

## **Big Brother Is Suing You Trends in Government Enforcement Actions**

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No company welcomes government scrutiny into their operations. Whether it is a formal subpoena or investigative demand or an informal request for information, inquiries from the government disrupt business as usual and cost money. And when government investigations become enforcement actions, they can create public relations nightmares and potentially expose the company—and its employees—to civil and criminal liability.

In this article, we discuss current trends in government enforcement actions to highlight areas where increased enforcement activities are expected and robust compliance programs are particularly worthwhile.

### **Corporate Criminal Enforcement**

There has been a massive increase in public corruption enforcement, both criminal and civil, focusing not just on government officials but companies and corporate executives connected to government funds. Public corruption is a top priority for the U.S. Department of Justice (“DOJ”), which has shown its willingness to use aggressive tactics.

We have also seen more forceful corporate criminal enforcement generally, with a focus on public corruption but spanning all areas. In a 2021 address to the ABA’s National Institute on White Collar Crime, Deputy Attorney General Lisa O. Monaco announced changes in the government’s corporate criminal enforcement policies. She reaffirmed that the DOJ would hold those who break the law accountable, and that accountability “starts with the individuals responsible for criminal conduct.” *See* Press Release, US Dep’t of Just., *Remarks As Prepared for Delivery, Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA’s 36th National Institute on White Collar Crime*, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>. Accordingly, she directed the department to “restore prior guidance making clear that to be eligible for any cooperation credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue,” regardless of their position, status, or seniority. *Id.* Deputy Attorney General Monaco re-emphasized the DOJ’s focus on corporate crime during her 2023 remarks. *See* Press Release, US Dep’t of Just., *Remarks as Prepared for Delivery, Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime*, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>.

Deputy Attorney General Monaco also emphasized the importance of companies to actively review their compliance programs and proactively invest in them to ensure they adequately monitor for and remediate misconduct. *Id.* The government is increasingly scrutinizing corporate compliance policies to determine whether corporations themselves should be held criminally liable for individual conduct. The Serious Fraud Office has been increasing enforcement, and has noted that large corporations will be held criminally liable if an employee commits fraud for the

corporation's benefit and the corporation does not have reasonable procedures in place to prevent fraud.

Along with that stick, there is also a carrot: Those companies that voluntarily self-disclose potential wrongdoing by employees or agents "prior to an imminent threat of disclosure or government investigation" will receive "resolutions under more favorable terms than if the government had learned of the misconduct through other means," according to the government. *See* U.S. Attys' Offices Voluntary Self-Disclosure Policy, available at <https://www.justice.gov/usao-edny/press-release/file/1569406/download>. Time will tell how this is applied in practice; in actuality, cooperation may not gain companies much, particularly where the government is looking to create a general deterrence effect.

### **Foreign Exports, Sales, and Connections**

Export control and sanctions enforcement has increased, affecting both domestic companies and those with foreign affiliates. This includes investigation of illegal diversion of technology to China, Iran, Russia, and North Korea, with particular focus surrounding enforcement of export controls on Russia in response to its invasion of Ukraine. *See, e.g.,* US Dep't of Comm., *Resources on Export Controls Implemented In Response to Russia's Invasion of Ukraine*, available at <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/russia-belarus>.

Moreover, there is a significant uptick in Foreign Corrupt Practices Act (FCPA) enforcement, and global cooperation among law enforcement agencies is growing. Again, companies are incentivized to self-disclose and do so promptly.

### **Antitrust**

There has been a general decrease in criminal antitrust enforcement in volume, size of fines, and length of prison sentences. *See* US Dep't of Just., Antitrust Division, *Criminal Enforcement Trends Charts*, available at <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>. Criminal enforcement has generally shifted away from corporate liability, correlated with decreased funding since 2010. *See* Washington Center for Equitable Growth, *The State of U.S. Federal Antitrust Enforcement*, available at <https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true>.

One glaring exception, however, appears to be with respect to large corporations, particularly in tech, where antitrust scrutiny has increased. A much-publicized example is regulators' attention to Ticketmaster's dominant position after the company's sale of Taylor Swift tickets in 2022 was riddled with problems. At the time, U.S. Senator Amy Klobuchar, chair of the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, said, "The high fees, site disruptions, and cancellations that customers experienced shows how Ticketmaster's dominant market position means the company does not face any pressure to continually innovate and improve." *See* Press Release, U.S. Senator Amy Klobuchar, *Chairwoman Klobuchar, Ranking Member Lee Announce Hearing on Lack of Competition in Ticketing Markets*, available at <https://www.klobuchar.senate.gov/public/index.cfm/2022/11/chairwoman-klobuchar-ranking-member-lee-announce-hearing-on-lack-of-competition-in-ticketing-markets>.

Additionally, there has been scrutiny of large mergers in many industries as a draft of new merger guidelines was recently released for public comment. Assistant Attorney General Jonathan Kanter of the Antitrust Division commented, “As markets and commercial realities change, it is vital that we adapt our law enforcement tools to keep pace so that we can protect competition in a manner that reflects the intricacies of our modern economy.” See Press Release, Federal Trade Comm., *FTC and DOJ Seek Comment on Draft Merger Guidelines*, available at <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines>.

## **Healthcare**

U.S. Food and Drug Administration (“FDA”) inspections have returned to pre-pandemic levels and are expected to increase, affecting the food and healthcare industries. At the same time, the FDA’s use of Remote Regulatory Inspections, instituted during COVID, will continue. All types of inspections may be problematic for industries where key personnel may have left or are inexperienced in inspections after years of not seeing them. Companies should take steps to ensure they are ready to respond to any inspection, whether in person or remote. They should also ensure they respond thoroughly to whistleblowers, thoroughly documenting the efforts they have taken to address whistleblowers’ concerns, as the number of large investigations of these concerns is likely to rise. The FDA has also begun to conduct unannounced inspections of pharmaceutical manufacturers in India, where, along with China, most overseas drug facilities are found. (Unannounced inspections in China are expected to follow.)

Life sciences companies are expected to see a higher level of enforcement activities directed against them under the FCPA, including about overseas clinical trials. Even routine healthcare sector activities such as arranging for foreign nationals to attend overseas conferences, educational events, or facility visits have been targeted for enforcement action, as happened with a major multinational corporation this year. See US Securities & Exchange Comm., *SEC Enforcement Actions: FCPA Cases*, available at <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases>.

Meanwhile, state attorneys general are becoming increasingly active, especially on trade and pricing practices, as well as anticompetitive practices enforcement, particularly in the healthcare space. See, e.g., Minnesota House of Representatives, *House Okes Beefed-Up State Oversight of Proposed Health Care Sales, Mergers*, available at <https://www.house.mn.gov/sessiondaily/Story/17988>.

## **Data Preservation**

The federal government is targeting financial institutions for failure to follow preservation obligations, including preservation of communications made on high ranking executives’ personal devices—i.e., smartphones. For example, the SEC charged sixteen Wall Street firms in September 2022 with widespread recordkeeping failures. It found that the firms’ employees “routinely communicated about business matters using text messaging applications on their personal devices,” and the firms did not maintain or preserve the majority of those off-channel communications, in violation of federal securities laws. See Press Release, U.S. Securities & Exchange Comm., *SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures*, available at <https://www.sec.gov/news/press-release/2022-174>.

## **Child Labor**

The nationwide problem of underage migrant workers being put to work illegally was exposed by the New York Times in early 2023, sparking a swift response from the Biden administration. *See* Hannah Dreier, *Biden Administration Plans Crackdown on Migrant Child Labor*, N.Y. Times, Feb. 27, 2023, available at <https://www.nytimes.com/2023/02/27/us/biden-child-labor.html>. In a February 2023 statement, the U.S. Department of Labor (“DOL”) reported seeing a nearly seventy percent increase in children employed illegally by companies since 2018, and pledged to target not just the factories that illegally hire children but the larger companies whose supply chains use child labor. *See* Press Release, U.S. Dep’t of Health and Human Servs., *Department of Labor and Health and Human Services Announce New Efforts to Combat Exploitative Child Labor*.

The DOL and parallel state agencies have increasingly cracked down on child labor violations starting in early 2023, including by obtaining an unprecedented and well-publicized \$1.5 million fine against a Wisconsin-based sanitation company that allegedly employed more than 100 children ages 13 to 17 to clean meat processing facilities on overnight shifts. *See* Press Release, US Dep’t of Labor, *More Than 100 Children Illegally Employed In Hazardous Jobs, Federal Investigation Finds; Food Sanitation Contractor Pays \$1.5M In Penalties*, available at <https://www.dol.gov/newsroom/releases/whd/whd20230217-1>.

From a compliance perspective, the issue of child labor is particularly troubling given the trend for underage workers to use false identification that passes the U.S. government’s E-Verify system to circumvent the age requirement. *See, e.g.,* Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. Times, Feb. 28, 2023, available at <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>. Verifying age is particularly difficult in the migrant context where individuals may misrepresent their age upon entering the country to gain more favorable treatment. Verifying age is so challenging, in fact, that one major media source recently retracted a story claiming to interview an underage migrant worker after traveling to Guatemala to obtain official documentation showing he was twenty-one. *See* NBC News, *Migrant Worker In NBC News Interview Is Older Than Previously Reported*, Apr. 12, 2023, available at <https://www.nbcnews.com/news/us-news/migrant-worker-older-than-previously-reported-rcna78539>.

## **Environment**

Environmental enforcement has seen a slight uptick recently amid a general downward trend of civil enforcement actions. The U.S. Environmental Protection Agency (“EPA”) reported its staffing resources have declined thirty percent in the last ten years. Yet the agency says it is determined to target “the most serious water, air, land, and chemical violations and hazards that impact communities across the country.” *See* US Environmental Protection Agency, *Enforcement and Compliance Annual Results for Fiscal Year 2022*, available at <https://www.epa.gov/enforcement/enforcement-and-compliance-annual-results-fiscal-year-2022>.

## **Securities**

The U.S. Securities and Exchange Commission (“SEC”) announced that its FY2022 enforcement actions had increased by nine percent, with a record-breaking \$6.4 billion in penalties. *See* Press Release, US Securities & Exchange Comm., *SEC Announces Enforcement Results for FY22*, available at <https://www.sec.gov/news/press-release/2022-206>. FY2022 saw the second-highest number of whistleblower awards in terms of both the number of individuals awarded and the total dollar amounts. *Id.*

These numbers reflect a much more aggressive approach with respect to investigations and willingness to litigate cases to trial. Such cases involve accounting and investing, cryptocurrency, “meme stocks,” mergers and acquisitions, Special Purpose Acquisition Companies (SPACs), cybersecurity, digital assets, insider trading, and more. *Id.* In one controversial approach, the SEC has once again insisted on factual and legal admissions of guilt in some settlements.

Additionally, we have seen increasing SEC enforcement of the healthcare industry, especially for insider trading, accounting, and disclosure-related offenses. One area that is likely to be a focus is in so-called “channel stuffing,” in which companies ship inventory ahead of schedule and record those shipments as sales, thereby inflating their revenue numbers.

## **Data Privacy**

FTC has increased enforcement both for data privacy violations as well as civil actions against companies for data breaches. In many of these cases, the FTC has charged the defendants with violating Section 5 of the FTC Act, which bars unfair and deceptive acts and practices in or affecting commerce. In one recent example, this year the agency required a major software company to pay \$20 million to settle charges that it violated the Children’s Online Privacy Protection Act (COPPA) by collecting personal information from children who signed up to its Xbox gaming system, unbeknownst to their parents.

## **Price Gouging**

Several state attorneys general have taken increasing action on price gouging, especially as it pertains to companies allegedly using the pandemic to justify price increases. These officials have varied in how they have used their authority to pursue enforcement, but in general, businesses that have maintained the proper paperwork regarding costs and promptly provided it when asked, as well as fully cooperated in other ways, have avoided drawn out investigations and minimized the threat of litigation.

## **Conclusion**

Companies and in-house counsel should be aware of these enforcement trends and consider them when reviewing and enhancing existing compliance programs to ensure they are appropriately limiting risk that a government inquiry will turn into a company-wide crisis.