimony in May 2018, Miami-Luken revealed repeated due diligence failings, including one example where Miami-Luken "attempted to investigate" a doctor it supplied with large amounts of controlled substances on a day when the facility was closed and never returned when the facility was open.[37] In a similar case against Rochester Drug Co-Operative, its CEO, and its compliance officer, the DEA Special Agent in Charge remarked that the charges "should send shock waves throughout the pharmaceutical industry" and that the investigation "unveiled a criminal element of denial in RDC's compliance practices, and holds them accountable for their egregious non-compliance according to the law."[38]

Separately, in October 2018, DOJ's Criminal Division announced the formation of the Appalachian Regional Prescription Opioid Strike Force to identify and investigate health care fraud schemes in the Appalachian region and surrounding areas and to prosecute medical professionals involved in the illegal prescription and distribution of opioids.[39] Although many of the charges stemming from the newly-formed strike force focus on individual practitioners, in July 2019, global consumer goods conglomerate Reckitt Benckiser Group plc ("Reckitt") agreed to pay the largest recovery in a U.S. opioid case to resolve its potential criminal and civil liability related to a federal investigation of its marketing of the opioid addiction treatment drug Suboxone.[40] The indictment alleged that Reckitt and its former subsidiary promoted Suboxone as a less-abusable, safer opioid alternative, when no such claims had been established, and used an online program advertised to help opioid-addicted patients to connect those patients to doctors it knew were prescribing Suboxone.[41]

To resolve the civil and criminal proceedings, Reckitt agreed to forfeit proceeds totaling $647 million, civil settlements with the federal government and the states totaling $700 million, and an administrative resolution with the Federal Trade Commission for $50 million.[42] The government's increased attention and devotion of resources to using criminal prosecutions to fight the opioid epidemic signals that companies advertising and supplying products to vulnerable populations should be prepared for added scrutiny.

III. COVID-19 Enforcement Actions To Date

Already, DOJ has mobilized a COVID-19 fraud hotline,[43] the FDA has urged consumers to be wary of fraudulent COVID-19 test kits,[44] and there have been calls for DOJ to create a Coronavirus Task Force dedicated to monitoring and investigating False Claims Act violations.[45] U.S. Attorney's Offices have announced increased scrutiny for fraudulent efforts to capitalize on fear of the virus, and Attorney General William Barr directed all U.S. Attorney's Offices to "prioritize the investigation and prosecution of Coronavirus-related fraud schemes."[46] States too have begun cracking down on companies that attempt "to unlawfully and fraudulently profit off consumers' fears" by requesting that online registrars remove scam websites and Craigslist advertisements for fraudulent disease protections and remedies.[47]

On March 21, 2020, the first charges in connection with COVID-19 wrongdoing were filed in federal court in Texas against the operators of the website "coronavirusmedicalkit.com," who are alleged to have engaged in a wire fraud scheme by offering consumers access to supposed World Health Organization vaccine kits in exchange for credit card information.[48] The court issued a temporary restraining order requiring the website registrar to take immediate action to block public access while the investigation of the website and its operators continues.[49] After initiating the action, a DOJ spokesperson emphasized that the government "will use every resource at the government's disposal to act quickly to shut down these most despicable of scammers, whether they are defrauding consumers, committing identity theft, or delivering malware."[50] In fact, it has been reported that DOJ is seeking congressional approval for expanded emergency powers, including the ability to ask chief judges to detain people indefinitely, halt proceedings, and pause the statute of limitations for criminal investigations and civil proceedings during national emergencies.[51]

DOJ is encouraging members of the public to report suspected COVID-19 fraud schemes, including individuals and businesses selling fake cures for COVID-19 or seeking donations for illegitimate or non-existent charitable organizations, phishing emails from entities posing as the World Health Organization or the Centers for Disease Control, and malicious websites and applications that appear to share Coronavirus-related information to gain and lock access to users' devices and financial information.[52] The World Health Organization has already experienced an attempted cyber hack[53] and issued a warning that "[c]riminals are disguising themselves as WHO to steal money or sensitive information."[54]

Similarly, on March 23, 2020, the SEC issued a warning "urg[ing] public companies to be mindful of their established disclosure controls and procedures, insider trading prohibitions, codes of ethics, and Regulation FD and selective disclosure prohibitions to ensure to the greatest extent possible that they protect against the improper dissemination and use of material nonpublic information."[55] The SEC also reminded companies "of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading" and noted that it "is committing substantial resources to ensuring that our Main Street investors are not victims of fraud or illegal practices in these unprecedented market and economic conditions."[56] This announcement comes on the heels of calls for an ethics investigation into potential insider trading and STOCK Act violations stemming from recently disclosed stock sales by some U.S. senators.[57]

IV. Updated Compliance Guidance

Continued compliance and vigilance are critical. In April 2019, DOJ released updated guidance for white-collar prosecutors for evaluating corporate compliance programs, signaling DOJ's continuing desire to make the Corporate Enforcement Policy an effective tool both for companies proactively seeking to improve their compliance programs and for investigators looking to identify and prosecute culpable individuals and corporations. Similarly, earlier this year, the UK Serious Fraud Office published guidance on how the agency assesses the effectiveness of companies' compliance programs, further emphasizing that global regulators have an increased focus on compliance.

Specifically, DOJ provided a detailed update to the Evaluation of Corporate Compliance Programs document, which provides a collection of key questions for use by both prosecutors—to assist in their consideration and evaluation of companies' compliance practices—as well as companies and their in-house compliance professionals as food for thought in confronting their own compliance challenges.

The prior version of the guidance consisted of 11 categories and cataloged 119 questions covering topics prosecutors typically sought answers to while investigating a company's compliance program and which compliance personnel also were encouraged to consider in looking at their own business. The 11 umbrella topics included: (1) Analysis and Remediation of Underlying Conduct; (2) Senior and Middle Management; (3) Autonomy and Resources; (4) Policies and Procedures; (5) Risk Assessment; (6) Training and Communications; (7) Confidential Reporting and Investigation; (8) Incentives and Disciplinary Measures; (9) Continuous Improvement, Periodic Testing and Review; (10) Third Party Management; and (11) Mergers and Acquisitions. The update provides additional detail regarding the import of the three sections' overarching categories, two of which are illustrative of the overall changes.

First, under "Autonomy and Resources," the update explains that "prosecutors should address the sufficiency of the personnel and resources within the compliance functions, in particular, whether those responsible for compliance have: (1) sufficient seniority within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board's audit committee."[58] These types of factors should prove particularly useful for companies and management that are creating a compliance program for the first time or those that are attempting to buttress their existing programs.

Second, under "Commitment by Senior and Middle Management," the updated guidance reinforces that a company's executives will be held to a high standard when it comes to compliance. The update states that "[t]he company's top leaders – the board of directors and executives – set the tone for the rest of the company. Prosecutors should examine the extent to which senior management have clearly articulated the company's ethical standards, conveyed and disseminated them in clear and unambiguous terms, and demonstrated rigorous adherence by example."[59]

While the health care industry broadly has been placed under a microscope, medical service and equipment providers, pharmaceutical companies, and emergency services providers as well as government contractors facing unforeseen performance hurdles should exercise increased compliance vigilance in light of these recent compliance guidelines and the current state of emergency. For example, although the March 6, 2020 *Coronavirus Preparedness and Response Supplemental Appropriations Act* waived certain Medicare telehealth payment requirements during the current public health emergency, thus providing increased access to telehealth services across state lines in this time of crisis.[60] As recently as 2018, DOJ signaled a focus on investigating and bringing criminal enforcement actions regarding telemedicine-related abuses.[61] Once the dust begins to clear from the pending pandemic, medical service and equipment providers, pharmaceutical companies, and emergency services providers alike should expect a heightened level of investigation and scrutiny related to their activities during the current crisis, particularly with a focus on whether adequate compliance and internal controls were implemented in light of the updated compliance guidelines.

Moreover, as businesses across all sectors face pressure to recover losses, robust corporate governance is critical. With the lessons of past crises as a guide and regulators' renewed focus on investigating violations against the public in times of emergency, we can expect increased government focus on areas such as (1) fraud, including health care, insurance, and consumer fraud; (2) SEC regulatory compliance and disclosures; (3) insider trading; (4) market manipulation; (5) antitrust violations, including price fixing or gouging, predatory pricing, and bid rigging; (6) False Claims Act compliance; (7) Foreign Corrupt Practices Act compliance; and (8) cybercrimes such as hacking and identity theft.

V. Takeaways

It is clear that DOJ is absolutely committed to ensuring that companies implement strong compliance programs that both deter and correct allegations of misconduct. Companies and clients that fail to do so should expect to face thorough and exacting investigations from prosecutors trained better than ever in compliance issues. Even during this time of uncertainty, companies cannot risk falling into the traps that many of the specific case examples above make clear are possible pitfalls of failing to prioritize compliance in times of crisis.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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