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Lessons Learned: 8 Predictions for Regulatory Enforcement in 2020

By Richard Girgenti

As we enter a new decade and the fourth year of the Trump administration, many of the questions about what to expect in the post-Obama era in regulatory enforcement have been answered and there is greater clarity about what to expect going forward.

Much of the enforcement activity over this tenure has been driven by the administration's prioritization of national security, anti-terrorist financing, international corruption, the weaponization of foreign policy through sanctions and deterring fraud against the government. As a result, there has been stepped up enforcement in the areas of Anti-Money Laundering (AML), Sanctions and Committee on Foreign Investment in the United States (CFIUS) and continued enforcement of the Foreign Corrupt Practices (FCPA) and the False Claims Acts (FCA). These areas will be priorities going forward and inform what we can expect of the enforcement agenda for 2020.

What's more, in a highly divided political environment, state attorneys general in Democratic states will continue to find ways to challenge federal decisions in areas of public safety, anti-trust, and environmental and consumer protection.

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Despite the publicity and skepticism in some quarters surrounding the whistleblower in the Congressional impeachment proceedings, whistleblower programs remain an important tool for government enforcement.

Organizations will need to continue to focus on ensuring the effectiveness of corporate compliance programs and meeting government-issued standards. However, building stakeholder value and a strong corporate culture for integrity will be the ongoing challenge for optimizing organizational integrity.

Here are some of the anticipated developments for 2020.

• **FCPA Enforcement Will Continue Unabated—Reports of Its Demise Were Greatly Exaggerated**

While there had been some skepticism expressed early in the Trump administration about whether there would be continuous vigorous enforcement of the FCPA, there was little doubt at the end of 2019 that this initial skepticism had been misplaced.

Indeed, 2019 was a record year with 14 companies paying $2.9 billion to resolve FCPA

enforcement actions brought by the DOJ and SEC. The biggest of these settlements (nearly 70% of the 2019 total) occurred in the last few weeks of the year against the Swedish telecom company Ericsson ($1.06 billion) and the Russian telecom company MTS ($850 million)—two of the largest settlements in FCPA history (**The Top 50 Corporate FCPA Settlements—FCPA Professor**). Two other 2019 settlements—Walmart ($283 million) and Fresenius ($232 million)—made the top 20 all-time high settlements.

Every year cannot be a record year. However, given the track record over the last three years, we are likely to continue to see a concentration in enforcement activity with a few major settlements, more likely with foreign companies, and a leveling off in the number of settlements. Yet there is no reason to believe that there will be any less effort by the career officials at the DOJ or SEC in 2020.

• **Anti-Money Laundering and Sanctions Enforcement Remain a High Priority**

As it was in the Obama administration, enforcement of AML and sanctions matters continues to be a high priority for regulators and law enforcement agencies in the Trump administration. Expectations for financial institutions are growing. Sanctions regulations are becoming more numerous and remain a major tool in foreign policy and in reaction to foreign conflicts. The administration's use of sanctions against individuals and entities has far exceeded previous administrations, both in scale and scope.

There has been, and will continue to be, a drive to make AML and sanctions compliance more efficient with the use of technologies. AML and sanctions programs are increasingly viewed in the larger context of financial crime, including corruption and misappropriation of assets by politically exposed persons (PEPs).

In addition, there has been a push in a number of emerging areas such as virtual currency regulation, cyber and beneficial ownership reform that increases the areas of potential enforcement activity. Of particular note is the DOJ's recent revision of its voluntary disclosure policy for export controls and sanctions violations which became effective in December and extends the policy to financial institutions only if companies report first to DOJ (**Department of Justice Revises and Re-Issues Export Control and Sanctions Enforcement Policy for Business Organizations | OPA | Department of Justice**). This could create dilemmas for financial institutions and other companies whenever discovered violations fall within the jurisdiction of other agencies at both the federal and state level.

CFIUS (The Committee on Foreign Investment in the United States) Enforcement Will Increase

An area that deserves increased attention in the upcoming year is CFIUS enforcement.

CFIUS, an inter-agency committee of the U.S. government with representatives from 16 U.S. departments and agencies authorizes the president of the United States (through CFIUS) to review "any merger, acquisition or takeover … by or with any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States." CFIUS' role is to evaluate whether and to what extent such transactions could impact U.S. national security. If a transaction could pose a risk to U.S. national security, the president may suspend or prohibit the transaction, or impose conditions on it (**Latham & Watkins' "Overview of the CFIUS Process**").

This past year, CFIUS has stepped up its authority to unwind transaction and enforce its mitigation orders in an increasingly public and aggressive manner. In September 2019, the Department of Treasury, expanded CFIUS' jurisdiction to cover real estate transactions and low-level foreign investments in U.S. businesses that engage with a critical technology, critical infrastructure or sensitive personal data of U.S. citizens.

National security concerns and increased concern over Chinese access to PPI information of U.S. citizens strongly suggests that CFIUS enforcement will only increase in the coming year.

• **SEC Enforcement Will Stay Its Current Course**

Enforcement activity by the SEC in fiscal 2019 resulted in $4.3

billion in fines and disgorgements, up from $3.9 billion a year earlier. Those fines and disgorgements came through 862 enforcement actions, up from 821 in 2018. That is the second-highest level ever, after a record 868 actions taken in 2016. Much of the increase was attributable to a one-time Mutual Fund initiative and may be more of an anomaly than a trend. As in the first three years of the administration, SEC enforcement priorities included protecting retail investors and investigating cyber-related misconduct **(SEC Division of Enforcement 2019 Annual Report).**

An example of the commission's focus on retail enforcement was the action it took against the Woodbridge Group of Companies and its former owner and CEO Robert Shapiro, related to a massive Ponzi scheme impacting over 8,400 retail investors. In January 2019, Woodbridge and Shapiro were ordered to pay over $1 billion in combined penalties and disgorgement.

The majority of the SEC's 526 standalone cases in FY 2019 concerned investment advisory and investment company issues (36%), securities offerings (21%) and issuer reporting/accounting and auditing (17%) matters. As in the past, a small percentage of cases (5%) accounted for the majority (70%) of all financial remedies the commission obtained.

There is nothing to suggest that we should anticipate any change in SEC enforcement action in 2020.

• **Commitment of SEC to Its Whistleblowing Was Called Into Question. 2020 Will Tell the Full Story**

For the first year since its inception in 2011, the SEC's Office of the Whistleblower saw a decline in the number of whistleblower complaints received. While the decrease was small—just over 1% (5,212 tips in 2019 vs. 5,282 tips in 2018), there would seem to be a leveling off of tips received, **(2019 Annual Report to Congress Whistleblower Program).**

Interestingly, tips regarding corporate disclosures increased, while tips for fraud, manipulation, insider trading, trading and pricing declined. Tips for FCPA remained the same.

It would be hard to attribute the slight decline in whistleblower complaints to the uncertainty created by the commission's proposed changes to the whistleblower rules that would give the commission greater discretion to adjust down the largest awards.

For 2020, it is unlikely we will see much change in the number of whistleblower complaints received by the SEC. Tips will continue to remain an important source for investigations and enforcement actions.

• **False Claims Act Enforcement Remains a High Priority for Deterring Fraud Against the Government**

In FY 2019, the DOJ obtained more than $3 billion in settlements and judgments from civil cases involving fraud and false claims against the government. Following a 10-year trend, of the more than $3 billion, $2.6 billion related to matters involving the health care industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories and physicians. Seven drug manufacturers alone paid $624 million to resolve claims that they illegally paid patient copays for their own drugs through purportedly independent foundations that the companies in fact treated as mere conduits. Two other pharmaceutical companies paid $200 million to resolve allegations of kickback payments. (**US Department of Justice False Claims 2019)**

Other significant recoveries involved procurement fraud against the government and falsified research on federal grants. Over $2.1 billion arose from lawsuits filed under the qui tam provisions of the False Claims Act with the government paying $265 million to the individuals who exposed fraud and false claims by filing these actions.

In 2020, the False Claims Act enforcement will continue to be a high priority for deterring fraud against the government.

• **Continued Stepped Up Enforcement by Attorney Generals in Democratic States**

One of the predictable consequences of a highly and politically divided country has been that Attorneys General in Democratic states have taken up enforcement in areas where there has been a perceived decline in federal enforcement. This is particularly the case in the enforcement

of environmental and safety standards, anti-trust and consumer protection. California, Massachusetts and New York will continue to be in the forefront of this new and aggressive enforcement activity.

An example of a state AG stepping in is the T-Mobile/Sprint merger. The DOJ greenlighted the merger. However, both New York and California AGs have challenged the merger—an example of activity we will continue to see in 2020 and beyond.

• **The Effectiveness of Corporate Compliance Programs Will Remain a High Priority**

Preventing misconduct and maintaining organizational integrity can be daunting. With enforcement activity remaining at a high level, organizations need to stay focused on ensuring the effectiveness of corporate compliance programs.

Certainly, the government has given every signal that it intends to closely scrutinize the adequacy and effectiveness of a company's compliance program at the time of an offense, as well as at the time of a charging decision and in consideration of a company's remedial efforts to improve its program.

However, most government guidelines provide minimum standards. Organizations that are committed to the highest levels of organizational integrity will not only need to build compliance programs that meet these standards, but will also need to focus efforts on building a culture of integrity as well as creating an organizational purpose that builds stakeholder value into its performance goals and recognizes environmental, social and governance (ESG) factors.

In April 2019, the DOJ, in the latest of a long line of policies and guidance issued over the years, reinforced its view when it updated its guidance on the evaluation of corporate compliance programs (**DOJ Guidelines on Corporate Compliance**). The DOJ reiterated the three fundamental questions that prosecutors will ask when evaluating a corporation's compliance program.

• Is the corporation's compliance program well designed?

• Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?

• Does the corporation's compliance program work in practice?

The DOJ guidance went on to list and explain the critical factors that would be considered in answering each of these questions. Although the updated guidance does little more than reiterate prior guidance, it serves as a reminder that the government has not wavered in its commitment to evaluate the effectiveness of corporate compliance efforts in its charging and sentencing decisions.

• **Conclusion**

As we enter a new decade—and a U.S. election year—there is little doubt that regulatory enforcement activity will remain high and that government scrutiny of compliance programs will continue to play a major role in charging and sentencing decisions. Organizations will be challenged to demonstrate the effectiveness of compliance programs. Technology can help control the costs associated with compliance. However, proactively focusing on building a culture of integrity and creating an organizational purpose that builds stakeholder value should play and increased role in helping organizations in the first instance avoid lapses that could lead to regulatory challenges and ultimately stay out of the crosshairs of enforcement actions.

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