

## Covid-19 coronavirus: key regulatory and enforcement risks

*April 2020*

### ***Introduction***

The Covid-19 coronavirus pandemic has brought unprecedented global challenges across all industries. Each day brings new medical information, a new projection on the economic impact, and seemingly never-ending uncertainty about the future.

As companies grapple with this new reality and position themselves to survive the crisis, and then thrive once the crisis ends, Allen & Overy has been actively monitoring the risks companies face from a regulatory and enforcement perspective. While companies must rightly focus on their pressing short-term needs and commercial issues, a key lesson from the 2008 financial crisis should not be forgotten: the economic turmoil sparked a years-long wave of regulatory and enforcement action targeting crisis-era conduct.

With that lesson in mind, this note contains guidance across a range of regulatory and enforcement risks that companies across different industries are grappling with during the Covid-19 crisis, including securities, commodities and related derivatives, antitrust, anti-corruption, anti-money laundering, sanctions, foreign investment, and political law.

We identify key risks and suggest mitigation strategies. More in-depth analyses on specific issues and industries will be added.

### ***Securities***

A number of securities regulators are moving quickly to respond to the Covid-19 crisis.

#### **45-day filing extensions and insider trading risks**

In recent weeks, for example, the U.S. Securities and Exchange Commission ("SEC") has implemented new relief measures for companies experiencing difficulties meeting their obligations under federal securities laws due to the Covid-19 crisis.

On March 4, 2020, the SEC issued an [order](#) permitting publicly traded companies to apply for a 45-day extension to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020. Companies applying for this extension must show why the specific circumstances of the applicant warrant the relief.

As this order takes effect, the SEC's Division of Enforcement is urging companies to guard against heightened insider-trading risks that may accompany delayed filings. Stephanie Avakian and Steven Peikin, co-directors of the Commission's enforcement unit, issued a [statement](#) outlining these potential risks.

The SEC emphasizes in the statement that qualifying companies may face increased insider-trading risks because more employees may have access to material non-public information ("MNPI") for a longer period. To deal with this risk, the SEC urges companies to make sure that internal controls are adjusted to account for the expanded group of corporate insiders with access to sensitive information:

*"Those with such access- including, for example, directors, officers, employees, and consultants and other outside professionals- should be mindful of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading,"* Avakian and Peikin said in the statement.

The SEC's statement is an important reminder that, as the Commission issues new Covid-19 coronavirus relief measures, companies must contemporaneously ensure that their internal controls and policies address attendant insider trading risks. This is especially critical given that, as here, the Commission may not alert companies to collateral risks until weeks after the relief measures take effect. Authorities in other jurisdictions have issued similar warnings. For example, the UK Financial Conduct Authority has also [warned](#) the market that steps should continue to be taken to prevent market abuse, such as enhanced monitoring or retrospective reviews, and that it will *'continue to monitor for market abuse and, if necessary, take action'*.

#### **Delayed reporting – key risks:**

- More people, including employees and third party consultants will have access to MNPI during the crisis than before. These individuals may not have been trained in how to handle such information properly.
- More employees and third parties may be able to access MNPI remotely. This presents additional data security challenges, including abuse of MNPI by these individuals and their family members, friends, and associates who may also gain exposure to these materials.
- Markets are historically volatile, and announcements that would be unlikely to cause much market movement during ordinary times may produce significant reactions. As the SEC Staff observed, MNPI can be unusually valuable in these extraordinary times.
- Many individuals are facing financial uncertainty and distress which could lead to reckless and potentially unlawful actions. Employees, now exposed to MNPI, may take the opportunity to engage in trading under the false assumption that relatively small trades will go unnoticed. In fact, the SEC's analytical tools are designed to identify exactly this sort of unusual activity.

In turbulent times, companies must act quickly to protect against the risk of insider trading or other fraudulent or manipulative trading in their securities. Such conduct can expose a company not only to SEC enforcement activity and potential criminal charges, but to private shareholder and other litigation as well, including the attendant reputational damage that ensues.

The following are some practical steps companies may consider:

- Take steps to remind employees of the confidential nature of the company's information, the terms of the company's disclosure and insider trading policies, and reiterate (and possibly expand) blackout periods and preclearance of trades.
- Review insider trading policies, codes of ethics and conduct, and their Regulation FD and selective disclosure prohibitions to ensure that the blackout and any preclearance processes appropriately extend to persons receiving MNPI during the Covid-19 crisis. Companies should disseminate these policies broadly, including to all employees and consultants who might have access to MNPI. Companies need to have an effective insider trading policy that goes to everyone in an organization, as well as family members and

independent contractors, because securities laws hold organizations liable if people they control engage in insider trading and the company has not taken steps to prevent it.

- Arrange for remote, online training for employees and consultants. As “stay-at-home” orders continue, entities should regularly provide remote video training to employees, officers, and directors on compliance procedures, including any enhanced procedures during this time, to address the expected increased scrutiny on trading. Focused online training will send a strong message about the company's culture of compliance.
- Update and expand compliance surveillance activities and data security protocols to prevent issues where possible, and where complete prevention is not possible, to monitor and detect potential violations in real-time. The expansion of teleworking has made this more important than ever before, and companies that fail to act promptly and comprehensively may find themselves responding to the consequences of problematic conduct rather than preventing it in the first place.

### **Valuation of illiquid securities and investments**

In a turbulent and falling market, the valuation or marking of illiquid securities and investments is particularly challenging. Prosecutors and regulators have shown consistent interest in investigating and prosecuting “mismarking” cases in which they believe investments or positions were valued at artificially beneficial levels purely in order to avoid taking losses. This type of scrutiny was particularly high after the 2008 financial crisis; we expect that mismarking investigations will be a feature of the next wave of enforcement activity.

In particular, firms should be sure that they document their valuation policies; remind the responsible employees about these policies; and pay extra care and give careful review and consideration to any proposed change in valuation methodologies, especially any change that would be financially beneficial to the firm or to the value of an individual employee’s book or portfolio.

## ***Commodities/Commodity Derivatives***

Commodities regulators, including the Commodity Futures Trading Commission (“CFTC”) and self regulatory organizations like the National Futures Association, are immediately focused on maintaining orderly and properly functioning markets. Regulators have further taken steps to relieve regulatory burdens imposed on registrants like exchanges and intermediaries, including recordkeeping and reporting requirements, made impracticable by recent events. That said, enforcement staff are equally attuned to heightened opportunities for market abuse.

Key risk areas include:

- **Settlement windows.** Given the volatility in commodities markets, trading platforms, including futures exchanges and swap execution facilities, are paying particular attention to settlement windows. Therefore, participants in these price formation processes should ensure that their activities are not “disorderly.”
- **Spoofing.** Disruptive practices like “spoofing” are already the subject of heightened civil and criminal enforcement activity. But with the heightened volatility in the commodities markets, the potential for spoof orders to cause prices to run is now amplified and participants should expect surveillance staff to be extra vigilant for perceived spoofing activities.
- **Misappropriation.** Over time, commodities regulators have added misappropriation to their enforcement tool kit and recent settlements and the announcement of an insider trading task force within the CFTC's enforcement division suggest that the agency intends to use its authority aggressively. Traders, brokers and other market participants may find themselves exposed to increasingly material non-public information and the opportunities to benefit from the misuse of such information may be enhanced given market

dislocation. Employers, supervisors, desk heads and internal compliance and surveillance staff should be extra vigilant in this regard.

- **Dislocation in physical markets.** The Covid-19 crisis has caused tremendous stress in physical commodities markets as precipitous drops in demand, for example for gasoline, have resulted in excess supplies and a race to secure available storage space. Regulators will be on the look out for perceived trading plays designed to exacerbate dislocation in the physical markets to drive prices in related derivatives markets.

## *Antitrust*

The Covid-19 crisis has created a radical shock to global markets, throwing individuals and businesses into disarray, and starting a new era of uncertainty the end point of which remains unknown. However, notwithstanding a global pandemic, the antitrust laws, for the most part, remain in full force and effect.

The Antitrust Division of the [U.S. Department of Justice](#) ("DOJ") and many other antitrust enforcers across the globe, including in Canada, France, Italy, Poland, the United Kingdom, China, South Korea, South Africa, and Australia have announced their firm intention—and in some cases have already launched investigations—to prosecute price-fixing, excessive pricing, bid-rigging, market allocation, and other types of anti-competitive practices, to the full extent of the law. This is especially true in sensitive industries such as food, household supplies, face masks, sterilizers, and respirators. Recent warnings from the DOJ and FTC have also focused on the labor markets, [cautioning companies](#) that they are on alert for employers, staffing companies, and recruiters, among others, who might seek to exploit the current crisis by engaging in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked.

However, at the same time, a number of these (and other) antitrust authorities have announced that they will relax certain of their rules. In some cases, enforcers or governments have granted formal exemptions from antitrust laws, for example to allow temporary cooperation between competitors (subject to safeguards) in order to ensure the supply of scarce products or services. In other jurisdictions, authorities have offered guidance to businesses, including to particularly economically-challenged sectors. And on top of this, the European Commission has put in place a Temporary State Aid Framework, to enable Member States to support the economy through a variety of measures.

The upshot is that companies must continue to be mindful of antitrust laws, despite the uncertainties of current markets, and even where they receive pressure to act by regulators or quasi-regulators. While some conduct which would in normal circumstances have raised antitrust concerns may be permitted (or at least may not be an enforcement priority for certain antitrust authorities), other conduct will not be tolerated.

Firms should therefore consider issuing compliance guidance reminders to their employees to ensure that their conduct remains on the right side of the law. Each business should appropriately tailor their reminders to the relevant industry, but a few key risks and basic points should be covered:

- **Remind employees that Covid-19 mitigation joint activity and information sharing are still subject to antitrust laws.** Given the scope of the Covid-19 crisis, businesses may feel pressure to coordinate to alleviate shortages, manage supply chains, or enforce best practices on sanitation or related issues. Firms in the pharmaceutical and medical industries may seek to pool resources and work jointly toward the development of a vaccine or other therapeutic treatments. While these goals may be laudable by themselves, they do not provide a free pass from the competition laws absent a specific exemption. Thus, any joint industry effort comes with competition law risk, even if the underlying motivations are otherwise altruistic.

- **Cartel conduct such as price-fixing or bid-rigging is unlikely to benefit from any lenient treatment.** Global antitrust enforcers have issued statements reminding the markets that per se illegal conduct will continue to be enforced criminally despite the crisis. Businesses should remind their employees not to enter into any agreements on pricing, bids, allocation of markets or restrictions on output with competitors, and to consult company or antitrust counsel with any questions about permissible conduct. In particular, this message must be delivered to functions that have frequent exposure to competitors or are well connected in the industry.
- **Issue guard rails for standard setting or industry organization participation.** Each of the above issues are particularly acute in the context of standard setting or industry organization meetings where competitors gather in large numbers. As industries grapple with the unfolding crisis and collectively consider best practices, competitor collaborations in developing responses to Covid-19 drive procompetitive and societal benefits. Businesses must remain vigilant, however, in reminding participating employees that permissible collaboration must not cross the line into inappropriate information sharing or agreements with competitors. In-house counsel should prepare or re-issue guidance to any employees participating in such meetings.

The crisis is spawning, and will continue to spawn, significant and complex antitrust issue that will vary from industry to industry. Allen & Overy is monitoring industry trends and government actions, and will continue to update guidance.

## *Anti-corruption*

Legal and compliance professionals should consider how the Covid-19 crisis may affect corruption risk under applicable anti-corruption laws, including the Foreign Corrupt Practices Act, and what steps may be taken to mitigate these risks even while large swaths of the company's employees may be working remotely. Some corruption risks are amplified in the current environment:

### **Government touchpoints and lobbying**

As always, where business interacts with government officials, there is an elevated risk that conduct may violate anti-corruption laws. State and local governments around the world are now taking unprecedented measures to respond to the pandemic and shore up their economies in ways that directly affect companies. Companies may engage with government officials on these issues, for example, companies may seek to: obtain regulatory approval for vaccines or clinical trials; bid for government contracts in connection with relief measures; lobby government officials for favorable tax treatment, deregulation, or "bailout" funds; apply for exceptions with respect to virus-related government restrictions, such as the closing of offices, factories, or other facilities; seek preferential treatment in connection with enhanced border controls to transport goods and employees across borders and through customs; and make charitable donations or make facilities available to benefit the public health or respond to Covid-19 related challenges.

### **Government contracting**

In times of economic distress, government investment and procurement may be viewed as more enticing, particularly when potential commercial customers are themselves facing financial challenges. An economic downturn may increase pressure on businesses to demonstrate financial performance and the motivation to engage in improper behavior may outweigh an otherwise strong culture of compliance.

### **Business restructuring, mergers and acquisitions**

The economic environment in the coming months may lead to significant restructuring, financing, acquisition of distressed businesses, and efforts to engage in joint venture partnerships. Despite business pressures to move expediently and in a cost-effective manner, parties should ensure that they conduct proper risk-based corruption due diligence. A company acquiring operations or working with a new joint venture partner should implement post-acquisition integration plans on a reasonable timetable. If historic issues are uncovered, ensure the conduct is stopped and consider other appropriate risk mitigation measures.

### **Compliance tips**

These are challenging times for legal and compliance personnel. Travel restrictions and shuttered offices may restrict a company's ability to respond fully to allegations of wrongdoing, conduct interviews and collect documents and data in-person, and conduct on-site audits, reviews or other monitoring exercises. Remote working may also increase the likelihood that employees use non-approved forms of communications for business that cannot be maintained or monitored.

Legal and compliance personnel should consider the following options to mitigate corruption risk:

- Identify the government touchpoints in the business, including with respect to procurement, and who is engaging with government officials directly or through third-parties.
- Ensure that employees involved in these efforts have appropriate training, understand the risks, and know where and to whom to escalate concerns that may arise.
- Get creative in your training and education programming where in-person efforts are likely limited. Consider whether to:
  - Conduct targeted small group video conferencing training; and
  - Increase the cadence of communications and education efforts while employees are working remotely.
- Where third-parties or agents are used to interact with government officials on behalf of the business, particularly in high-risk jurisdictions, consider a review or monitoring to ensure that compensation is commensurate with services provided and risk-based due diligence has been conducted.
- Evaluate whether anti-corruption policies and procedures require a refresh to account for changes in business and risks.
- If the business is considering making a charitable contribution or donation of goods or services, such as donating medical supplies or making space available to the government, ensure that corruption concerns have been considered, such as whether the donation was requested by a government official and whether a government official or family member will benefit from the donation.

Companies that move swiftly to adjust to the new normal and maintain strength and flexibility in their compliance programs will be better positioned in the long-term.

## ***Anti-money Laundering***

The U.S. Financial Crimes Enforcement Network ("FinCEN") expects financial institutions to continue to diligently adhere to their BSA obligations throughout the Covid-19 crisis. However, FinCEN has also indicated that it recognizes that the Covid-19 crisis may create new challenges in financial institutions' ability to meet certain Bank Secrecy Act ("BSA") obligations, including complying with timing requirements for certain BSA report filings.

As a result, FinCEN indicated in a [notice](#) issued on April 3, 2020 that it appreciates that certain reasonable delays in BSA compliance may occur as a result of the Covid-19 crisis. In addition, FinCEN has suspended the implementation of the February 6, 2020 ruling (FIN-2020-R001) on Currency Transaction Report filing obligations for reporting transactions involving sole proprietorships and entities operating under a "doing business as" (DBA) name until further notice. FinCEN has also created a Covid-19 online contact mechanism, which allows financial institutions to communicate their Covid-19-related concerns to FinCEN while adhering to their BSA obligations.

Financial institutions are encouraged to closely monitor updates from functional regulators regarding the impact of the Covid-19 crisis on BSA and anti-money laundering compliance obligations. For example, on March 16, 2020 FinCEN issued a [notice](#) advising financial institutions to remain alert to imposter scams, investment scams, product scams, insider trading, and malicious or fraudulent transactions similar to those that occur in the wake of natural disasters. Similar warnings have been issued by the UK Financial Conduct Authority, which has set up a [webpage](#) dedicated to helping consumers protect themselves from coronavirus-related scams.

## *Sanctions*

The Covid-19 crisis will likely have an impact on compliance risk with respect to economic, financial, and trade sanctions laws, in particular those administered by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"). Several risks have arisen:

- Increased use of remote working could reduce companies' abilities to monitor employees' activities and ensure adherence to sanctions compliance policies, processes, and procedures.
- Normally scheduled sanctions training programs and audits may be delayed or altered, which could increase sanctions exposure risk.
- OFAC will continue to operate despite this current period of uncertainty; accordingly, companies should continue to exercise vigilance in the sanctions space and remain mindful of possible sanctions developments, *e.g.*, new sanctions designations.
- Likewise, companies should be wary of sanctions compliance complacency; despite the economic slow-down and political focus on the pandemic, our expectation is that OFAC will pursue enforcement actions against entities that breach sanctions during this period, and companies should not expect sanctions-related amnesties or leniency for violations that occur during this period.
- It is possible that the U.S. government will loosen certain sanctions programs in order to facilitate the provision of humanitarian aid to otherwise sanctioned jurisdictions. Unless and until this happens, however, all sanctions restrictions remain in place, and in all circumstances companies should continue to exercise caution in dealings related to any sanctions targets.
- OFAC may be slower in processing license applications and/or regulation guidance queries due to complications arising from staff working remotely.
- Particularly if the shutdown is prolonged, it is possible that OFAC and other sanctions enforcement bodies will seek to toll relevant statutes of limitations.

## *Foreign Investment in the United States*

Legal and compliance professionals should consider how the Covid-19 crisis will impact deals subject to review by the Committee on Foreign Investment in the United States ("CFIUS"). In particular,

- Processing of CFIUS filings may be delayed as CFIUS's constituent agency staff members work remotely. The normal review of filings should continue, but remote working and incumbent limitations on review coordination may slow the review process.
  - However, we understand that CFIUS is using a rolling in-office working schedule, whereby reduced staff work in the office in staggered shifts on a daily basis in order to handle tasks that cannot be performed remotely.
  - On the other hand, CFIUS may see a reduction in filings in early 2020 as the pandemic affects cross-border M&A transactions and inbound U.S. investment. This potential reduction in filings may mitigate the potential delays described above.
- An economic downturn in the U.S. may lead to political pressure on CFIUS to approve deals.
- It is possible that CFIUS could choose to exercise its discretion in extending its review period for transactions, particularly if the COVID-19 crisis is prolonged.

## *U.S. Political Law*

While regular life has been upended by travel restrictions and directives to minimize social interaction, governments and business are moving swiftly to prepare and respond to the COVID-19 pandemic and the economic fallout. As a result, business leaders are engaging more regularly with public officials and seeking government action. This is the time when compliance with various political laws – lobbying, public procurement regulation, gifts and entertainment for public officials, pay-to-play and campaign finance regulation – is essential from a legal and reputational standpoint. Below, we address how risk for companies under these regulations is likely to arise during the COVID-19 crisis and provide compliance suggestions for in-house legal and compliance personnel.

### **Lobbying**

Lobbying and other interactions with the government during these times is mission critical in some cases and is more likely to involve engagement from key senior management whose activities pre-COVID-19 would generally not have triggered lobbyist registration. In addition, efforts to obtain government contracts may be considered lobbying and be subject to various restrictions. Government contracting is likely to increase on an emergency and longer-term basis as federal, state, and local agencies and public hospitals seek to manage COVID-19.

Key considerations with respect to lobbying:

- *Lobbying generally includes written and electronic communications:* Most lobbying laws, including the federal Lobbying Disclosure Act, apply to all forms of communication, including written, electronic, and in-person correspondence. Even though in-person meetings are likely restricted under physical distancing and stay-at-home directives, any communications intended to influence decision-making of covered public officials may be considered lobbying and require registration.
- *Know what activities trigger lobbying registration in your jurisdictions:* Lobbying laws generally include a threshold of a person's time, number of contacts, lobbying expenditures, or compensation for lobbying (or a

combination of those factors) to determine whether registration is required. Activities that are considered lobbying will also vary across jurisdictions. Legal and compliance personnel should have insight into which executive and employees are engaging with public officials to determine when and whether registration may be required.

- *Communications to obtain government contracts may constitute lobbying:* In many states, efforts to provide goods or services to a government agency may be treated as lobbying and require registration and filing of reports. Government contractors may also be subject to other restrictions on political activity, such as limits on political contributions and fundraising, gifts to public officials, and black-out periods for communications with public officials.
- *Grassroots or indirect lobbying:* In this time of physical distancing, companies may turn to social media and other forms of grassroots lobbying to encourage members of the public (including employees or customers) to contact public officials in connection with particular legislative proposals. In some states, grassroots lobbying may trigger registration and reporting obligations. Consider the target audience and review applicable laws prior to engaging in such grassroots lobbying.
- *Lobbying on behalf of a foreign entity may trigger U.S. Foreign Agents Registration Act (“FARA”) restrictions:* Foreign governments have engaged U.S. lobbyists to promote foreign countries' responses to COVID-19 and gauge U.S. public opinion of those responses. Such activities require registration under FARA and enforcement of failures to register has increased in recent years.

#### **Gifts to agencies and public officials and donations solicited by public officials**

Governments at all levels are seeking assistance from private industry to address the COVID-19 crisis, including in-kind donations of goods or services or financial contributions to charitable organizations. Care should be taken to ensure that these well-intentioned donations comply with applicable ethics and conflict of interest laws. For example, gifts solicited by a public official may be prohibited or trigger disclosure obligations. Gifts to a government agency are generally permitted if certain procedural steps are followed and may require disclosure. The permissibility of a gift to a private charity at the request of an official, depending on the jurisdiction, may be subject to restrictions under ethics rules or trigger disclosure obligations.

#### **Temporary relief may be available from certain political law restrictions and disclosure obligations**

Due to the pandemic, various states and localities have provided limited relief from certain restrictions and some flexibility with respect to reporting obligations. On the other hand, some agencies have made clear that there will be little or no flexibility provided.

#### **Pay-to-play laws, corporate electoral engagement, and political contributions**

This is an especially important time for companies to ensure compliance with pay-to-play limits given the increase in government contracting. Many states such as New Jersey, Pennsylvania, Connecticut, and Illinois as well as many counties and cities have pay-to-play regimes that limit eligibility for government contracts based on political contributions or that require robust disclosure. Companies should be cognizant of these limits and take steps to inform covered employees that even small political contributions can jeopardize eligibility for government contracts in the future.

Campaign finance limits and disclosure obligations for the 2020 election cycle remain operative. Even though there will be fewer in-person fundraising events, campaigns are still actively fundraising for the November 2020 elections. Federal, state, and local campaign finance limits and disclosure obligations so far largely remain unchanged.

## ***Conclusion***

As this crisis continues to evolve, Allen & Overy is monitoring the regulatory and enforcement risks facing companies across industries. We will continue to update guidance and issue in-depth analyses on specific issues and industries. These can be found here:

### ***Securities***

[COVID-19: U.S. Regulatory Enforcement and Civil Litigation Over ESG Disclosures Update](#)

### ***Antitrust***

[Covid-19: Global Merger Review Update](#)

[Covid-19: Global Application of Antitrust Rules](#)

[Covid-19 and the EU State aid response](#)

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*Allen & Overy is advising clients on a range of coronavirus-related issues. For more information on the schemes discussed above or on the potential impact of coronavirus on your business or transaction, please speak to your usual A&O contact.*



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