

# KING & SPALDING: TRANSATLANTIC BUSINESS CRIME AND INVESTIGATIONS JUNE COLUMN

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King & Spalding's Special Matters and Government Investigations team shares its views on developments in transatlantic business crime and investigation.

by [Michael Watling](#) (New York), [Margaret McPherson](#) (New York), [Kerrie Dent](#) (Washington DC), [Joanna Harris](#) (London), [Margaret Nettesheim](#) (London), [Hannah Thorpe](#) (London)

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### IMPACT OF COVID-19 ON FINANCIAL CRIME COMPLIANCE AND GOVERNMENT ENFORCEMENT IN THE UK AND US

In this month's column, we examine the impact of the 2019 novel coronavirus disease (COVID-19) pandemic and the resulting government measures on three important areas:

- Investigations and prosecutions at the UK's Serious Fraud Office (SFO) and the US Department of Justice (DOJ).
- Guidance from the UK's Financial Conduct Authority (FCA), the US's Financial Industry Regulatory Authority, Inc (FINRA) and Securities Exchange Commission (SEC) on financial crime controls in the financial services sector.
- Guarding against corruption in the healthcare sector.

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### IMPACT OF COVID-19 ON SFO AND DOJ INVESTIGATIONS

As the COVID-19 pandemic has forced offices to shut down and placed limits on in-person contact, criminal prosecutors in the US and UK have adapted their practices to these new circumstances.

#### **DOJ: a shift in priorities but no slowdown**

With no signs that the COVID-19 pandemic will ease up any time soon in the US, the DOJ continues to react to the challenges presented by the rapid spread of COVID-19 on a daily basis. The pandemic has caused tremendous disruption to the legal system and presented many hurdles to the DOJ's efforts to enforce federal laws. Although the hurdles have not slowed the DOJ's enforcement activity, they have forced it to shift enforcement priorities.

#### **DOJ: impact on progress in the courts**

From the start, the public safety measures implemented in response to the COVID-19 crisis disrupted federal criminal and civil cases and imposed significant new challenges on the DOJ's ability to investigate and prosecute allegations of wrongdoing. By mid-March 2020, federal district courts were closing and suspending court services because of COVID-19. Federal courts, co-ordinating with state and local health officials on COVID-19, issued orders relating to court business, operating status, and public and employee safety. Numerous courts implemented public safety guidance issued by the Director of the Administrative Office of the US Courts that recommended, among other things:

- Postponing all courthouse proceedings with more than ten people.
- Conducting in-person proceedings only when necessary.
- Conducting jury proceedings only in exceptional circumstances.

The restrictions imposed as a result of COVID-19 necessarily have impacted prosecutors' ability to present cases to grand juries for indictment, to comply with statutes of limitation and with Constitutional and statutory speedy trial requirements for charged cases, and to try cases in court. Courts and US Attorneys' offices are wrestling with how best to address constitutional issues such as the right to speedy trial and the right to legal counsel. And press reports indicate that the DOJ has even asked Congress to toll statutes of limitation for criminal investigations during national emergencies and for one additional year following the end of the national emergency. See [DOJ seeks new emergency powers amid coronavirus pandemic, POLITICO, 21 March 2020](#). The resolution of such issues will impact the DOJ's priorities, and the pace at which it can conduct its investigations, for the foreseeable future.

As the nation has begun loosening COVID-19 restrictions, US courts also have started to address the process of reopening. In early June 2020, the Jury Subgroup of the Coronavirus Task Force issued a 16-page report entitled "Conducting Jury Trials and Convening Grand Juries During the Pandemic". The comprehensive report, written by a group of federal trial judges, court executives, and representatives from the federal defender community and the DOJ, states that:

“Jury trials are the bedrock of our justice system, expressly provided for in the Constitution and in the Sixth and Seventh Amendments. When each court determines that the time is right, the judiciary must reconstitute jury trials during the COVID-19 pandemic.”

The report explains: “At its core, this report offers guidance to help individual courts consider the multitude of issues that will impact reconvening jury trials in our federal courts.” Those issues include:

- The type and amount of personal protective equipment needed to accommodate jurors, the public, attorneys, members of the press and witnesses.
- Addressing jurors’ concerns about protecting their health from the earliest stages of the process.
- Juror travel to and from the courthouse.
- Social-distancing and deep-cleaning procedures for courthouse spaces.
- Seating jurors and other participants in ways that mitigate health risks.

### **DOJ: impact on enforcement priorities**

Importantly, even in the face of the logistical challenges presented by COVID-19, the DOJ (in contrast to its UK counterpart, the SFO) has remained active in its enforcement efforts.

Early on, the DOJ moved swiftly to redefine criminal enforcement priorities to account for the impact of the safety measures on its ability to investigate and bring cases, and to focus on crimes that relate directly to the COVID-19 pandemic. On 16 March 2020, Attorney General William Barr issued a memorandum to all United States Attorneys establishing the DOJ’s priorities during the pandemic. As a sign of the time, his first priority was to “protect the health of those who practice in or are called to appear before our courts”. The second priority was to “remain vigilant in detecting, investigating, and prosecuting wrongdoing related to the crisis”. The memorandum observed that the DOJ already had received reports of individuals and businesses selling fake cures for COVID-19 online and sending false phishing emails purporting to be from the World Health Organization or the Centers for Disease Control and Prevention. The Attorney General’s directive to prosecutors was firm:

“The pandemic is dangerous enough without wrongdoers seeking to profit from public panic and this sort of conduct cannot be tolerated. Every US Attorney’s Office is thus hereby directed to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.”

Deputy Attorney General Jeffrey A Rosen in turn directed each US Attorney to appoint a “coronavirus fraud co-ordinator” to direct the prosecution of COVID-19-related crimes, and he provided a list of a “wide range of fraudulent and criminal behaviour” that already had been reported to the DOJ and on which prosecutors should focus enforcement efforts, including:

- Robocalls making fraudulent offers to sell respirator masks.
- Fake COVID-19-related apps and websites that install malware.
- Social media scams fraudulently seeking donations.
- Sales of fake testing kits, cures, “immunity” pills, and protective equipment.
- Robberies of patients departing hospitals.
- Threats of violence against public officials.
- Threats to intentionally infect other people.

Rosen suggested that prosecutions of pandemic-related criminal conduct could be brought under mail fraud, wire fraud, computer fraud and healthcare fraud statutes as well as for violations of the Food, Drug, and Cosmetic Act, the Consumer Product Safety Act, and the Sherman and the Clayton Antitrust Acts.

The COVID-19-related cases continue. Just last week, the DOJ issued press releases concerning a wide array of enforcement actions relating to COVID-19:

- An Austin, Texas man was sued for running a multi-million-dollar fraud scheme in connection with the Small Business Association Paycheck Protection Program.
- A Chinese manufacturer was charged with exporting defective and misbranded masks falsely purporting to be KN95 respirator masks.
- A Veterans Affairs respiratory therapist was charged with stealing COVID-19-related medical supplies and selling them on eBay.
- An Orange County, California man was indicted in an investment fraud scheme involving bogus claims of a COVID-19 cure.

### **DOJ: fraud cases arising from government stimulus**

To be sure, the DOJ's enforcement activity focusing on crimes that capitalise on the COVID-19 crisis only tells part of the story. The other part of the story is the mass distribution of COVID-19-related stimulus payments, which inevitably will result in an abundance of criminal and civil investigations related to possible misuse of that money. Over the past few months, through the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and other legislation, Congress has provided stimulus money to aid in the economic recovery from COVID-19. The total federal response to the COVID-19 pandemic is currently approximately \$2.8 trillion, more than twice as much as any other emergency relief effort in history. And while the Senate does not plan to consider the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act), which was passed by the House of Representatives on 15 May 2020 and includes another \$3 trillion in stimulus money, Republican Majority Leader Mitch McConnell has indicated that the Senate will be considering a "fourth and final" COVID-19 response bill soon.

If history is a guide, then this unprecedented distribution of funds will lead to allegations, warranted or not, of fraud on the government, and federal investigations and prosecutions will follow. As a recognition of that inevitability, and as with similar efforts in response to other crises, such as the Troubled Asset Relief Program (TARP) implemented in the wake of the 2008 financial crisis, there will be significant government oversight relating to these relief funds. Among other things, a new Special Inspector General (Special IG), with a broad mandate and subpoena power to ensure proper use of CARES Act funds, has been appointed. This new Special IG will work closely with the Criminal and Civil Divisions of the DOJ and local US Attorney's Offices to police possible misuse of funds.

The DOJ will certainly seek to prosecute criminal conduct where warranted, pursuant to a variety of criminal statutes ranging from mail and wire fraud to theft of federal funds, with a focus on everything from fraudulent requests for charitable donations to Ponzi schemes. But the civil False Claims Act (US FCA) historically has been, and likely will be, the DOJ's primary weapon for combating financial fraud relating to COVID-19.

The potential for US FCA investigations related to the pandemic response is substantial for a variety of reasons, including:

- Medical products (paid for by federal health care programs) being rushed to the market, perhaps with insufficient testing or possible quality issues.
- New federal contractors supplying goods or services to the government who may be unfamiliar with various requirements associated with receiving government funds.

- A general lack of diligence and care by both the government and individuals attempting to obtain funds, due to the incredible haste with which these funds have been made available.

Prosecutors are not shy about investigating allegations of US FCA violations because they typically result in large financial recoveries and are perceived as promoting general deterrence of similar conduct (exposure for US FCA violations can be significant and includes treble damages, monetary penalties for each false claim submitted and the payment of attorneys' fees).

Accordingly, companies, organisations and individuals that receive money from CARES Act programs, or funds provided in connection with other government efforts to combat the COVID-19 pandemic and associated issues, must be aware that they are subjecting themselves to a high likelihood of government scrutiny. Given the potential exposure, those receiving funds should take all reasonable steps to ensure compliance with applicable regulations and with the requirements of the US FCA.

### **DOJ: impact on whistleblowing activity**

Also, with increasing furloughs and layoffs, we predict an increase in whistleblower activities and reports: while we might not see the result of that activity publicly in the short term, mass layoffs will start a wave of whistleblower activity now that will be the source of a spate of cases that become public down the road.

### **SFO: impact on investigative measures**

The SFO stated in an update posted to their website on 7 May 2020 that during the COVID-19 lockdown, their office has been open only for essential tasks which must be carried out in person; otherwise, all staff have been working from home with a focus on work that can be performed remotely, both on active investigations and "pre-investigation" allegations. In contrast to the approach taken by the DOJ in the US, the result in practice has been a significant decline in SFO activity.

Between 23 March and 30 April, the SFO did not conduct any suspect or compelled interviews. This lack of suspect or compelled interviews likely relates to security concerns about conducting such interviews virtually and practical difficulties implementing social distancing for in-person interviews. The SFO has, however, conducted voluntary interviews of witnesses by phone. During the same period, the SFO did not apply for any search warrants, or carry out any raids. It issued only 16 section 2 notices requesting information, a relatively small number compared to typical volumes in prior years.

### **SFO: impact on trials**

With courts closed for several weeks, ongoing SFO litigation has been disrupted as well. The closely watched Unaoil trial was suspended in March, resuming in mid-May when courts reopened under strict social distancing rules. The Crown Court currently requires that a two-metre distance be maintained between people in the court, including jurors, solicitors and barristers. To accommodate this requirement, the Unaoil trial was moved from the smaller Southwark Crown Court to the Old Bailey, which has larger courtrooms available. Despite these measures, two of the defendants, Ziad Akle and Stephen Whiteley, were excused from attending for health reasons; the judge instructed the jurors not to draw a negative inference from their absence.

Other accommodations to the trial process include shorter hours to allow for commuting outside of rush hour and staggered times for entering the courthouse. Juror iPads used to review evidence were cleaned to prevent transmission of the virus. On 29 May, the Unaoil jury entered deliberations following an acknowledgement by the judge that under the restrictions, it may take jurors longer than usual to review the evidence and reach a verdict.

### **SFO: moving forward**

As lockdown restrictions begin to ease in the UK, the SFO faces a reckoning about how to move forward. COVID-19-related regulations coupled with economic instability creates an environment likely to result in increased criminal conduct including serious fraud and bribery, heightening the need for new SFO investigations.

However, even before COVID-19, the SFO has come under fire for its slow pace of advancing and resolving investigations, and an uneven track record in results. In response, the SFO under Lisa Osofsky's leadership has closed a number of longstanding investigations, including most recently its three-year investigation into ABB Limited which was dropped in May on the basis that it did not meet the relevant test for prosecution as defined in the Code for Crown Prosecutors. On 2 June, the SFO also announced new organisational measures and resource allocation to ensure quicker and more efficient progress of investigations. In a recent interview, Lisa Osofsky also asserted an aim to reduce the SFO's reliance on whistleblowers, victims and self-reports, and to build the SFO's intelligence capacity and leverage information and relationships the SFO already has.

The SFO is therefore under particular pressure to improve the pace of its investigations at the very moment in history that doing so seems most difficult. However, the probable influx of COVID-19-related fraud and corruption cases may prove to be an opportunity for the SFO to implement these measures and reset their approach, leading to a more proactive and efficient approach to investigating and prosecuting. At the same time, however, public opinion may turn against investigations into businesses beleaguered by the COVID-19 pandemic. It will also be interesting to see whether the SFO's budget will be impacted given that the government will be eager to boost the business sector following the prolonged lockdown as well as being focused on Brexit. These factors may create an environment that is unreceptive to a large volume of corporate prosecutions.

### Conclusion

We have perceived no slowing of the pace of the white-collar investigations and enforcement during the COVID-19 pandemic. But if there has been a slowing of the speed with which the DOJ is moving on these cases because of a shift in priorities to COVID-19-related wrongdoing, then we are confident that the pace is set to pick back up again (and then some) as even more stimulus money is disbursed and the COVID-19 restrictions are loosened.

In contrast, the SFO's activity has decreased significantly in response to COVID-19 restrictions. The difference in approaches during the pandemic can be explained by a number of factors: the UK's national healthcare system is not vulnerable to fraud in the same way that the US's private healthcare system is and, in any case, the SFO has a much narrower investigatory scope than the DOJ. The DOJ is, simply put, bigger with a diverse range of sub-departments. For example, the SFO has a current annual budget of £52.56 million, 450 permanent staff and on average 60 live cases ([SFO: About us](#)) whereas the DOJ has a current annual budget of \$29.2 billion, 113,114 employees and, on average, over one million pending cases ([DOJ: FY 2020 budget request at a glance](#)).

However, given the SFO's aim to conclude investigations more efficiently and develop more of its own cases through intelligence work, the DOJ may be a useful model. In addition to investigating whistleblower allegations and self-reported cases, the DOJ does a substantial amount of work to develop cases on its own, often pursuing industry-wide sweeps. In this, it may be beneficial for the SFO to look to the DOJ as an example during the pandemic.

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## IMPACT OF COVID-19 ON FINANCIAL CRIME CONTROLS IN THE FINANCIAL SERVICES SECTOR

The COVID-19 pandemic is having an unprecedented impact on financial markets as well as on the operational challenges facing financial institutions.

### What is the likely impact of COVID-19 on the financial crime risks faced by the financial sector?

On 31 March 2020, the European Banking Authority (EBA) made a statement which warned that "experience from past crises suggest that in many cases, illicit finances will continue to flow" despite most economies facing a downturn in the wake of the COVID-19 pandemic ([EBA: Our response to Coronavirus \(Covid-19\)](#)).

On 4 May 2020, the inter-governmental Financial Action Task Force (FATF) published its report on COVID-19 related Money Laundering and Terrorist Financing which identified a number of key areas contributing to the increased risk of money laundering and terrorist financing ([FATF: COVID-19-related money laundering and terrorist](#)

*financing: Risks and policy responses (FATF Report)*). The FATF Report anticipated an increase in criminal activity, including:

- Fraud, ranging from fundraising for fake charities, impersonating government officials to obtain personal information, trading in counterfeit goods and promoting fraudulent investments schemes.
- Cybercrime, in particular launching email and text message phishing attacks, ransomware attacks and launching business email compromise scams.

The FATF Report also identified likely increased financial volatility, and that the increasingly volatile market may lead to an increase in investor fraud or insider trading that seeks to make profit from large swings in stock value, as well as the use of virtual assets or currency to launder the proceeds of crime.

Similar concerns have been echoed by regulators in the UK and the US and they have issued statements and issued guidance in light of these perceived risks.

### **UK: what is the FCA's key message?**

On 6 May 2020, the FCA published guidelines on its expectations for how firms should apply their systems and controls to prevent and combat financial crime during the COVID-19 pandemic (*FCA: Financial crime systems and controls during coronavirus situation (FCA Guidelines)*). While firms may be facing these increased risk factors on increasingly tight budgets, the FCA made it clear that it was imperative that firms "maintain effective systems and controls to prevent money laundering and terrorist financing" and that they should not change their risk appetite to relieve any operational issues that may be experienced as a result of the COVID-19 pandemic. However, like FINRA and the SEC, the FCA acknowledged that firms may need to delay or re-prioritise some activities.

### **UK: FCA guidelines**

The FCA Guidelines suggest that ongoing customer due diligence reviews and transaction monitoring alerts may need to be re-prioritised, but that amendments to controls should be:

- In response to the current circumstances.
- Clearly risk assessed, documented and follow appropriate governance.
- Done on a risk basis; the FCA would not expect diligence on high risk customers to be delayed.
- Monitored and have a clear plan for returning to "business as usual" as soon as reasonably practicable.
- Reviewed and the FCA notified of material issues which are causing significant delays or impacting the effectiveness of financial crime controls.

### **UK: changing client identification verification procedures**

It is also clear that the restriction in travel and lockdown measures have affected the usual methods of verifying a customer's identity. While the FCA has reiterated its expectation for firms to meet its obligations on client identity verification, it has pointed to guidance provided by the Joint Money Laundering Steering Group which lists additional safeguards and checks to assist carrying out verification remotely. These measures include accepting scans, and using digital identify solutions, commercial providers or third-party assurances (such as a client's lawyer or accountant). The measures taken by firms should still be considered appropriate for the risk profile of the customer.

### **US: what is FINRA's key message?**

From the pandemic's outset, FINRA has acknowledged that the volatile market and the remote work environment create opportunities for fraud and compliance breakdowns. At the same time, it has made clear that retail



brokerages must make changes to meet these challenges and protect investors. FINRA has also relaxed regulatory requirements which are more administrative in nature. Overall, FINRA's guidance notifies retail brokerages of pandemic-related challenges they are likely to face, and of their obligation to adapt to those challenges and guard against fraud and misconduct. And, where appropriate, FINRA has directed members and investors to review SEC guidance on relevant topics.

### US: what is FINRA?

FINRA is an SEC-sanctioned independent regulatory organisation responsible for protecting US investors by overseeing the retail broker industry in the US. It is the primary US regulator for retail brokerage activity and traditional wealth management business lines. While FINRA has spoken less often than other financial regulators during the pandemic, it has released guidance of critical importance not only to the hundreds of thousands of brokers and dealers it regulates, but also to the millions of investors who entrust their assets to those firms. FINRA's COVID-19 guidance aims to serve the agency's dual purposes of protecting investors and ensuring market integrity.

### US: Task Force and NCFC

FINRA itself has adapted to the challenges posed by the pandemic. In March, FINRA announced the COVID Fraud Task Force to ensure that the agency will respond to potential COVID-19-related fraud in the retail brokerage industry and in US markets in a co-ordinated manner ([FINRA: COVID Fraud Task Force](#)). In announcing the Task Force, FINRA also made clear that its newly minted National Cause and Financial Crimes Detection Programs (NCFC) will remain active in uncovering and investigating any potential pandemic-related fraud, and will refer matters to the SEC where appropriate. On 19 March 2020, FINRA announced the creation of the NCFC as a replacement for and expansion of the Office of Fraud Detection and Market Intelligence ([FINRA: FINRA appoints Greg Ruppert Executive Vice President of National Cause and Financial Crimes Detection Programs](#)). FINRA's news release also announced the hiring of a long-time Charles Schwab executive, Greg Ruppert, to lead the NCFC.

### US: FINRA's guidance on adapting to the remote work environment

On 9 March 2020, FINRA issued its primary COVID-19-related guidance, Regulatory Notice 20-08 ([FINRA: Regulatory Notice 20-08: Pandemic-related business continuity planning, guidance and regulatory relief](#)). The Notice provides a wide range of guidance related to the pandemic. Upon a showing of need, FINRA will extend the deadline for regulatory filings, responses to FINRA inquiries, and expiring qualification examinations and continuing education. According to Regulatory Notice 20-08, member firms should take action including, but not limited to:

- Updating business continuity plans to be sufficiently flexible to address the pandemic's wide range of potential effects.
- Ensuring a supervisory system reasonably designed to:
  - adequately oversee employees working remotely; and
  - respond to the heightened cybersecurity risks.
- Notifying FINRA of emergency office relocations and exercising heightened supervision over affected customer accounts.
- Acting to mitigate risks associated with pandemic-related communication challenges.

As a supplement to Regulatory Notice 20-08, FINRA issued an FAQ page related to regulatory relief for its member firms on 24 March 2020. In it, FINRA provides detailed answers to common questions including, but not limited to, anti-money laundering and supervision ([FINRA: Frequently asked questions related to regulatory relief due to the coronavirus pandemic](#)).



In the early months of the pandemic, FINRA discussed the remote work experience with some of its member firms. Based on its observations, FINRA issued Regulatory Notice 20-16 containing guidance for best practices and encouraged (but did not require) member firms to implement any applicable enhancements. The Notice, dated 28 May 2020, also reminds firms to memorialise any resulting adjustments to policies and supervisory procedures (*FINRA: Regulatory Notice 20-16: FINRA shares practices implemented by firms to transition to, and supervise in, a remote work environment during the COVID-19 pandemic*). Much of the guidance consists of strategies for enhancing supervision across several areas, including general employee supervision, trading supervision and supervision of communications with customers. Regulatory Notice 20-16 also makes clear that the remote work environment will not excuse compliance failings and that firms should enhance their protocols in response.

### US: FINRA's statements on protecting against fraud

Like other financial regulators, FINRA has taken an aggressive stance against pandemic-related fraud to protecting both member firms and their customers. On 5 May 2020, FINRA issued Regulatory Notice 20-13, cautioning that COVID-19's "profound impact" had created an atmosphere ripe for financial fraud (*FINRA: Regulatory Notice 20-13: Heightened threat of fraud and scams*). In it, FINRA warned of four common scams taking place during the pandemic: "(1) fraudulent account openings and money transfers; (2) firm imposter scams; (3) IT Help Desk scams; and (4) business email compromise schemes." Regulatory Notice 20-13 also suggests risk mitigation tactics, and urges firms to immediately address any scams and to promptly notify appropriate regulatory authorities where the nature of the scheme requires it (such as by filing an SAR). Even absent a reporting requirement, firms can protect customers and other member firms by reporting potential fraud to FINRA and other relevant government agencies.

FINRA has also issued guidance directly to investors during the pandemic. For instance, it instructed investors to be on the lookout for unscrupulous promoters who might urge them to take advantage of the CARES Act's hardship withdrawal opportunities from retirement accounts even when doing so would not be in the investor's best interest (*FINRA: COVID-19 early withdrawals*). FINRA also advised investors on how to avoid the same four types of scams that it warned retail brokers about in Regulatory Notice 20-13 (*FINRA: Fraud and your investment accounts during COVID-19 pandemic (11 May 2020)*). FINRA has directed both retail brokers and investors to review relevant SEC guidance on the pandemic, particularly as it pertains to investor protection or matters affecting issuers (*FINRA: SEC guidance and resources relevant to member firms and FINRA: Fraud and Coronavirus (COVID-19)*).

### US: what is the SEC's key message?

Like FINRA, the SEC has been active in relaxing various administrative requirements, while highlighting the risks arising from the COVID-19 crisis and continuing with its enforcement activities.

### US: SEC alerts and guidance

The SEC has relaxed numerous rules during the pandemic, for example giving public companies an additional 45 days to file disclosure reports that otherwise would have been due between 1 March and 30 April 2020 (*SEC: SEC provides conditional regulatory relief and assistance for companies affected by the coronavirus disease 2019 (COVID-19)*) and providing relief from certain filing deadlines and requirements for in-person board meetings applicable to investment advisers and funds affected by COVID-19 (*SEC: SEC takes targeted action to assist funds and advisers, permits virtual board meetings and provides conditional relief from certain filing procedures*).

In addition, the SEC has issued guidance around specific business crime risks potentially arising from the COVID-19 crisis, including an Investor Alert reminding investors to be cautious of claims that a company's product or service could detect, prevent or cure COVID-19, especially in the case of microcap companies (*SEC: Look out for coronavirus-related investment scams - Investor Alert*), and issuing Corporate Finance guidance regarding COVID-19-related disclosures, the need to refrain from trading on material, non-public information or making selective disclosures relating to COVID-19, and reporting earnings and financial results (*SEC: Coronavirus (COVID-19): Division of Corporation Finance: Securities and Exchange Commission: CF Disclosure Guidance: Topic No. 9 (25 March 2020)*).

There is no sign of any slowdown in enforcement because of COVID-19. The SEC already has issued sweep requests to public companies receiving Paycheck Protection Program loans, as well as issuing subpoenas for new and pre-existing investigations to companies.

### US: looking forward

After the 2008 financial crisis, Congress and the SEC implemented several reforms, including enhanced enforcement tools like whistleblower awards and creating specialised units within the Division of Enforcement. As a result, there was a dramatic spike in enforcement actions.

This may well be an indicator of how SEC enforcement will change as a result of the COVID pandemic, albeit that the public policy considerations are different given the financial sector's role in the 2008 financial crisis versus the COVID-19 crisis. The SEC will likely focus particularly on securities fraud in the healthcare and pharmaceutical spaces. Companies that have received CARES Act money will be under scrutiny and should be particularly careful to be compliant and accurate in their public statements.

Many commentators also anticipate an increase in cryptocurrency fraud schemes in the coming years, as people become more comfortable working in a virtual world at home and therefore more interested in the cryptocurrency space. Indeed, the FBI recently issued a warning that it expects a rise in scams involving cryptocurrency related to the COVID-19 pandemic (*FBI: FBI expects a rise in scams involving cryptocurrency related to the COVID-19 pandemic (13 April 2020)*). We will therefore inevitably see more law enforcement resources devoted to combating fraud in this area, including at the SEC.

### Conclusion

Overall, regulators in both the UK and the US have sought to ease the pressure on the firms and companies within their purview by relaxing administrative requirements and, in doing so, freeing up time and resources. However, they have acknowledged the increased risks of financial crime arising during the pandemic and made clear that they expect firms and companies not only to maintain their standards, but also to mitigate those risks. Indeed, FINRA, the SEC and the FCA have and will continue to identify and investigate issues as they arise. Firms should take heed of their specific guidance, properly document their decision-making processes, and ensure that they adapt to the new challenges faced during this period.

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## GUARDING AGAINST CORRUPTION IN THE HEALTHCARE SECTOR DURING THE COVID-19 CRISIS

The pandemic has forced governments across the world to take drastic measures to respond to the health crisis, leading to an increased risk of corruption. The Council of Europe Group of States Against Corruption (GRECO) published a corruption risks statement warning that "as countries face undeniable emergencies, concentration of power, derogation of rights and freedoms, and as large amounts of money are infused into the economy to alleviate the crisis corruption risks should not be underestimated. It is therefore most important that anti-corruption is streamlined in all COVID-19, and more generally, pandemic-related processes" (*GRECO: Corruption risks and useful legal references in the context of COVID-19 (15 April 2020)*).

Transparency International has issued a similar statement echoing that governments' first priority should be promoting health and safety, but that crises such as this often "expose cracks in our health systems, highlighting potential risks and opportunities for corruption" (*Transparency International: Corruption and the Coronavirus (18 March 2020)*). GRECO's statement makes clear that the stakes are high: bribery in the healthcare sector not only increases the cost and reduces the quality of goods and services, but it distorts competition and ultimately, has "serious financial consequences for public health care insurers, and thus for the state budget".

Indeed, we have already seen instances all over the world of individuals attempting to capitalise on the COVID-19 crisis. In the UK, a media investigation identified a senior NHS procurement official who set up his own PPE supply company; in Bolivia, Health Minister Marcelo Navajas was arrested in relation to purchasing over-priced ventilators; in the Ukraine, an investigation is underway into the tender process for 71,000 hospital protective

suits after the government bypassed its own procurement rules; and in Ecuador, a report shows evidence of price gouging in respect of the purchasing of body bags.

### **Key risk areas**

#### **Procurement**

In both the UK and the US, public procurement processes are moving at a much faster pace than usual, and derogations relaxing regulations have come into force to allow certain products to enter the market quickly. Additionally, in the US, the Department of Health and Human Services issued a declaration under the Public Readiness and Emergency Preparedness Act (PREP Act) in February 2020 to facilitate expanded contracting to meet critical needs arising in connection with the pandemic.

While relaxing rules around tenders makes sense in unprecedented times, it can also lead to a reduction in transparency and bidders may have less insight into their competition and the results. Governments around the world will need to balance potentially competing concerns of compliance and fighting the disease.

In the US, the federal government has placed the onus on the states to secure supplies needed during the pandemic. As a result, states have competed against one another for items like ventilators, PPE and treatments. Some governors have expressed concern at their inability to secure some of these supplies.

#### **Supply chain**

The medical industry has always been particularly vulnerable to corruption, and that vulnerability is now increased. The COVID-19 crisis has resulted in a shortage in raw materials, labour and goods which has caused many businesses to shift its suppliers or manufacturers to new jurisdictions or form new relationships. Supply shortages may also pose additional risks when it comes to customs risks at borders. Businesses need to continuously evaluate these changes in risk.

#### **Quality control**

In many cases in the healthcare industry, buyers may not be purchasing directly from a manufacturer, which leaves an opportunity for brokers to maximise profits. In other instances, suppliers may take advantage of the COVID-19 crisis to demand upfront payment for medical supplies that may not pass quality control checks. For example, the Spanish Government purchased COVID-19 test kits upfront which were later found to be unreliable and the Polish Health Minister used his position to purchase face masks from a “family friend” which did not meet quality control standards and could not be used.

#### **Research and development (R&D)**

R&D that is not fully transparent can mean there is a higher risk, both to health and to cost. There is also a risk that products may be promoted to prevent, ease symptoms of or even cure COVID-19 without being thoroughly tested and deemed safe to use.

Businesses should keep in mind the transparency of funding for R&D. It may be costly to develop or purchase medical devices or drugs which are potentially ineffective or even unsafe.

### **How can businesses safeguard themselves from these risks?**

Enforcement authorities will soon be reviewing carefully both governmental and business responses to the COVID-19 pandemic. Businesses may want to consider whether its compliance safeguards remain adequate:

- Be proactive: remain mindful of the risks associated with government contracting, particularly where interacting with the government is new, or in new areas. Consider reviewing government touchpoints and ensuring there is adequate internal oversight.

- **Risk assessments and procedures:** conduct risk assessments and review current procedures. New relationships, geographies and even new sectors bring bribery and corruption risks and, in most cases, additional regulations.
- **Commitment from the top:** global enforcement authorities, including the SFO and the DOJ, continue to emphasise the importance of top-level commitment. Ensure business leaders remain visible, act with integrity and send a clear message to their employees about their expectations.
- **Training:** schedule training, such as anti-bribery and corruption refreshers, for employees that may not be able to act in the market as usual.
- **Due diligence and oversight:** consider tailoring third party due diligence to the current climate which may help flag risks before any violations occur.