

SUMMARY AND TAKEAWAYS FROM WEBINAR ON ENFORCEMENT AND COMPLIANCE DURING COVID-19

OVERVIEW

On May 19, 2020, Momentum Events held a virtual panel to discuss enforcement and compliance during COVID-19 from the perspective of government enforcers, in-house counsel and defense counsel. Colleen Conry, managing partner of Ropes & Gray's Washington, D.C. office, moderated the panel. More than 600 people attended the live session, which was not recorded.

KEY TOPICS AND TAKEAWAYS

Is the pandemic changing government enforcement priorities?

■ EXPECT HEIGHTENED FOCUS ON FRAUD RELATED TO COVID-19.

Preventing fraud related to the COVID-19 pandemic and the federal relief expenditures is a clear priority for U.S. enforcement agencies. Reallocation of government resources often happens following times of crisis, which can—and likely will—have a lasting effect on the enforcement landscape. Federal fraud and fraud-related offenses have long statutes of limitations, so enforcement actions related to the current COVID-19 crisis will likely play out over the years to come.

- **PRE-PANDEMIC INVESTIGATIONS AND ENFORCEMENT GOALS ARE CONTINUING.** With that in mind, companies should not anticipate a major diversion of resources or attention away from traditional enforcement priorities. Specialized groups, such as the DOJ and SEC's FCPA unit, remain focused on pursuing their current investigations and enforcement goals, even with the heightened attention to preventing fraud and waste in connection with COVID-19.

How can companies best manage investigations and meet enforcement agencies' expectations during the COVID-19 era?

■ WORKAROUNDS ARE THE NEW NORMAL, FOR NOW.

Investigations are continuing in the current environment, even as logistics become more complicated. All four panelists cited strategies that they are employing to navigate travel restrictions, stay-at-home orders and the inability to meet with clients, colleagues, witnesses or others face-to-face. For instance, government agencies may rely more heavily on video interviews or testimony and may increasingly turn to their counterparts in foreign jurisdictions during this time. Companies, outside counsel and enforcement entities are addressing these complications on a case-by-case basis and, for the most part, have been able to find workable solutions so that progress can be made. Still, the panelists agreed that, for important in-person interviews and meetings in particular, using videoconference or teleconference is unlikely to become the new normal. From both government and defense perspectives, a lot of nuance is lost when you cannot hear an individual tell their story and respond to questions in person. The same is true from the perspective of in-house compliance professionals, along with the added concern that you lose the chance to build critical relationships and trust that can make employees more comfortable raising concerns in the future.

■ GIVEN THE NEW LOGISTICAL COMPLICATIONS, COMPANIES WILL HAVE TO CAREFULLY PRIORITIZE WHERE TO DEVOTE THEIR INVESTIGATION RESOURCES.

Prioritization has become more critical as complications surrounding previously routine enforcement activities have increased. For example, standard investigative techniques that could happen easily before social distancing, such as collecting witnesses' data from personal devices or interviewing individuals in person, are suddenly more challenging and could potentially pose a public health risk. Whether an investigation is government-facing or internal, COVID-19 is requiring companies to carefully

PANELISTS

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prioritize the most critical investigations and investigative steps, devote the resources necessary to plan for and execute on those key tasks, and weigh what is most important in light of the ongoing health crisis.

- **FOR GOVERNMENT-FACING MATTERS, COMPANIES SHOULD COMMUNICATE OBSTACLES THAT THEY ARE FACING BECAUSE OF COVID-19.** Any assessment of a company's cooperation with a government investigation is case- and context-specific. COVID-19 will certainly play a role in what companies can reasonably do to cooperate. At the same time, citing COVID-19 alone as an obstacle to, for example, fully complying with a request for documents or information is likely insufficient, particularly as some areas of business are operating as usual. There may very well be a safe and reasonable way to make progress in the current environment, and, if that is the case, law enforcement would likely expect the company to do so. If COVID-19 has created a significant obstacle to progress, and there is no reasonable alternate approach, then companies should communicate that to the government in a fulsome manner.

What are some long-term enforcement considerations in light of COVID-19?

- **ACTIONS TAKEN TODAY MIGHT BE JUDGED DIFFERENTLY LATER.** Thinking ahead to future investigations, the panelists discussed the risk that actions taken during times of crisis are often judged after the fact, with the benefit of hindsight and without a clear memory of any extenuating circumstances. Maintaining core procedures and following policies are critical, now more than ever, as is careful documentation of any deviations and the reasons why those deviations were necessary. For example, virtual interviews may be acceptable for now, but could later be viewed as inadequate and undercut the credibility of an internal investigation and its findings.
- **OPPORTUNITIES FOR GROWTH.** Times of upheaval can offer opportunities for growth. Company leaders may have better availability to step back and focus on big-picture, compliance-related topics that may be harder to prioritize during the normal workday. Processes and procedures are being tested by these unusual circumstances, which may help companies see what is working and what needs improvement, and may provide an opportunity to improve the efficacy of corporate compliance.

ADDITIONAL QUESTIONS FROM PARTICIPANTS

The panelists were able to address a number of specific questions from webinar participants. However, because the event was limited to one hour, a number of additional inquiries were not addressed or were not addressed at great length. These questions raise interesting and important considerations for companies operating during these unusual times:

TECHNOLOGY

- *What is the likely impact of increased reliance on technology in regulation and compliance in this environment?*
- *How can companies avoid having video interviews or meetings recorded by the interviewee or other participants during investigations?*
- *How can companies handle the logistical complications around collecting personal devices with information relevant to an investigation during the COVID-19 crisis?*

PACE OF INVESTIGATIONS

- *What are the expectations around the pace of responding to government inquiries? Are those expectations likely to change as the COVID-19 crisis goes on?*
- *Should companies plan for an uptick in enforcement activity in the coming months? Years?*
- *When is it appropriate to ask an enforcement agency to postpone an investigation or a particular investigative step in light of the crisis? Are different agencies handling these requests differently?*
- *Will enforcement agencies consider pausing their investigations if a company is facing financial difficulties?*

FOREIGN ENFORCEMENT EFFORTS

- *How are foreign enforcement agencies responding to the COVID-19 crisis? Are their priorities shifting away from traditional enforcement areas?*
- *Have there been differences in how enforcement agencies in other countries have been able to maintain their ongoing investigations during this time?*
- *How important is it to travel in person to interface with foreign regulators? Does this vary by country?*

For questions or more information, legal and compliance personnel are encouraged to contact your regular Ropes & Gray attorney or colleen.conry@ropesgray.com and ryan.rohlfsen@ropesgray.com.