

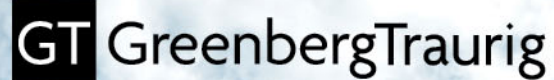
Welcome

Thank you for attending today's webinar. Under current circumstances, a significant portion of the workforce is working remotely; the higher utilization of the internet and servers impacts bandwidth. We appreciate your patience and understanding should any unexpected technical issues arise. As always, it is our intent to give you the information you need as seamlessly as possible.

Tips for best experience:

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- Use a wired connection, if possible. (Ethernet connection from router to computer.)
- Do not run additional applications during presentation. (Outlook, Internet browsers...)
- Mute your audio unless you are presenting.

The presentation will begin shortly.



Financial Crime Enforcement in the COVID-19 Crisis Era.

Who are the key enforcement players and what are their primary concerns relating to the COVID-19 crisis?

Donald S. Davidson
Elaine C. Greenberg
Robert Long
David I. Miller
Anne-Marie Ottaway

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Introduction – A Scared New World

Key Enforcement Agencies – the usual alphabet soup

- DOJ/FBI
- SEC
- CFTC
- CFPB
- State & local agencies
- UK FCA and SFO

Introduction – cont'd

- How will enforcement agencies react and reallocate their resources in response to the recent market turmoil and the financial devastation caused by COVID-19?
 - Expect the usual enforcement emphases, but certain areas likely will be prioritized (as happened after the 2008 financial crisis).
 - Financial crises invariably expose Ponzi and other fraudulent schemes, failure to disclose risks, etc.
 - Buffet's rule: when the tide goes out, you see who was swimming naked.

Introduction – cont'd

- Enforcement Collaboration and Competition
 - Expect even more determined inter-agency collaboration in times of crisis.
 - But also expect the usual competition for which player can rack up the biggest penalties.
- Expect a greater emphasis on individual responsibility than after the 2008 crisis.
 - Expect intense political pressure (Congressional hearings, etc.) to nail and jail C-suite suits.
- But the usual challenges to this impulse will remain.
 - Much easier to get a company to settle with \$ versus an individual who might be donning orange.
 - Also much easier to impute scienter to a company (via vicarious liability/the collective knowledge doctrine).

Key priority – Insider Trading

- Why does insider trading enforcement matter?
 - It is about fraud; not parity of information for all.
- Classical vs. misappropriation theories
 - Key is duty to shareholders (classical) or to source of information (misappropriation).
 - Exception is tender offer context where no breach of duty is required.
- Tipping liability – personal benefit.
 - SDNY prosecutions.

Insider Trading, cont'd

- March 23, 2020 statement by SEC Enforcement heads
- What does it mean?
 - Authorities are watching.
 - Especially true when markets are volatile.

Insider Trading, cont'd

- The STOCK Act
 - Creates a duty of relationship of trust and confidence to USG and people of U.S. owed by Congressional members/staff, Executive employees, etc.
 - But structural and constitutional enforcement hurdles remain.
- New enforcement focus area of “political intelligence.”
- COVID-19-related trading.

Insider Trading, cont'd

- Does *U.S. v. Blaszcak* (No. 18-2811 (2d Cir. 2019)) make insider trading easier to prosecute?
 - Securities fraud statute created by SOX (18 U.S.C. § 1348) vs. Title 15 Securities Fraud.
 - Case involved misappropriation of confidential information from the Centers for Medicare & Medicaid Services.
 - The court held that confidential government information may constitute "property" for purposes of the wire fraud and Title 18 securities fraud statutes.
 - The court also held that the *Dirks* "personal-benefit" test does not apply to those Title 18 fraud statutes.
 - Paradoxically, the SEC still must prove more elements in civil cases.

Insider Trading, cont'd

- Still a major DOJ/SEC/CFTC priority
- More onerous elements for SEC than DOJ actions?
- CFTC entered the fray in 2015 (using misappropriation theory) in re Arya Motazedhi (Dec. 2015).
- What's coming around the bend?

Insider Trading, cont'd

- UK Update – Insider Dealing
 - Criminal offences:
 - Insider dealing – Part 5 Criminal Justice Act 1993
 - Market manipulation – Sections 88-91 Financial Services Act 2012
 - Market Abuse Regulation (3 July 2016) introduced civil offences:
 - Insider dealing
 - Unlawful disclosure
 - Market manipulation
 - Attempted market manipulation

Insider Trading, cont'd

- FCA Primary Market Bulletin Issue No. 27 – Coronavirus update (Published: 17/03/2020):

“Issuers should continue to comply with their obligations under the Market Abuse Regulation (MAR) and relevant FCA rules. Issuers should be aware that their own operational response to coronavirus may itself meet the requirements for disclosure under MAR.

We are conscious that coronavirus may create challenges in the convening and operation of disclosure committees. However, we continue to expect listed issuers to make every effort to meet their disclosure obligations in a timely fashion.”

- FCA Business plan 2020/21 (published 9 April 2020)

“We will remain vigilant to potential misconduct. There may be some who see these times as an opportunity for poor behaviour – including market abuse, capitalising on investors’ concerns or renegeing on commitments to consumers. Where we find poor practice, we will clamp down with all relevant force.”

Mismarking/Valuation Fraud

- During periods of economic turmoil, valuing illiquid assets becomes challenging – partly due to decreased visibility into valuation mechanisms.
- This makes illiquid assets especially susceptible to fraud.
- We saw this movie before during the last financial crisis.
 - Spawned several valuation fraud enforcement actions.
- Has been a DOJ/SEC priority in recent years.
 - Deviations from procedures firms use to value illiquid assets are generally a focus of investigations.

Mismarking/Valuation Fraud, cont'd

- Current economic climate – expect a new round of enforcement actions.
- On April 21, 2020, the SEC announced a new rule proposal (Rule 2a-5 under the '40 Act) addressing valuation practices and the role of BoDs re fair valuation of holdings by investment companies and business development companies.
- Firms should be reviewing valuation procedures, spot-checking valuations, and establishing robust training.

Offering Frauds/Ponzi Schemes

- COVID-19-related fraud schemes.
- We can expect authorities to pursue fraudsters who take advantage of COVID-related financial aid/assistance under the CARES Act.
- Increase revelation of such schemes when the markets are down.
- Likewise, the UK law enforcement authorities will clampdown hard on those who exploit the government schemes, such as Business Interruption Loan and Bounce Bank Loan schemes for SMEs (available via accredited lenders) and job retention scheme.
 - As of 13th May HMRC had received 795 reports of suspected fraud in relation to the job retention scheme and stated *“We won’t hesitate to take criminal action against the most serious cases”*

Accounting Fraud

- In times of crisis and/or market volatility, accounting fraud cases sprout like mushrooms after a rainy day. Two primary reasons:
 - First, volatility – especially downward – increases the likelihood that publicly-traded companies may manipulate earnings (or engage in other accounting fraud) to support their stock price.
 - Second, dramatic changes in asset values invariably shine a spotlight on prior accounting shenanigans.
- We saw major enforcement actions in the early 2000s, which led to SOX reforms.
- This scenario repeated itself after the Great Recession, which led to several DOJ and SEC actions for manipulating earnings, falsifying financials, and stock option backdating.

Accounting Fraud, cont'd

- With the huge financial losses arising from the unprecedented govt-mandated shutdown of our economy, expect to see more of the same.
- Likely jump in whistleblower claims (and awards).
- KEY is compliance and enhanced focus on internal corporate controls.
 - Strong audit committee and GAAP and disclosure compliance.

Cryptocurrency

- A major priority – DOJ, SEC, and CFTC are all over it.
 - DOJ on criminal side.
 - SEC on ICO side.
 - CFTC on all other civil enforcement areas – trading of a “commodity.”
- Old wine in new bottles - nothing novel about the fraud in this area, just the technology being used.
 - The authorities are looking at outright scams (like penny-stock, pump-and-dump, offering frauds, and boiler room operations).
 - SEC is looking hard at issuers who believe their tokens are not “securities” under the securities laws and therefore are selling them without any registration or exception to same and without using a registered broker-dealer.
- Given volatility of markets and currency, several participants are moving to crypto.

Cybersecurity/Data Privacy

- Obvious data privacy and cybersecurity issues arising from the huge increase in remote working due to COVID-19.
- IT issues/hacking/data breach/phishing concerns.
- SEC disclosure rules regarding the above issues.
- State data privacy rules.
- DOJ, State AGs, NY DFS.

Cybersecurity/Data Privacy , Cont'd

- What is happening in the UK?
 - **Project Etherin** - overarching law enforcement response to fraud during the Covid-19 crisis, led by the National Economic Crime Centre. Police response in England and Wales is being coordinated by the City of London Police and includes daily monitoring and analysis of reports to Action Fraud followed by appropriate disruption.
 - On 21 April the UK's National Cyber Security Centre launched a suspicious email reporting service as part of their Cyber Aware campaign. In the first two weeks it received over 160,000 reports leading to 14,000 links to scams being removed.
 - **Information Commissioner's Office (ICO)** issued a statement on 15 April 2020 about how they will regulate during the Covid-19 crisis.

“We must reflect these exceptional times. We will continue to recognise the continuing importance of privacy protections, and the value of transparency provided by freedom of information. These rights are a part of modern life we must not lose. But my office will continue to safeguard information rights in an empathetic and pragmatic way that reflects the impact of coronavirus.”

Disclosure Issues

- SEC is looking at how companies are disclosing the effects of COVID-19 on their businesses and whether they are in compliance with disclosure requirements
- SEC recently issued Statements on the Importance of Disclosure
- Considerations for effective disclosure
- The UK perspective.
 - Joint statement from the Financial Conduct Authority (FCA), Financial Reporting Council (FRC) and Prudential Regulation Authority (PRA) on 26 March 2020 announcing a series of actions to ensure information continues to flow to investors and support the continued functioning of the UK's capital markets (<https://www.fca.org.uk/news/statements/joint-statement-fca-frc-pra>). This includes:
 1. A statement by the FCA permitting a temporary delay in the publication of audited annual financial reports from 4 to 6 months from the end of the financial year.
 2. Guidance from the FRC for companies preparing financial statements in the current uncertain environment. This is complemented by guidance from the PRA regarding the approach that should be taken by banks, building societies and PRA-designated investment firms in assessing expected loss provisions under IFRS9.
 3. Guidance from the FRC for audit firms(link is external) seeking to overcome challenges in obtaining audit evidence.

BSA/AML and FCPA/UKBA Issues

- Even before COVID-19, significant uptick in enforcement.
- DOJ has brought actions for willful failures to comply – defective AML compliance, failures to file SARs, etc.
- SEC uses books/records authority to enforce compliance.
- With federal bailouts (e.g., PPP), DOJ may use the BSA to police lenders' fraud detection measures.

BSA/AML and FCPA/UKBA, cont'd

- FCPA prosecutions will continue unabated.
 - While DOJ's Fraud Section is more focused on COVID-19-related fraud, we can still expect DOJ and SEC to police FCPA violations.
 - Same thing for SFO policing UK Bribery Act.
- Many cases are still in pipeline
 - These cases take a long time to investigate and resolve.
- FCPA cases are a BIG money maker – huge fines/penalties.
- PPE-related bribery?
- CFTC announced last year that it is looking at foreign-bribery-related cases.

