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4 White Collar and Regulatory Enforcement Trends to Watch in 2024

By Brendan Quigley
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The first half of 2024 saw a number of notable developments across the white collar and regulatory enforcement arena. In light of these trends, discussed more fully below, corporate counsel, compliance professionals, and board members should consider:

1. Whether the confidentiality provisions in their companies' employment agreements, consulting agreements, NDAs and similar agreements contain appropriate carve outs for communicating with regulators.
2. The effectiveness of their own whistleblower programs, in light of the potential for increased whistleblower activity (and potential scrutiny of those programs) generally.
3. Whether their anti-corruption training and third-party diligence processes are capturing potential sanctions and export control violations, in addition to more traditional FCPA compliance.
4. What types of trading are prohibited by their companies' insider trading policies and whether the scope of these prohibitions is being adequately explained in training.
5. Whether their executives and employees are trained and advised on the requirements to enter into any 10b5-1 plan, in light of recent SEC and DOJ activity in this area.

6. The adequacy of any AI-related disclosures they make to investors, in light of the potential for increased SEC scrutiny in this area.

DOJ and CFTC Emphasize Incentivizing and Protecting Whistleblowers

Since being enacted as part of the Dodd-Frank Act in 2010, the SEC's whistleblower program has revolutionized securities enforcement investigations and paid out hundreds of millions of dollars in awards.

In the first half of 2024, both the DOJ and CFTC—recognizing that in complex, corporate investigations there is often no substitute for "insider" information about alleged fraud or other misconduct—took steps to strengthen (and in DOJ's case, create) their own whistleblower programs.

In March, Deputy Attorney General Lisa Monaco, DOJ's second highest-ranking official, announced DOJ would be implementing a formal program to incentivize whistleblowing regarding potential corporate criminal wrongdoing. Monaco emphasized DOJ was not looking to replace or supersede existing whistleblower programs, such as the SEC's, but opined that another program was needed to fill gaps in what she called the "patchwork" of existing programs.

On Aug. 1, 2024, DOJ issued written guidance for the program. As expected, eligibility is fairly limited. Among other things, only individuals—not companies—are eligible for an award, and the individual cannot be eligible for an award if they would have been eligible for an award through another U.S. government or statutory whistleblower program if they had reported the conduct at issue through the program. Further, the program applies only to the reporting of information relating to: (1) certain crimes involving financial institutions, from traditional banks to cryptocurrency businesses; (2) foreign corruption involving misconduct by companies; (3) domestic corruption involving misconduct by companies; or (4) health care fraud schemes involving private insurance plans. Still, the program provides yet more incentives for whistleblower reporting and will likely lead to at least some uptick in whistleblower activity.

For its part, the CFTC brought its first action against a company for having non-disclosure agreements that supposedly chilled whistleblower activity, echoing actions the SEC has taken in recent years. In the CFTC action, the company's employment and separation agreement defined the term "confidential information" broadly and prohibited disclosure of such information, without any carve out allowing the employee to disclose such information to the CFTC. The CFTC alleged that this provision violated CFTC Rule 165.19(b), which makes it unlawful to "take any action to impede an individual from communicating directly with the Commission's staff about a possible violation of the Commodity Exchange Act, including by enforcing, or threatening to enforce, a confidentiality agreement or pre-dispute arbitration agreement with respect to such communications."

Companies should review employment agreements, consulting agreements, NDAs and similar agreements to ensure they contain appropriate carve outs for communicating with regulators. Further, it would be advisable for companies to evaluate the effectiveness of their own whistleblower programs, in light of the potential for increased whistleblower activity generally.

DOJ Continues Focusing on Sanctions, Export Control and Other National Security Initiatives

Over two years ago, Monaco publicly declared that "sanctions are the new FCPA." Since then, DOJ has continued to build its capabilities to investigate and criminally prosecute violations of the laws concerning sanctions, export controls, and other areas involving national security. The first half of 2024 saw DOJ's National Security Division, which oversees criminal sanctions and export control investigations, issue its first-ever public declination under its voluntary self disclosure policy. Specifically, in May, DOJ announced it declined to charge a life sciences company, Millipore Sigma, which had voluntarily self disclosed export control violations committed by an employee and customer who conspired to ship chemicals to an unauthorized purchaser in China (each of whom were, in fact, charged and pleaded guilty).

We expect to see similar investigations and prosecutions continue for the foreseeable future. Companies would do well to ensure their anti-corruption training and third-party diligence processes are capturing potential sanctions and export control violations, in addition to more traditional FCPA compliance.

Aggressive Insider Trading Enforcement

While insider trading is a more traditional area of SEC and DOJ enforcement, both agencies achieved notable wins in the first half of 2024 on somewhat novel theories.

In April, in *SEC v. Pamuwat*, the SEC prevailed on a so-called “shadow insider trading” theory. The SEC alleged that the defendant violated the securities laws by—while in possession of material non-public information (MNPI) about his own company—trading in the stock of a company in the same industry. Significantly, the defendant’s employer’s insider trading policy prohibited trading not only in the employer’s securities while in possession of MNPI but also trading in the “securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the” employer.

In July, in *United States v. Peizer*, DOJ prevailed in a criminal trial of a former CEO, who had been charged with securities fraud by using so called 10b5-1 plans to avoid $12 million in losses. Rule 10b5-1 allows a corporate insider of a publicly traded company to set up a plan for selling company stock and can offer an executive a defense to insider trading charges. However, the defense is unavailable if the executive possesses MNPI when they enter the plan. Additionally, a plan does not protect an executive if the trading plan was not entered into in good faith or was entered into as part of an effort or scheme to evade the prohibitions of Rule 10b5-1. The jury in *Peizer* accepted the government’s theory that the former CEO was aware of MNPI when he entered into two 10b5-1 plans which allowed him to trade and enabled him to avoid losses.

Assuming these results hold up on appeal, we expect they will embolden SEC and DOJ to pursue similar aggressive theories in the future. As we have previously noted, the result in *Pamuwat* depended in part on the fact that the company’s insider trading policy prohibited trading in any public company’s stock while in possession of MNPI, not just the defendant’s employer’s stock. Companies would be well advised to review their insider trading policies to ensure they and their employees understand the different circumstances that could expose the employees to liability. Similarly, in light of *Peizer*, companies should ensure their executive and employees are trained and advised on the requirements to enter into any 10b5-1 plan in good faith and consider requiring the executives and employees to certify they are not in possession of MNPI when entering into a plan.

Artificial Intelligence

While the AI field is rapidly evolving, it has already caught the attention of regulators. In March, the SEC brought two actions against investment advisers for making false and misleading claims about AI. These actions highlight the SEC Enforcement Division’s attention to representations advisers and other companies make concerning their use of AI, in particular around so-called “AI-washing,” i.e., alleged misrepresentations about how a company uses AI in its business. While these actions involved investment advisers who had fiduciary duties to their clients, it would also be prudent for securities issuers to pay close attention to their own AI-related statements given the SEC’s focus in this area.

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