

Executives at Risk: Winter 2020/2021

White Collar Alert

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Introduction

The fourth quarter of 2020 resulted in some significant developments in white collar cases impacting corporate executives, including:

- The first federal criminal antitrust charges targeting collusion in the labor market
- Cartel-related charges against executives in domestic investigations, including poultry and ready-mix concrete industries
- The settlements of four former Wells Fargo executives with the Office of the Comptroller of the Currency (OCC) for their role in the bank's systemic sales practices misconduct
- The guilty plea of the president of the International United Auto Workers Union (UAW) and settlement of the UAW for their roles in a scheme to embezzle union dues over a nearly 10-year period

All of this has unfolded against the backdrop of the global pandemic. Though the fall saw the resumption of criminal trials, including partial convictions of two former biopharmaceutical executives in the Southern District of New York (SDNY), in recent months, the pandemic has once again led to the shuttering of courthouses and delays of jury trials.

As we move into 2021, the most significant development is likely the start of a new administration. By all accounts, white collar criminal prosecutions were down significantly over the last four years both in terms of the number of prosecutions and total penalties. Many expect prosecutions to rebound under the Biden administration, though it will likely take months to see any appreciable increase.

Pandemic Update

Courts Again Suspend Jury Trials and Restrict Operations Due to COVID-19 : Last spring, courts across the country ceased in-person proceedings including jury trials. Over the summer some courts loosened these restrictions and held a limited number of jury trials into the last quarter of the year. For example, in November, the SDNY held its first white collar jury trial since the pandemic shuttered courthouses, delivering a mixed verdict to two former executives of biopharmaceutical company MiMedx who had been [charged](#) with securities fraud-related offenses. The jury [found](#) the former Chief Executive Officer (CEO) guilty of securities fraud but acquitted him on the conspiracy charge, while finding the former Chief Operating Officer (COO) guilty of conspiracy to commit securities fraud and acquitting him on the charge of securities fraud.

But as COVID-19 cases continue to rise and vaccination timelines remain unclear, courts are closing down again. The SDNY has [adjourned](#) jury trials scheduled between January 19 and February 12. The Eastern District of New York (EDNY), which had begun to seat juries, [backed off](#) of its phased reopening in November 2020 and has now [suspended](#) in-person proceedings through March 1. Jury trials remain suspended in federal courts across the country, including in Chicago, Los Angeles, and the District of Columbia.

Actions Against Executives

Cartel

Antitrust Division Brings Criminal Wage-Fixing and No-Poach Charges, Heightening Focus on Labor Market : In January, the U.S. Department of Justice's (DOJ) Antitrust Division [announced criminal charges](#) against a company for allegedly agreeing with competitors not to solicit each other's employees, referred to as a "no-poach" agreement. A Texas federal grand jury indicted Surgical Care Affiliates LLC (SCA), a subsidiary of United Health Care Group and the owner and operator of more than 200 outpatient medical care centers across the United States, and its related entity, for allegedly conspiring with other health care providers not to solicit each other's senior-level employees. The charges follow a December 2020 [indictment](#) alleging that Neeraj Jindal, the former owner of a Texas health care staffing company engaged in wage fixing by conspiring with competing health care staffing companies to lower the rates paid to physical therapists in Texas. He also was charged with obstruction of justice for allegedly making false and misleading statements during the government's investigation. The former executive faces up to 10 years in prison and a \$1 million fine for the antitrust charges, and an additional five years in prison and a \$250,000 fine for the obstruction charges.

The no-poach and wage-fixing charges represent a relatively new focus on alleged collusion in the labor market. DOJ claimed that it would investigate and potentially prosecute such conduct criminally since it issued its [Antitrust Guidance for Human Resources \(HR\) Professionals](#) in 2016 to assist professionals in the human resources sector to avoid running afoul of antitrust laws. Up until now, DOJ has only brought civil, rather than criminal, charges to resolve these cases.

Poultry Cartel Investigation Widens as Six More Executives Indicted : In October 2020, a Colorado federal grand jury [indicted](#) six additional executives of broiler chicken companies for their role in an alleged price-fixing and bid-rigging conspiracy to manipulate the price of chicken broilers sold to fast food restaurants and distribution centers over a seven-year period. They include the former president and CEO of Pilgrim's Pride, the sales director for Pilgrim's Pride, and a former sales executive for Tyson Food. The grand jury also charged the former Pilgrim's Pride sales director with obstruction of justice and making false statements. [As we previously reported](#), four executives of two major broiler chicken companies were indicted in June 2020, bringing the total number of individuals charged in the investigation to 10. They were: the sitting president and CEO and former vice president of Pilgrim's Pride and the sitting president and vice president of Claxton Poultry. In addition, in October 2020, Pilgrim's Pride announced that it

would [plead guilty](#) to participating in the price-fixing and bid-rigging scheme and agreed to pay a \$110.5 million criminal fine. The investigation stems from a class action lawsuit filed in the Northern District of Illinois in 2016, in which DOJ moved to intervene in June 2019.

Antitrust Division Charges Companies and Execs in Ready-Mix Concrete Investigation : In January, the Antitrust Division announced that it had entered into a [deferred prosecution agreement](#) (DPA) with ready-mix concrete producer Argos USA LLC (Argos) related to an alleged conspiracy to fix prices, rig bids, and allocate markets for sales of ready-mix concrete in Georgia between 2010 and 2016. Under the DPA, the company agreed to pay a \$20 million criminal fine, cooperate in the investigation, and adopt a compliance program to prevent and detect antitrust violations. In return, the Antitrust Division agreed to defer prosecuting the criminal charges during the pendency of the DPA. DPAs have become more common since the Antitrust Division announced a [change in policy](#) in July 2019 permitting the Division to resolve cases by DPA in order to incentivize corporate compliance. The charges against Argos follow on the September 2020 [indictments](#) of ready-mix concrete producer Evans Concrete LLC and four ready-mix concrete salesman, managers, and executives for participating in the alleged conspiracy.

Procurement Collusion Strike Force Brings First Charges, Expands Partnerships : In October 2020, the Antitrust Division announced [charges](#) against a North Carolina engineering company, Contech Engineered Solutions LLC, and a former executive of the company for allegedly participating in a conspiracy to rig bids and defraud the North Carolina Department of Transportation. The charges are the first attributable to DOJ's Procurement Collusion Strike Force (PCSF), a multi-agency task force created in November 2019 to identify, investigate, and prosecute bid-rigging in the government procurement process. In its first year of operation, the PCSF has trained more than 500 federal, state, and local government agencies in detecting government procurement bid rigging, which has resulted in the opening of several grand jury investigation but not resulted in criminal charges directly attributable to the strike force until now. The Antitrust Division also announced in October 2020 that it had [expanded its partnership](#) to an additional 11 agencies, including nine U.S. Attorney's Offices.

FCPA

Former Meat Industry Executives Settle with SEC While Company Pleads Guilty to Bribery Charge : In October 2020, Brazil-based holding company J&F Investimentos S.A. (J&F), [pled guilty](#) to conspiring to violate the anti-bribery provision of the Foreign Corrupt Practices Act (FCPA) and agreed to a \$256 million fine to DOJ. The same day, the U.S. Securities and Exchange Commission (SEC) [announced](#) a settlement with J&F, its co-owners Joesley and Wesley Batista, and global meat and protein producer JBS S.A. (JBS) to resolve books and records and internal accounting controls violations of the FCPA. JBS agreed to pay approximately \$27 million in disgorgement and the Batistas each agreed to pay \$550,000 in civil penalties. According to the SEC, the Batistas participated in a bribery scheme connected to JBS's acquisition of Pilgrim's Pride Corporation (a U.S.-based issuer) in which the Batistas made approximately \$150 million in bribe payments, partly derived from JBS operating accounts, for the benefit of Brazilian foreign officials. As part of the settlement, the parties agreed to a three-year self-reporting requirement on certain remedial actions and the Batistas agreed to take enhanced FCPA and ethics trainings.

Government Contracts Fraud

Government Contractor Executive Pleads Guilty to Conspiring to Bribe Pension Agency Official : In August 2020, James N. Girardi, the COO of a government contracting firm, [pled guilty](#) to conspiring to bribe a Pension Benefit Guaranty Corporation (PBGC) procurement official over a three year period. In January 2021, Girardi was [sentenced](#) to six months of home confinement and two years of probation for his role in the bribery scheme. Specifically, Girardi agreed to provide cash payments and other things of value, including a job worth \$1 million, to the PBGC public official in exchange for the official's efforts to steer government contracts to the firm. The government official helped the company draft a bid protest challenging a contract award to another company; provided the company with sensitive, non-public information; and provided assistance in pricing the company's contract proposals to the PBGC. PBGC ultimately awarded the firm a \$3.3 million government contract in 2016. In May 2020, the public official involved and the CEO of Girardi's firm [pled guilty](#) to similar offenses. The CEO is set to be sentenced on January 27.

Former Aviation Services CEO Indicted for Allegedly Defrauding U.S. Military Related to Afghanistan Contracts : In November

2020, an Alabama federal grand jury [indicted](#) the former CEO of aviation services subcontractor, AAL USA, in connection with two alleged schemes to defraud the U.S. Department of Defense (DoD) related to aviation contracts to support military efforts in Afghanistan. First, the former CEO allegedly placed his employees in labor categories for which they did not meet the minimum qualifications and directed them to obtain fraudulent credentials to substantiate their qualifications, causing the government to overpay for unqualified labor. In a second scheme, the CEO allegedly falsely billed the government for construction of a commercial aviation repair station, which was unrelated to any government contract. It remains to be seen whether the executive will fight the charges.

Securities and Accounting Fraud

Former Pharmaceutical CEO Charged with Insider Trading Over Teva Deal : In August, the former CEO of Auspex Pharmaceuticals Inc. (Auspex), Sepehr Sarshar, was charged by [DOJ](#) and [SEC](#) with insider trading for allegedly tipping friends and family ahead of the company's \$3.2 billion acquisition by Teva Pharmaceutical Industries Ltd. (Teva) in 2015. The former CEO allegedly passed material non-public information to several friends and family members – including a college friend, his then girlfriend, another long-time friend, and a close family relative – who made between \$300,000 (according to the SEC) and \$700,000 (according to DOJ) in combined profits off of the tip that Auspex's acquisition by Teva was proceeding. The stock price of Auspex jumped more than 70 percent upon the announcement of the acquisition by Teva. The CEO later allegedly made misstatements to the Financial Industry Regulatory Authority (FINRA) regarding its insider trading investigation into Auspex securities. The CEO has not yet entered a plea.

Fugitive Businessman to Pay \$5.3 Million in Insider Trading Case : In December, the U.S. District Court for the SDNY entered a [final consent judgment](#) against a fugitive Greek businessman, George Nikas, in connection with an alleged international insider trading scheme relating to trading in at least two public companies in advance of news that the companies were acquisition targets. The case [originated](#) from the SEC Market Abuse Unit's Analysis and Detection Center, which uses data analysis tools to detect suspicious trading patterns. According to the SEC's [complaint](#), the businessman allegedly received tips from an investment banker at a large investment bank and used the information to gain over \$2.6 million in illicit profits. The businessman agreed to pay the SEC \$5.3 million, while neither admitting nor denying the allegations of the complaint. He also faces [criminal charges](#) brought by the U.S. Attorney's Office for the SDNY.

Former SAE Exploration Executives Charged With Fraudulently Inflating Publicly Reported Revenue : In October 2020, the SEC [charged](#) the seismic data company SAE Exploration Holdings Inc. (SAE) and four of its top executives with fraudulently inflating revenue by approximately \$141 million. According to the [complaint](#), the executives misappropriated approximately \$12 million dollars from SAE and, using shell companies, secretly invested \$5.9 million into a company that they controlled. That company then allegedly used the misappropriated funds to pay SAE for an outstanding balance, "round-tripping" the misappropriated funds. The former executives allegedly paid themselves the other \$6 million dollars that they misappropriated. By recognizing revenue from the company SAE controlled, SAE allegedly overstated its revenue by approximately \$100 million. The same month, a criminal indictment against the SAE CEO was [unsealed](#) in the SDNY.

Domestic Bribery

Political Strategists Charged in Separate Schemes to Bribe Ohio, Illinois State Leaders : In October 2020, Jeffrey Longstreth, a longtime political strategist for former Speaker of the Ohio House of Representatives Larry Householder, and Juan Cespedes, a lobbyist hired by an energy company to allegedly funnel money to Householder's enterprise, [pled guilty](#) to their roles in the alleged racketeering conspiracy. As set out in the federal [indictment](#), which was [unsealed](#) in July 2020, Householder conspired with four strategists and lobbyists to pass and uphold a billion-dollar nuclear plant bailout. The co-conspirators allegedly received \$60 million through a 501(c)(4) entity secretly controlled by the former speaker, with funds disbursed to support political candidates as well as for the defendants' personal benefit. Some of these funds allegedly came from an Ohio-based public utility holding company that is unnamed in the indictment but is publicly reported to be FirstEnergy Corp. Following the October guilty pleas, FirstEnergy Corp. [terminated](#) its CEO, Charles E. Jones, as well as two other executives based on an internal review.

In November 2020, a federal grand jury in Illinois [indicted](#) the former CEO of Commonwealth Edison Company (ComEd), Anne Pramagiore, and three others for their roles in an alleged scheme to bribe the former Speaker of the Illinois House of Representatives. The government charges that the defendants arranged for jobs and contracts for the Illinois speaker's political allies and workers and created false documentation for payments in order to circumvent ComEd's internal controls. The indictment comes on the heels of ComEd's July 2020 [DPA](#) with DOJ, in which ComEd agreed to pay a \$200 million criminal penalty and engage in continuing remediation and cooperation with the government.

Tax

Former CEO Convicted of Willfully Failing to Report Foreign Bank Account : In December 2020, a federal court [ruled](#) that Arthur Bedrosian, the former CEO of generic drug company, Lannett Company, failed to disclose a Swiss bank account containing \$1.9 million when he filed his taxes in 2007. Federal law requires U.S. persons to report certain foreign financial accounts to the IRS by filing a Report of Foreign Bank and Financial Accounts (FBAR). The trial court initially ruled that the former CEO's conduct may have been negligent but not willful. On appeal, the Third Circuit ruled that the lower court improperly analyzed the former CEO's subjective intent and should have applied an objective standard to determine whether the former CEO's conduct was reckless, and therefore, willful. On remand, the lower court applied the objective standard and concluded that the former CEO knew or should have known the FBAR he filed was inaccurate and therefore acted willfully. The court found it significant that the former CEO's unreported account held a significant amount of money, the former CEO received advice from his tax preparer that he was breaking the law by not reporting his overseas account, and that he was a sophisticated and successful businessman. As a result, the former CEO faces penalties of up to half the amount of the account.

Financial Services CEO Pleads Guilty to Defrauding Shareholders Despite Decades-Long Ban on Working in the Industry : In October 2020, David Nava, the former CEO of Surf Financial Group LLC (Surf Financial), a California financial services firm, [pled guilty](#) to conspiring to defraud shareholders of publicly traded companies and operating an unlicensed money transmitting business (MTB) to transmit millions of dollars from foreign locations. Federal securities regulators had permanently banned the CEO from working in the securities industry in 1994. To carry out this scheme, the former CEO directed an attorney to prepare fraudulent legal opinions for the purpose of lifting restrictions on publicly traded companies so that he and others could sell seven million shares of stock. The former CEO also admitted that he used nominees in the transactions to ensure that he was, as he described it, a "ghost." In addition, the CEO pled guilty to falsifying his tax returns for 2014-2016 by knowingly underreporting Surf Financial's profits on such returns. Sentencing is set for March 2021.

Noteworthy Investigations

Four Former Wells Fargo Executives Settle Civil Charges with the OCC : In January 2021, the Office of the Comptroller of the Currency (OCC) [announced](#) a settlement with James Strother, the former general counsel of Wells Fargo Bank, N.A. (Wells Fargo), resulting in a cease and desist order against the former general counsel and a \$3.5 million civil penalty. Previously, the OCC [announced](#) settlements with three other former executives from Wells Fargo's Community Bank. The settlements include: (1) a prohibition order and \$925,000 civil money penalty to the former Community Bank Group Finance Officer, Matthew Raphaelson; (2) a personal cease and desist order and \$400,000 civil money penalty to the former Head of Community Bank Deposit Products Group, Kenneth Zimmerman; and (3) a personal cease and desist order and \$350,000 civil money penalty to the former Head of Community Bank Human Resources, Tracy Kidd. The OCC found that these executives knew or should have known about Wells Fargo's systemic sales practices misconduct. As part of the settlements, each executive agreed to cooperate with the OCC in any investigation, litigation, or administrative proceeding related to sales practices misconduct at the bank. [As we previously reported](#), in January 2020, the OCC charged five former Wells Fargo executives for their roles in sales practices misconduct and settled with three others, including former CEO John Stumpf.

Former United Auto Workers President Pleads Guilty to Conspiring to Embezzle Union Funds While the Union Reaches Settlement to Resolve Corruption Investigation: In September 2020, Dennis Williams, the former president of the International United Auto Workers Union (UAW) [pled guilty](#) to conspiring to embezzle UAW dues money between 2010 and September 2019. The union president admitted that he sought and received reimbursement for hundreds of thousands of dollars of personal

expenditures by falsely claiming they were legitimate business expenses. The personal expenditures included multi-month-long stays at private villas, cigars, golfing apparel, green fees at golf courses, and high-end liquor and meals. The former president was the 15th defendant convicted in connection with the criminal investigation into corruption within the UAW, and in November 2020, two other senior union members were sentenced to approximately two-and-a-half years in prison for accepting more than \$250,000 in kickbacks from a UAW vendor in exchange for steering a \$4 million contract to the vendor. In December 2020, the union reached a [settlement](#) with the DOJ to resolve the extensive corruption probe. The parties filed a proposed consent order, under which the court would appoint an independent monitor to a six-year term to investigate fraud and corruption and seek discipline against members.

Extradition & Extraterritoriality

Ghana Extradites Two Nationals to Face Charges in Separate Cyber-Fraud Schemes : In August 2020, Ghanaian citizen Maxwell Atugba Abayeta was [extradited](#) from Ghana to the U.S. to face federal charges for his part in an alleged conspiracy to defraud a Tennessee real estate company of hundreds of thousands of dollars by impersonating the company's email accounts. Atugba Abayeta is also accused of engaging in other cyber schemes, including romance scams, fraudulent check scams, advance-fee scams, and credit card scams. Ten other individuals have pled guilty, been found guilty at trial, or been charged in the scheme. Abayeta's extradition follows Ghana's [extradition](#) of Ghanaian citizen Deborah Mensah to the U.S. one week prior in an unrelated case but involving similar charges. Mensah faces fraud charges in Manhattan federal court for her role in alleged cyber scams targeting businesses and the elderly. She and her co-conspirators allegedly received more than \$10 million in proceeds from the scam and used fake identities and shell companies to avoid detection. Four other individuals have been sentenced for their role in the scheme.

DOJ Secures Extradition of Cryptocurrency Founder to Face Fraud, Money Laundering Charges : In November 2020, Panama [extradited](#) dual Brazilian/U.S. national Gutemberg Dos Santos to the U.S. to face federal charges for his alleged role in an international fraud and money laundering conspiracy that defrauded investors in "AirBit Club," a purported cryptocurrency company, of nearly \$20M in investments. Dos Santos, the co-founder of AirBit Club, and his co-conspirators allegedly induced investors to invest in AirBit Club through cash investments and club memberships in return for the promise of guaranteed profits on cryptocurrency mining. Dos Santos allegedly marketed AirBit Club as a multi-level marketing firm in the cryptocurrency industry and hosted lavish presentations around the world to convince investors to purchase AirBit Club memberships. Dos Santos was arrested along with several co-conspirators in Panama in August 2020 before he was extradited to New York.

Whistleblower Issues

Company Outsider Receives \$1.8 Million Whistleblower Award from the SEC : In September 2020, the SEC [announced](#) that a company outsider would receive an SEC whistleblower award of more than \$1.8 million. The SEC's [order](#) stated that the individual "voluntarily provided original information" to the SEC that was "significant" regarding ongoing securities violations by the unidentified company. The Chief of the SEC's Office of the Whistleblower also noted in a [statement](#) that the whistleblower was not employed by the company, which is unusual. Because the SEC reports limited information about whistleblowers, the exact role of the company outsider is not publicly available. The SEC has awarded at least \$738 million to more than 130 whistleblowers since issuing its first award in 2012, [according](#) to the Commission. That total includes an [award](#) of \$114 million that was announced in October 2020 as the highest award in the program's history. The \$114 million award included a \$52 million award in connection with an SEC case and a \$62 million award arising out of related actions by another agency.

Noteworthy Sentencings

Heir Location Services CEO Sentenced to Probation for Customer Allocation Scheme : In September 2020, Bradley Davis, the CEO of an heir location services company, received a sentence of probation after he and his company, Brandenburger & Davis, [pled guilty](#) to conspiring with a competitor to divide customers and fix prices for heir location services over nine years. Heir location service companies locate potential heirs of individuals who have died without a will and assist with the probate process in return for a fee. Davis cooperated with the government, leading to a guilty plea from Daniel J. Mannix, the owner of the competitor company. The government sought sentences of 13 and 21 months for Davis and Mannix, respectively, but in both cases, the court sentenced

the defendants to probation. In sentencing Davis, the judge criticized the government's decision not to seek restitution, stating that punishing the CEO would not help restore what the victims lost. The sentence of probation is well below the [average year-and-a-half sentence](#) for criminal antitrust cases.

Following Panama Papers Leak, 83-Year-Old Businessman and His Accountant Sentenced to Several Years in Jail for Hiding Offshore Assets:

In September 2020, an 83-year-old businessman, Harald Joachim von der Goltz, received a four-year sentence for tax evasion and money laundering by concealing significant assets overseas. The businessman, who pled guilty in February 2020, was the first person to be convicted as a result of the Panama Papers data leak. The government conceded that a sentence below the guideline range of 97-121 months was appropriate given the defendant's age and health but still advocated for a "significant incarceration period." In its sentencing memorandum, the government argued that the businessman lied about his ownership of foreign assets and tried to leave the country when he first met with the government following the revelations of the Panama Papers. Also in September 2020, the businessman's 76-year-old accountant, Richard Gaffe, received a sentence of over three years in prison for his role in the conspiracy.

CEO Sentenced to More Than 11 Years for Siphoning of Company Funds, Obstructing Justice :

In November 2020, Lawrence J. Gerrans, the former CEO of medical device company, Sanovas Inc., received a prison sentence of more than 11 years for funneling at least \$3.5 million in company funds to his personal bank accounts following his conviction after a two-week trial. The defense had argued for a three- to five-year sentence, a recommendation that the government [described](#) as "notable for its lack of remorse and for sheer chutzpah." The government sought a prison term of 15 years, one year above what the Probation Office recommended, in part based on the CEO's alleged use of counterfeit documents to support his pre-trial motion to dismiss.

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