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Emerging Issues and Trends in Government Investigations Presented to



Prepared by Blank Rome LLP

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Overall Enforcement Snapshot

- **Pivot to more active enforcement climate**
 - Trump admin saw ~30% drop in white-collar prosecutions vs. Obama admin
 - But DOJ forecasts changing tides...
- **With renewed focus on corporate/white-collar crime**
 - National security/cyber
 - Financial/SEC crimes (e.g., digital currencies, ESG, etc.)
 - COVID-19 enforcement
- **More dedicated resources**
 - AG Request for \$325M for 900 new FBI agents
 - Plus \$36.5 million to hire 120 attorneys nationwide to prosecute pandemic-relief
 - Creation of new task forces and working groups

Audience Question #1

- *Corporate fines during the first 20 months of the Trump administration were _____ compared to the last 20 months of the Obama administration?*
 - a) Up ~ 10%**
 - b) Flat**
 - c) Down ~25%**
 - d) Down ~75%**

DOJ Criminal Division Policy Changes

DAG Monaco Remarks (Oct. 2021)

- 1) Return of *Yates Memo* principles re: cooperation credit
 - Company must provide all non-privileged info re: “involved” individuals
 - Applies regardless of employee status or seniority
 - Eliminates prior focus on those “substantially involved”
- 2) DOJ to assess *all* prior misconduct in resolution assessment
 - Must consider full “criminal, civil and regulatory record of any company” when deciding what resolution is appropriate for subject or target
 - Enhanced focus on recidivist corporate violators
- 3) For cooperating companies, no presumption against monitors
 - *“To the extent that prior [DOJ] guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance”*

So, what does this mean?

- *“Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct — or else it’s going to cost them down the line.”*
- *“For clients facing investigations, as of today, the department will review their whole criminal, civil and regulatory record — not just a sliver of that record.”*
- *“For clients cooperating with the government, they need to identify all individuals involved in the misconduct — not just those substantially involved — and produce all non-privileged information about those individuals’ involvement.”*
- *“For clients negotiating resolutions, there is no default presumption against corporate monitors. That decision about a monitor will be made by the facts and circumstances of each case.”*
- *“Looking to the future, this is a start — and not the end — of this administration’s actions to better combat corporate crime.”*

Audience Question #2

- *What do you view as a “best practice” interval for reviewing corporate compliance programs?*
 - a) Quarterly**
 - b) Twice a year**
 - c) Once a year**
 - d) As needed**

Civil False Claims Act Trends and Issues

- **FCA statistics reflect continued, strong pipeline of new cases**
 - 2nd year in a row with over 800+ total new FCA matters
 - 5th year in a row with 45+ DOD FCA matters
 - Key stat: 2nd year with 200+ USG-initiated matters
- **Return of FCA to SCOTUS (DOJ dismissal authority)**
- **Future of False Claims Amendments Act of 2021?**
- **Return of sub-regulatory guidance in FCA cases?**
 - EO 13992 + Garland Memo (rescinding Brand Memo)

Cyber + National Security

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National and Cyber Security Focus

- **Growing cyber and geopolitical threats**
 - Solar Winds, Colonial Pipeline, and MS Exchange (2021)
 - Invasion of Ukraine (2022)
- **Leads to new regulation**
 - POTUS Cyber EO (May 2021) + rulemaking (2022) + CMMC 2.0 (2023?)
 - Russia Sanctions (2022)
- **... and more enforcement resources**
 - DOJ Cyber Fraud Initiative (Oct. 2021)
 - More investigators

Sanctions: the “New FCPA”

DAG Monaco remarks at 2022 GIR Live: Women in Investigations

- Historic focus on financial services industry
- ...Now reaching “any business with an international supply chain”
- Sanctions an enforcement priority

“Every company needs to be pressure-testing its sanctions compliance program, for instance through risk assessments, technology upgrades and industry benchmarking. Every board of directors of such a company should be inquiring whether it is conducting necessary oversight of the company’s sanctions controls. Every corporate officer should be committed to ensuring they have the programs, culture, personnel and counsel to identify problem areas and navigate the rapidly changing landscape. And for anyone who seeks to evade sanctions, the warning is simple: the Justice Department is coming for you.”

Audience Question #3

- *Would Justice Department policy statements like this one lead you to recommend revisiting your compliance program?*
 - a) Yes**
 - b) No**
 - c) Yes, but only as part of our routine review process**
 - d) Maybe - it depends on our organizational risk profile**

Cybersecurity – Continuing Compliance Developments

- May 12, 2021 POTUS Cyber EO
 - Currently pending rulemaking
- Oct. 6, 2021 DOJ Cyber Fraud Initiative
 - Call to Whistleblowers
 - Theories of liability?
 - 2022 Settlements
- Nov. 4, 2021 - DOD announces CMMC 2.0
 - Awaiting final rule – forecast for March 2023

Audience Question #4

In what year did whistleblower Brian Markus file his FCA action against Aerojet Rocketdyne?

- a) 2021**
- b) 2019**
- c) 2016**
- d) 2015**

Cybersecurity – New Reporting Requirements

- Mar. 9, 2022 - SEC Proposed Rule
 - Public comment closed in May
- Mar. 22, 2022 - Cyber Incident Reporting for Critical Infrastructure Act
 - Awaiting rulemaking
 - Reporting requirement rules due by Mar. 2024
 - Final rule due Sep. 2025

Cyber + National Security – Takeaways and Tips

- For *any* contractors with obligations to maintain secure systems, protect confidential information, or report breaches/deficiencies
 - Pay careful attention to self-assessments and self-certifications
 - Beware of whistleblower opportunities – take any reports of noncompliance seriously
 - Focus on human factors and corporate culture
 - For publicly traded companies
 - For DOD contractors
- Be on the lookout for developments in rulemaking process
 - Review internal policies and procedures for responding to cyber incidents in light of priorities in proposed rule
 - Ensure clear delineation of roles/responsibilities for incident response and close coordination between IS/Cybersecurity and Legal teams
- Continue to monitor CMMC rulemaking and integrate emerging parallel disclosure regimes (CIRCA, SEC, etc.) into enterprise-wide risk management framework
 - Take heed DAG Monaco's advice on sanctions and export controls compliance
 - Beware of whistleblower opportunities – take any reports of noncompliance seriously; focus on human factors and corporate

Small Business Programs

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Small Business Programs – Trends and Policy

- Dwindling base of SB companies supporting the USG
- + goals to promote US manufacturing and supplier base diversity
- POTUS targets for more SB awards
 - Increase SDB awards by \$20B/yr
 - Enhance goals for other programs?

Table 1. Federal Procurement Goals and Percentage of FY2020 Federal Contract Dollars Awarded to Small Businesses, by Type

Business Type	Federal Goal	Percentage of Federal Contracts (small business eligible, including double counting)	Percentage of Federal Contracts (small business eligible, excluding double counting)	Percentage of Federal Contracts (all reported contracts, excluding double counting)
Small Businesses	23.0%	26.02%	25.42%	21.89%
Small Disadvantaged Businesses	5.0%	10.54%	10.39%	9.08%
Women-Owned Small Businesses	5.0%	4.85%	4.71%	4.10%
HUBZone Small Businesses	3.0%	2.44%	2.39%	2.04%
Service-Disabled Veteran-Owned Small Businesses	3.0%	4.28%	4.23%	3.92%



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Audience Question #5

A 2020 GAO report indicated a drop of what percent in small business supplying common goods to the USG between 2016 and 2019?

- a) ~1%**
- b) ~7%**
- c) ~17%**
- d) ~31%**

Looking Ahead

- More Money + More Visibility = Anticipated Enforcement
 - Current SB investment
 - Infrastructure and Jobs Act
 - Agency SB Program Reviews
 - Congressional Interest



Three Recent Settlements + Teachable Moments

- **\$2.8M** for alleged subcontracting plan/pass-through fraud
- **\$48.5M** for use of “front” SB companies to obtain set-aside contracts
 - OTSB identified opportunities, “ghostwrote” e-mails to create appearance of contract performance, and had employees pose as employees of SB concerns
- **\$5.2M** to resolve allegations relating to recertification
 - After 2011 acquisition of concern, entity no longer small (affiliation!)
 - Concern continued to certify SB status, and got 22 contracts it shouldn't have
 - Concern voluntarily disclosed to USG potential affiliation concerns tied to later sale transaction (*and received cooperation credit*)

Takeaways

- Expect enhanced scrutiny (and \$\$\$) around SB programs
- Revisit teaming arrangements and contracts with SB partners
- Where required, develop and monitor realistic SB contracting plans
- Pay careful attention to M&A involving SB contracts and programs

Audience Question #6

As of May 2022, the DOJ has pursued criminal and civil fraud matters that implicate ____ dollars of COVID-19 relief funding?

- a) \$1 billion**
- b) \$1.1 billion**
- c) \$8 billion**
- d) \$3,500**

Antitrust

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Antitrust Enforcement

EO 14036 - *Executive Order on Promoting Competition in the American Economy*

- “Whole of Government Competition Policy”
- Focus on labor markets: “curtail the unfair use of non-compete clauses”

FTC and DOJ – Commitment to aggressive enforcement, more litigation

Criminal Enforcement: Novel Theories, Mixed Success (to date)

- ***U.S. v. Jindal*** (E.D. Tex.) – NG on Sherman Act charges, BUT DOJ survived MTD in 1st ever criminal wage-fixing case
- ***U.S. v. DaVita*** (D. Colo.) – NG all counts, BUT Ct denied MTD; found indictment sufficiently alleged no-poach agreements = illegal market allocation/*per se* Sherman Act violations
- ***U.S. v. Penn*** (D. Colo.) - Broiler chicken bid rigging/price fixing case . . . x3

Antitrust Enforcement– What’s on the Horizon?

More Criminal Cases In the Pipeline

- As of late-April, approx. 20 active criminal cases, 140 GJ investigations
- Various industries, jurisdictions, more wage-fixing cases

Procurement Collusion Strike Force Remains Active

- Interagency partnership established in Nov. 2019, since expanded
- Objective = identify, crack down on anti-competitive conduct in public procurement
- Expanded international focus and use of data analytics to detect indicators of collusion

Recent Updates to DOJ Antitrust Division Leniency Policy

- Objective: make the policy more “transparent, predictable, and accessible to the public.”
- Requires *prompt* reporting, remediation

Takeaways and Tips

- Anticipate uptick in civil and criminal enforcement, litigation
- New standards/considerations for companies seeking leniency
- Educate HR department, contracts team, and C-suite about antitrust and competition law
- Review hiring-related agreements with competitors in the same labor market
- Promptly investigate allegations of no-poach/wage fixing agreements

Audience Question #7

- What year was the Sherman Act passed?
 - a) 1890
 - b) 1911
 - c) 1914
 - d) 1976

COVID-19 Pandemic

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COVID-19 Pandemic – Big Spending Followed by Enforcement

- More than \$5 Trillion in authorized spending via 6 laws, to buoy:
 - Small Business (e.g., PPP, EIDL)
 - Unemployment
 - Health Care (e.g., PRF)
- COVID-19 Fraud Enforcement Strike Force
- DOJ “Pandemic Relief Czar” – Director for COVID-19 Fraud Enforcement

COVID-19 Health Care Fraud Issues

- DOJ investigations and indictments against providers and others who exploited the pandemic to effectuate common schemes – e.g., stealing patient identities, falsifying health care visits, prescribing unnecessary tests, etc.
 - Telemedicine
 - Unnecessary testing/bundling of tests
 - False vaccination cards

Audience Question #8

- *DOJ recovered more than \$5.6 billion in False Claims Act enforcement matters in FY 2021. How much of that figure is attributable to health care fraud matters?*
 - a) \$5+ billion**
 - b) \$2.8 billion**
 - c) \$1.6 billion**
 - d) \$120 million**

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