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Questions Clients Are Asking About COVID-19

US Outlook: Top Questions About Criminal And Internal Investigations Following The Coronavirus Outbreak

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The COVID-19 pandemic presents novel challenges to U.S. regulators investigating allegations of corporate misconduct. Companies currently under investigation or that may find themselves under investigation must be prepared for the new landscape. This memorandum analyzes some of the difficulties that COVID-19 likely will create for white-collar investigators, what companies can expect going forward, and some strategies companies can employ to protect their interests and achieve the best possible outcomes.

I. What are the most acute effects of COVID-19 on U.S. regulators' ability to investigate?

Beyond the impact that social-distancing measures and work-from-home expectations will have on prosecutors, law enforcement personnel, and other regulators, COVID-19 will have unique ramifications for investigators by limiting their access to courts, witnesses, and documents.

Access to courts. As courts around the country curtail operations, send staff to work from home, and impose other social-distancing measures, the government will find it increasingly difficult to obtain authorization for a number of investigative tactics. In the initial investigation stage (pre-indictment) prosecutors rely in significant part on the authorization of a grand jury, including to obtain relevant documents and compel witness testimony. To the extent courts do not permit gatherings of more than a specified number of people or impose other limitations on access to courthouses, grand juries may not be able to convene. As of March 18, 2020, for example, "no regular grand jury in [the Eastern District of New York] has had a quorum since March 13, 2020."[1] Some courts have adopted measures to facilitate remote meetings of grand juries, but such measures can only go so far consistent with grand jury secrecy requirements.[2] The Southern District of New York, for example, has authorized jurors to join grand jury sessions by video, but only from the S.D.N.Y. courthouse in White Plains, New York.[3] In other words, the accommodation only saves grand jurors from having to travel to the courthouse in Manhattan. Other restrictions on access to courthouses,[4] shelter-in-place orders from state and local governments, and, of course, infection and illness among sitting grand jurors will make it difficult for grand juries to convene even with accommodations for remote deliberations. And without regular access to grand juries, the government will find it difficult to obtain relevant documents, compel witness testimony, and ultimately obtain indictments.

Similarly, reduction in court operations will increase barriers for the government to employ investigative tactics that require authorization from a judge. These include, for example, searches, seizures, wire taps, and trap-and-trace devices. Courts will, of course, be available for such applications, but with skeleton staffs and other interference with normal procedures, they will not be able to review and rule on them nearly as quickly, and the resulting bottleneck will force prosecutors to be more selective about when to employ such tactics.

Access to witnesses. The government has an array of investigative methods that do not require authorization from a grand jury or a judge. For example, law enforcement agents may conduct in-person surveillance, recruit cooperators and other informants, and monitor certain aspects of individuals' communications (such as mail covers, which permit U.S. Postal Inspectors to record information contained on the outside of mail and packages) without a warrant to the extent these activities do not intrude on an area in which a person has a reasonable expectation of privacy. But as people spend increasingly less time outside their homes, warrantless investigative methods will be less effective because, with very few exceptions, incursion into a person's home is unconstitutional absent a warrant supported by probable cause.[5]

Even more significant than legal limitations, however, are the practical obstacles. Successful fraud, corruption, and other complex white-collar investigations typically require a cooperator who can guide investigators to incriminating documents and tie the evidence together, including before a jury. Identifying and turning cooperators, however, is a subtle and personal process. It is not uncommon for investigators to spend hours meeting in small conference rooms with a witness before reaching a cooperation agreement. Prosecutors use these meetings to evaluate the witness's credibility,

assess how she would present before a jury, and ultimately to establish a rapport that will lead to productive cooperation. Even with advances in videoconferencing technology, there is no substitute for sitting in the same room when attempting to achieve those ends. It seems unlikely that any prosecutor would enter into a cooperation agreement without meeting the witness in person. Social distancing thus will take a toll on the ability of investigators to develop new cooperators.

The same is true for investigators' ability to speak with non-informant witnesses. Law enforcement may find it more difficult to find opportunities to speak with such witnesses, which they often do by intercepting them during the workday when they are alone—for example, as the witness steps out of the office for lunch. While work-from-home measures may make it easier to locate witnesses, witnesses may be less inclined to invite investigators into their homes than they would be to speak to them in a restaurant. Similarly, prosecutors may face similar challenges in meeting with those witnesses to further investigations and develop new ones.

Access to documents. Taken together, limitations on the government's ability to access courts and witnesses will also make it difficult for the government to access documents. Grand jury subpoenas, seizures, and voluntary document productions are three key ways that investigators obtain evidence in complex white-collar investigations. With the obstacles described above, prosecutors will face a choice between, on the one hand, employing conventional investigative techniques that may proceed slowly and, on the other hand, relying more heavily on companies and other organizations that have access to evidence. For companies involved in investigations, this presents an important opportunity to assert control over the process by conducting an internal investigation.

II. How will COVID-19's interference with the government's ability to investigate affect companies under investigation?

Notwithstanding the challenges, prosecutors and law enforcement are sure to take steps to combat fraud, root out corruption, and prosecute culpable individuals during these unsettled times. As discussed in Quinn Emanuel's recent client alert, *Lessons From Historical Crises: Compliance Pitfalls To Avoid During The Coronavirus*, "[l]essons of history teach us that whether a crisis is made by man or nature, there will be an uptick in government investigations and funding for those purposes."[6] Companies that may come within the crosshairs of those investigations must be ready to implement response strategies that account for the changes caused by COVID-19. The good news is that disruption from the pandemic will give companies additional leverage to respond to government investigations.

Tolling agreements. As described in another recent alert, *Tolling Statutes of Limitations During COVID-19 Pandemic*, absent congressional action, there is little the government can do to extend statutes of limitations.[7] As a result, and in light of pandemic-related impediments to investigators' ability to move quickly described above, the government will likely have to ask companies with greater regularity to agree to toll applicable limitations periods, thereby giving the government more time to investigate. Whether it makes sense to enter into a tolling agreement depends heavily on the circumstances of a given case, and there is no one-size-fits-all approach. To be sure, however, companies will have additional leverage when negotiating such agreements.

Self-reporting. Similarly, companies that uncover wrongdoing on their own will face a different calculus in determining whether to self-report. As investigators spend precious resources to move investigations delayed by the pandemic forward and shift priorities to focus on fraud arising out

of the COVID-19 pandemic itself, companies may conclude that prosecutors are unlikely to be interested in or able to pursue the matter on which the company would self-report. That, of course, can cut both ways. If prosecutors are unlikely to pursue the case, the negative consequences to the company from investigators learning of the misconduct independently could be less severe. But by the same logic, self-reporting should likewise lead to less severe consequences for the company, while at the same time providing protection to the company consistent with policies encouraging self-reporting. Either approach offers benefits that did not previously exist.

Internal investigations. Perhaps most significant, however, is that investigators who cannot pursue investigations on their own will look to companies for assistance. Company-financed internal investigations already are a mainstay of complex white-collar investigations. U.S. law imposes liability on organizations for criminal acts of their employees committed in the course of their employment.[8] The Justice Department has made clear that among its most important missions is to seek "accountability from the individuals who perpetrate[]" corporate wrongdoing, and "[i]n order for a company to receive any consideration for cooperation . . . , the company must completely disclose to the Department all relevant facts about individual misconduct."[9] Companies thus have a powerful incentive to expend significant time, resources, and money to conduct internal investigations in order to appease prosecutors, and white-collar investigators often rely heavily on those investigations to produce cases they can prosecute. The added challenges that COVID-19 will create for the government in conducting complex white-collar investigations will increase prosecutor's reliance on company-financed internal investigations. This presents a significant opportunity for companies facing scrutiny from law enforcement and other regulators.

III. What risks do companies face when they retain their go-to corporate law firms to conduct internal investigations?

Conducted properly and with appropriate sensitivity to prosecutors' interests and concerns, an internal investigation can empower a company to guide the process and minimize fallout from past misconduct. Executed poorly, however, internal investigations can compound errors of the past and make a bad situation worse.

One of the most important decisions a company makes when it is facing an actual or potential government investigation is whether to retain outside counsel and, if so, whom. Given the sensitivity of criminal and regulatory investigations, as well as the accompanying high stakes, many companies turn to their longtime corporate legal counsel for assistance. Often that firm will be familiar with the company's culture, management structures, important corporate transactions, and compliance protocols, and it might even have advised the company regarding the subject of the government's interest. There is a natural tendency in tense, often fast-moving situations like government investigations to assume that lawyers from that firm will have a shorter learning curve, easier coordination between the firm's white-collar and other lawyers, and a greater investment in defending the client's position.

But there are drawbacks to this approach. In a complex criminal investigation, a company's longtime corporate counsel can become subject to ethical conflicts, confirmation bias, divergent incentives, and other issues that may produce a suboptimal result for the client.

Ethical conflicts. Ethical conflicts are particularly common where the firm has advised the company on an issue relevant to the investigation. Where the same firm then conducts the internal

investigation, those lawyers could be required to conduct non-privileged and potentially hostile interviews of the same executives the lawyers previously advised. And to make matters worse, executives implicated in the investigation could point to the firm's advice as a defense to potential criminal charges, thereby turning lawyers from the firm into relevant fact witnesses—a thorny and ultimately unnecessary problem.

Cognitive biases. Beyond formal conflicts, however, are the biases that a company's longtime outside counsel can bring to an investigation. All people (including lawyers) rely on mental shortcuts in analyzing problems and making decisions. Psychologists have developed a lexicon for these processes, which include phenomena such as the "framing effect," in which seemingly rational choices can be manipulated by the way in which the choices are presented;[10] "anchoring bias," in which a rational actor places outsize emphasis on an initial estimate or starting point;[11] and "confirmation bias," in which a person evaluates evidence through a lens that is favorable to a preconceived notion.[12]

A company's go-to outside counsel is particularly vulnerable to confirmation bias. Courts have recognized that "[m]otivated reasoning, motivated remembering, and confirmation bias are part of the human condition."[13] Like anyone, lawyers are reluctant to conclude that the people with whom they have longstanding relationships have committed wrongdoing. As a result, lawyers conducting an internal investigation for an institutional client may be biased, however imperceptibly, to emphasize evidence that points to the innocence of the individuals whom those lawyers have advised, interacted with, and developed relationships with over time. This is particularly true where the lawyers' own advice and conduct are implicated in the investigation. Even where the lawyers conducting the investigation do not include the relationship partner or other firm lawyers who have advised the company in the past, the investigating lawyers still may be inclined to believe that their colleagues provided sound advice and that the client acted appropriately, rather than objectively assessing the facts and identifying potential wrongdoing.

Divergent incentives. Aside from confirmation bias, there are powerful incentives that can distort a law firm's decisionmaking when conducting an internal investigation for an institutional client for whom they have long provided corporate governance, compliance, transactional, or other advice. Even where the firm's lawyers can acknowledge, for example, misconduct by the executives from whom the lawyers have taken instructions or widespread systemic misconduct at the company, confronting those issues creates tricky reputational and financial problems for the firm. For one, the firm may be concerned about embarrassment resulting from the revelation that systemic problems or misconduct by high-level decisionmakers occurred under the firm's nose. Similarly, the firm might fear that the company's board of directors or other executives not implicated in misconduct will blame the firm, thereby jeopardizing the firm's relationship with the company going forward.

These risks are not merely theoretical. For example, a hedge fund under investigation for market timing and late trading practices retained as its defense counsel the same firm that had advised it in the transaction that had come under scrutiny.[14] It later alleged in a malpractice suit that the firm insisted on defending its advice to the fund on the merits, rather than asserting an advice-of-counsel defense, which could have disqualified the firm from acting as counsel in that matter and made its attorney-client communications and work product discoverable.[15]

Simply put, a law firm operating under a "one firm" approach has a strong interest in defending and preserving the status quo, whether or not the status quo is in the client's best interest.

This is not to impugn full-service firms that develop longstanding relationships with institutional clients, or to suggest misconduct or ill will on their part. It is simply a recognition of innate cognitive biases, reluctance or inability to pursue defenses like advice of counsel, and other limitations on the firm's ability to provide zealous, unconflicted advocacy for the client.

Independent counsel is better suited to advise companies as they navigate criminal and regulatory investigations. Unburdened by prior decisions and without preconceived notions about company executives, compliance programs, and other corporate systems, independent counsel is better suited to ask the difficult (but necessary) questions, confront systemic failures, and provide effective legal advice. This does not mean that a company facing an investigation necessarily should hire a law firm it has never worked with before. Prior engagements for discrete matters where the firm has particular expertise will not create the kind of problems that may arise with firms that regularly handle a company's corporate matters.

Finally, in addition to providing better advice, independent investigative counsel typically will have greater credibility with their government counterparts. Prosecutors and investigators are acutely aware of the issues described above, having learned through hard experience the ways in which cognitive biases, ethical conflicts, and divergent interests can work against the interests of a company under investigation. When independent counsel can appear as honest brokers, retained to help the company turn the page on past misconduct and empowered to root out wrongdoers, prosecutors have more confidence in the result of the internal investigation. In particular given prosecutors' increased reliance on internal investigations due to COVID-19, this will lead to a better result for the company.

IV. What industries are regulators likely to target in the aftermath of the pandemic?

The changes described above will affect every company facing an investigation, and companies should be prepared to avail themselves of response strategies that are calibrated to the new investigative dynamic. Nevertheless, some industries are likely to come under greater scrutiny as existing investigations advance and new ones commence.

Recipients of stimulus funds. As discussed in our firm's client alert, *CARES Act Economic Stabilization Package—Oversight Mechanisms & Anti-Fraud Provisions*, the recent stimulus bill contains a number of significant oversight mechanisms, including a special inspector general and congressional oversight committee, both modeled on the Troubled Asset Relief Program passed in response to the 2008 financial crisis.[16] Anyone who receives funds pursuant to the CARES Act will be subject to such oversight.[17] And if these offices fulfill their duties nearly as zealously as their TARP predecessors, significant recipients of CARES Act funds should expect dogged investigations into the use of those funds.

Healthcare companies. Beyond CARES Act-related investigations, companies in a number of other industries can expect increased scrutiny. Media attention and public outrage often precipitate government investigations. In light of public perception that there is a shortage of medical supplies such as ventilators and face masks, medical supplies manufacturers and other companies in the healthcare supply chain—many of which already were under close regulatory scrutiny in recent years—are likely to see redoubled efforts from investigators to identify and prosecute fraud and other misconduct. Pharmaceutical companies, hospitals, health insurers, pharmacy benefit managers, and other players in the healthcare industry all should be prepared.

Manufacturers. Other manufacturers, particularly those with plants overseas, may also receive additional attention from investigators. As COVID-19 infections wax and wane over the coming months, and governments impose and lift social-distancing measures, manufacturers may seek to stay ahead of the curve by shifting production to factories in different locations. Under the best circumstances, opening a new manufacturing facility, particularly in low- and middle-income countries, creates antibribery, economic sanctions, human rights, and other risks. These risks are even more acute in times of crisis such as now, and investigators will keep a close watch on manufacturing companies to see if they are cutting corners.

Companies that retain consumer data. Working from home creates an additional compliance risk that will receive attention from regulators: data privacy. With employees working outside the confines of intranets, oversight from IT managers, and other controls designed to keep data secure, companies face substantial risk of data breaches and other cybersecurity mishaps. Retailers, payment processors, e-commerce sites, cloud computing services, and other businesses that retain consumer data will be investigated closely if they fall victim to a data breach.

V. How will COVID-19 affect the way companies conduct internal investigations?

Internal investigation traditionally have relied heavily on having "boots on the ground." When onsite, lawyers and other professionals could (1) collect relevant data, including physical documents and personal electronic devices; (2) analyze sensitive material that, for legal or security reasons, cannot be transmitted across borders; (3) interview key witnesses; and (4) present findings of an investigation, either to the highest levels of the company or to regulators. COVID-19 will have an impact on each of these.

Data collection and protection. Even well into the age of electronic discovery, evidence collection and preservation remains largely local. This applies to physical documents, personal electronic devices, and often the company's electronic data, which may be accessible and exportable only from the company's premises. Social-distancing measures pose challenges not only for collecting data to make it available for an existing investigation, but also to safeguarding it for future investigations.

For investigations that must be extended past their anticipated finish dates, counsel should ensure that existing document preservation notices and litigation holds are broad enough to cover any delays in concluding an investigation. Counsel should also extend deadlines for the resumption of routine data deletion policies, and should consider reissuing document preservation notices to affected employees to ensure they remain aware of their ongoing obligations.

Analysis. In countries and industries with strict privacy or data protection laws, it can be difficult to review documents remotely. Countries such as Switzerland, for example, have strict secrecy and other data privacy laws that, in certain circumstances, make it a criminal offense to make data available outside the country without authorization from affected individuals. In the past, companies with documents located in Switzerland had to conduct large, onsite document reviews in order to comply with these laws.

Even if local regulations and social distancing restrictions make it impossible to directly review the relevant data, counsel can take preparatory steps necessary to resume existing investigations once

restrictions are lifted. Counsel should ensure that all relevant data is collected and processed for review, is available on short notice (if it has been archived temporarily for cost-savings), and all team members know their priority assignments once work is able to resume.

Interviews: The traditional investigation model relies on in-person interviews to gather information and assess witness credibility. Just as telephone or video conferences is an imperfect substitute for prosecutors, so too are such conferences for internal investigators. Moreover, remote interviews may pose additional challenges for internal investigations, such as preventing witnesses from disseminating documents used during the interview and maintaining applicable legal privileges if counsel cannot guarantee that third parties are not present for the interview.

If counsel determines that interviews should go forward in the current environment, counsel should take special precautions to ensure (1) that any documents used during the interviews are not inappropriately transmitted to third parties; and (2) any attorney-client privilege associated with the interview is not inadvertently waived due to the presence of third parties. To that end, the use of video conferencing for remote interviews is highly encouraged, not only to better determine credibility, but also to ensure that the witness is alone and is not improperly consulting third parties during the interview. Counsel should also consider secure screen-sharing and document transmittal technologies (see below), and even consider non-disclosure agreements for the most sensitive interviews.

Presentation. The conclusion of an investigation often is a formal presentation to a company's executive committee or board of directors, or to law enforcement or regulators. Traditionally, these have been done in person, which not only shows the seriousness with which the company takes the matter but to enable counsel to observe reactions and adjust accordingly. Additionally, there are times when it is preferable not to have a comprehensive written record at the end of an investigation, either because the matter is relatively small or because such record may be vulnerable to discovery at a later time.

In-person final presentations are unlikely to permanently give way to video conferences, simply given the stakes involved. However, should travel restrictions continue significantly longer than currently anticipated, many of the same video conferencing and screen sharing technology used for witness interviews can be used for presentations. Screen sharing can be especially useful for presentations in which counsel does not want to provide regulators with copies of the work product.

VI. How can companies prepare for the post-pandemic investigatory landscape?

Evaluate and update compliance protocols. The Justice Department in recent years has emphasized the importance of corporate compliance programs, even including it as a basis to decline to prosecute a company or reduce the penalty imposed.[18] For example, in 2019, the Justice Department declined to prosecute Cognizant Technology Solutions, an information technology service provider, even though prosecutors pursued criminal charges against the company's former president and chief legal officer. The Justice Department indicated that it had done so, among other reasons, due to "the existence and effectiveness of [Cognizant]'s pre-existing compliance program."[19] For the vast majority of companies, COVID-19 will cause significant changes to the way they run their businesses, which will in turn require changes to their compliance program to reflect that reality. An important corollary to ensuring compliance programs are appropriate is creating a record of the company's compliance efforts.

Assess the urgency of internal investigations. Companies should take stock of all ongoing internal investigations, including what stage they are in and how much and what type of work remains. For each investigation, determine which, if any, element of the investigation can be accomplished effectively right now. While making progress where feasible, prepare to resume other aspects of the investigation as soon as possible. For example, where a company anticipates layoffs that could affect relevant witnesses, counsel should have a plan to preserve those individuals' data (including physical documents) and a means to interview them.

Document key steps and decisions made in conducting internal investigations. Relatedly, companies and their counsel should redouble their efforts to document all key decisions, including measures taken and those considered but not taken. This is important because, particularly when working remotely, information will need to be disseminated to decisionmakers who will be in multiple locations with greater barriers to communication and collaboration. Similarly, as noted above, staffing can change quickly, either due to company action or due to illness. It is critical that all necessary information be recorded and accessible to current employees and new team members.

Invest in technology that facilitates remote communication, document collection, and review. The pandemic has highlighted how an effective technology suite—such as virtual private networks, video conferencing software, and well-staffed IT departments—can provide invaluable support to employees that suddenly must work from home more than usual. This can also pay dividends in the context of an investigation. The ability to collect, search, analyze, and extract electronic data in-house would reduce reliance on outside e-discovery firms, likely reducing costs associated with investigations. Video conferencing and screen sharing applications allow witness interviews or presentations to prosecutors while minimizing the risk that a witness surreptitiously copies the documents or that you have to leave with prosecutors copies of work product that the company is not prepared to share. Companies should also update their data retention policies to account for large numbers of employees working remotely, and they must enforce those policies in order to ensure they preserve data that might later be useful.

Remain opportunistic in the face of uncertainty. Though disruptive now, the coronavirus epidemic and the measures taken in response may ultimately herald a sea-change in how modern investigations are undertaken. In the short-term, there are challenges to be overcome, but counsel may find that the advantages of more and more effective remote work outweigh the negatives. Remote investigations can be both effective and cost-efficient, and the current restrictions provide a good opportunity to rethink the existing investigations model and develop a more resilient practice.

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This memorandum addresses only a few of the potential changes that COVID-19 will cause in the world of white-collar criminal and regulatory investigations. If you have any questions about the issues addressed in this memorandum or otherwise, please contact us to discuss further.

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[1] *See* Administrative Order 2020-11, *In re: Coronavirus/COVID-19 Pandemic* (E.D.N.Y. Mar. 18, 2020), https://img.nyed.uscourts.gov/files/general-ordes/AO%202020-11.pdf.

[2] *See* Fed. R. Crim. P. 6(e)(2)(B) (prohibiting disclosure of matters occurring before a grand jury).

[3] *See* Standing Order, *In re: Coronavirus/COVID-19 Pandemic*, 20 Misc. 168 (S.D.N.Y. Mar. 20, 2020), https://www.law360.com/articles/1255774/attachments/0.

[4] *See, e.g.*, Standing Order, *In re: Coronavirus/COVID-19 Pandemic*, 20 Misc. 138 (S.D.N.Y. Mar. 13, 2020) (listing restrictions on visitors to courthouses), https://www.nysd.uscourts.gov/sites/default/files/2020-03/Second%20Amended%20Standing%20Order_Visitors%20to%20the%20Courthouses_%2020%20MISC%20138.pdf.

[5] *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." (quotation marks and citations omitted)).

[6] Quinn Emanuel Firm Memorandum, *Lessons From Historical Crises: Compliance Pitfalls To Avoid During The Coronavirus*, https://www.quinnemanuel.com/media/1420010/client-alert-compliance-pitfalls-to-avoid-during-the-coronavirus.pdf.

[7] Quinn Emanuel Firm Memorandum, *Tolling Statutes of Limitations During COVID-19 Pandemic*, https://www.quinnemanuel.com/media/1419991/client-alert-tolling-statutes-of-limitations-during-covid-19-pandemic-1.pdf.

[8] *See, e.g.*, *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970–71 (D.C. Cir. 1998) ("Where there is adequate evidence for imputation" of an employee's criminal acts to the corporation, "the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.").

[9] Dep. Att'y Gen. Sally Yates, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download (also known as the Yates Memo). Emphasis in original. *See also* Dep. Att'y Gen. Rod Rosenstein, *Remarks at the 34th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2017) ("Effective deterrence of corporate corruption requires prosecution of culpable individuals. . . . [The Foreign Corrupt Practices Act Corporate Enforcement Policy] will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals. . . . [Cooperation and remediation] assist the Department in running an efficient investigation that identifies culpable individuals."), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[10] Daniel Kahneman & Amos Tversky, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453 (1981).

[11] Daniel Kahneman & Amos Tversky, *Judgment and Uncertainty: Heuristic and Biases*, 185 Science 1124 (1974).

[12] Scott O. Lilienfeld, Rachel Ammirati, & Kristin Landfield, *Giving debiasing away: Can psychological research on correcting cognitive errors promote human welfare?*, 4 *Perspectives on Psychological Science* 390 (2009).

[13] *Oxbow Carbon LLC Unitholder Litigation*, No. CV 12447-VCL, 2017 WL 3207155, at *6 (Del. Ch. July 28, 2017); *see also Mitchell v. State*, 454 P.3d 805, 812 (Or. Ct. App. 2019) (in evaluating a claim of ineffective assistance of counsel, "we must be aware of the distorting effect of hindsight, which includes a risk of confirmation bias, that is, a risk that, in hindsight, there may be a tendency to view counsel's errors as having had no effect on what may seem to have been an inevitable or foreordained outcome" (quotation marks and citations omitted)); *United States v. Bonds*, 922 F.3d 343, 345 (7th Cir. 2019) (noting the "serious risk of confirmation bias" in fingerprint analysis and describing measures examiners should take to minimize the impact of such bias).

[14] *See Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP*, 52 A.D.3d 370 (N.Y. 1st Dep't 2008).

[15] *See, e.g.*, N.Y.R. Prof. Conduct 3.7 (with limited exceptions, a "lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact"); *In re County of Erie*, 546 F.3d 222, 228 (2d Cir. 2008) (waiver occurs "when a client asserts reliance on an attorney's advice as an element of a claim or defense").

[16] Quinn Emanuel Firm Memorandum, *CARES Act Economic Stabilization Package—Oversight Mechanisms & Anti-Fraud Provisions*, https://www.quinnemanuel.com/the-firm/publications/cares-act-economic-stabilization-package-oversight-mechanisms-anti-fraud-provisions/.

[17] *See id.*

[18] *See, e.g.*, Justice Manual § 9-47.120, FCPA Corporate Enforcement Policy (discussing importance of compliance programs); Justice Manual § 9-28.800, Corporate Compliance Programs (same).

[19] Declination Letter, Cognizant Technology Solutions Corporation (Feb. 13, 2019), https://www.justice.gov/criminal-fraud/file/1132666/download.