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MEMORANDUM

From: Douglas A. Fellman
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Date: April 24, 2020

Re: Chipotle Mexican Grill Enters into Deferred Prosecution Agreement to Resolve Charges Related to Foodborne Illness Outbreaks

On April 21, 2020, Chipotle Mexican Grill, Inc. (“Chipotle”) and the U.S. Department of Justice (“DOJ”) entered into a three-year deferred prosecution agreement (“DPA”) in connection with norovirus and *Clostridium perfringens* outbreaks that occurred between August 2015 and July 2018. Chipotle agreed to pay \$25 million in criminal fines and implement a number of systematic changes to its food safety procedures. Below we provide the facts of the case, the terms of the agreement, and key takeaways.

Facts of the Case

The following are a summary of some significant facts of the case, as set out in the Statement of Facts agreed to by Chipotle in the DPA:

From approximately 2015 to 2018, Chipotle faced at least five food safety incidents at various restaurants around the country, which stemmed primarily from the store-level employees’ failure to follow Chipotle’s food safety policies and procedures. These included the policy requiring the exclusion of restaurant employees who were sick or recently had been sick, as well as a failure by restaurant employees to hold food at appropriate temperatures to prevent and control for the growth of foodborne pathogens. These failures contributed to norovirus outbreaks in late 2015 and 2017 at four Chipotle restaurants, as well as one outbreak of foodborne illness related to *Clostridium perfringens* in July 2018. Collectively, more than 1,100 people reported becoming ill in connection with these incidents.

Terms of the Deferred Prosecution Agreement

It should be highlighted that the agreement between Chipotle and the Department of Justice did not result in a conviction. Instead, the agreement between the parties is a DPA, which is a mechanism

sometimes utilized by DOJ to resolve criminal investigations. A DPA involves an admission of certain facts constituting the elements of an offense, but it differs from a conviction insofar as DOJ agrees to “defer” prosecution subject to the company abiding by the terms of the agreement over a period of years. If the company successfully abides by the terms, what would otherwise have been the charges are dropped and a prosecution is not pursued. What remains significant about a DPA, however, is that the court retains jurisdiction until the charges are dropped and therefore has oversight over the matter.

Under the terms of Chipotle’s DPA, the company must comply with the terms of the agreement for a period of three years. Under the agreement, Chipotle must:

- Agree to a filing charging the company with causing food to become adulterated and holding adulterated food for sale in violation of the Federal Food, Drug, and Cosmetic Act (“FFDCA”), 21 U.S.C. §§ 321(f), 342(a)(4) (which will be dismissed if Chipotle complies with the terms of the agreement);
- Pay a total criminal fine of \$25 million;
- Not commit any other federal crime during the three-year period covered by the agreement, which would include criminal violations of the FFDCA; and
- Not contest any facts or information in the DPA.

In addition to the terms above, one notable provision of the DPA involves the development and implementation of an enhanced compliance program – which would be in effect for the duration of the three-year period – featuring the following key requirements:

- Chipotle must, in consultation with its Food Safety Council (which had been in place since 2017, before the DPA was reached), maintain a compliance program to ensure that the company complies with all applicable federal and state food safety laws, including, but not limited to, the FFDCA.
- In consultation with its Food Safety Council and any other independent contractor or consultant it may choose to retain, Chipotle must: conduct a root cause analysis of the failures related to the outbreaks described in the agreement; review its approach to food safety audits; evaluate its own compliance program in light of its business model; review existing training policies and procedures for all hourly staff; and other specific requirements for the five restaurants discussed in the factual stipulation, all within six months of the date of the DPA and documented in a comprehensive report (called a “Food Safety Plan”) that will be shared with the DOJ and FDA, upon request.
- After the initial review described above, Chipotle must engage in a similar analysis and documented Food Safety Plans for all Chipotle restaurants on an annual basis, which shall be available to DOJ and FDA, upon request.
- Chipotle must annually certify that it is in compliance with these terms.

As is typical for a DPA, if Chipotle is in full compliance with all of its obligations under the DPA at the conclusion of the three-year deferred prosecution term, including the provisions with respect to its compliance program, the government will move to dismiss the information and will not further prosecute Chipotle for criminal and/or civil violations arising out of its conduct.

Key Takeaways

First and foremost, the case demonstrates that the Department of Justice continues to actively investigate companies criminally in the food industry, when in its discretion it determines such investigations are warranted.

In this particular case, although the \$25 million criminal fine is the largest ever in a food safety case, Chipotle was able to avoid a conviction based on factors, it appears, including that the conduct at issue primarily stemmed from store-level employees' failure to follow company food safety protocols. In addition, DOJ took into account the fact that Chipotle has improved food safety at its restaurants since 2015, including in the following ways:

- Developing new food safety practices designed to address the threat of norovirus and other pathogens;
- Implementing a Food Safety Advisory Council made up of independent food safety experts to evaluate the company's procedures and make regular recommendations to corporate officers;
- Continuing to evaluate additional food safety enhancements, including its ongoing evaluation of improved, automated HACCP monitoring systems as well as an automated wellness check system for employees; and
- Continuing regular, internal and third-party food safety inspections and audits.

Moreover, the matter serves as an important reminder that the obligations under the FFDCA extend to food service establishments, not just food manufacturers. It also highlights why it is important for restaurants and members of the food service industry to ensure that managers and employees consistently follow food safety policies, including through regular trainings intended to identify areas of improvement and correction.

Finally, the settlement by itself does not offer much direct guidance about the food safety programs that restaurants need to follow, although DOJ does not typically provide direct proactive guidance to an industry. It remains to be seen whether FDA will use this settlement as an opportunity to provide more direct guidance to food service establishments regarding food safety programs.

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Should you have any questions, please contact us.