USA – NORTH CAROLINA

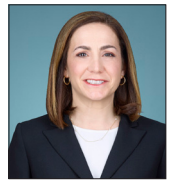
Trends and Developments

Contributed by:
John A Fagg, Jr, Jenny G Sugar, James P McLoughlin, Jr and Tanisha Palvia
Moore & Van Allen

Moore & Van Allen (www.mvalaw.com) provides its clients with professional services across more than 90 areas of focus. MVA's White Collar & Government Enforcement team has defended clients in high-stakes enforcement actions, investigations and criminal cases brought by every US federal authority that matters: the US Department of Justice, SEC, the CFTC, the CFPB, the Federal Reserve, the OCC, the IRS, Congress, numerous US Attorneys' Offices and State Attorneys General. The firm frequently represent clients in high-profile cross-border investigations, from Europe to Asia and Latin America. MVA's group is highly proficient in leading credible and efficient investigations – often to satisfy governments' demands and across numerous government authorities. Recent matters include winning acquittal for a former CEO of a publicly traded company against criminal antitrust charges, negotiating numerous resolutions of SEC and CFTC investigations for financial institutions, and resolving multiple spoofing and market manipulation investigations.

Authors

John A Fagg, Jr is co-head of MVA's White Collar & Government Enforcement practice. John represents corporations and executives in criminal investigations and trials, government enforcement proceedings and internal investigations. John recently served as lead trial counsel in the successful defence and acquittal of a former CEO of a publicly traded company facing criminal antitrust charges. Clients regularly turn to John to represent them in their most complex and challenging white-collar criminal and government enforcement matters. For more than two decades, John has represented clients in a wide variety of criminal and enforcement matters, from alleged securities fraud and commodities fraud to antitrust violations, public corruption and healthcare fraud.



Jenny G Sugar is a member of MVA's White Collar & Government Enforcement team representing corporations and executives in criminal and government enforcement investigations, proceedings and trials. In more than two decades as a federal prosecutor, Jenny investigated, prosecuted and oversaw matters involving complex financial crimes, tax fraud, Ponzi schemes and healthcare fraud. At the Western District of North Carolina US Attorney's Office, Jenny served as the Deputy Criminal Chief of the White-Collar section, led the BSA/AML Review Team and coordinated the district's COVID-19 fraud programme. She previously served as a prosecutor in the Justice Department's Tax Division in Washington.

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James P McLoughlin, Jr is a member in MVA's Litigation Group. He has defended clients in criminal and regulatory investigations, trials and appeals across a remarkable range of subjects, including securities and commodities fraud, the False Claims Act, antitrust, material support for a foreign terrorist organisation, market manipulation, spoofing, financial services, bankruptcy fraud, tax fraud, racketeering, conspiracy to assassinate a foreign head of state and compliance violations. These matters are often cross-border, pursued by multiple countries' authorities. He believes that, in these matters, absolutely everything matters. He is a member of the North Carolina, New York and District of Columbia Bars.

Tanisha Palvia is a member of MVA's White Collar & Government Enforcement team. She spent five years in New York at the Manhattan District Attorney's Office, where she prosecuted cases ranging from financial to violent crimes. Tanisha represents corporations and individuals facing investigations, criminal prosecutions, and civil enforcement actions. She conducts internal investigations for, among others, financial institutions, private and public universities, and medical providers. Tanisha is a member of the South Asian Bar Association, the Women's White Collar Defense Association Thought Leadership Committee, and the New York and North Carolina Bars.

Moore & Van Allen

100 N. Tryon St, Suite 4700
Charlotte
North Carolina
NC 28202
USA

Tel: +1 704 331 1000
Fax: +1 704 331 1159
Email: nancysmith@mvalaw.com
Web: www.mvalaw.com

The Current Landscape

The US Department of Justice remains as the principal government force in the white-collar crime landscape. For the states within the US Fourth Circuit, comprised of the federal judicial districts in Maryland, Virginia, West Virginia, North Carolina and South Carolina, it is always useful to distinguish between the Justice Department's Criminal Division, aka "Main Justice", and the offices of the United States Attorney in each of the federal judicial districts throughout the circuit. In North Carolina, for example, there are three offices. Each has a distinct personality and approach to investigations and prosecutions. An investigation and prosecution by Main Justice may or may not have active participation by the local US Attorney's Office.

With increasing frequency, Main Justice, the US Attorney's Offices, and US regulatory agencies are bringing complex, impactful prosecutions and civil enforcement actions in the Fourth Circuit. Growth throughout the region has created fertile ground for white-collar investigations and prosecutions. Several recent cases and developments, individually or as a group, are worthy of discussion.

Fourth Circuit – Confirming an Expansive Definition of "Loss" for Sentencing

One critical question in the sentencing of white-collar cases is often the loss that resulted from the conduct. The US Sentencing Commission, which publishes the US Sentencing Guidelines (USSG), which are intended to reflect federal sentencing policy, has recently confirmed a potentially draconian tool for federal prosecutors – the "intended loss". The commentary to the USSG indicates that the loss to be used in determining the sentence could be the greater of the actual loss and the intended loss. The Fourth Circuit addressed an unresolved issue concerning the validity of that policy in 2024. In two fraud cases, U.S. v Boler and U.S. v Freitekh, the Fourth Circuit concluded the term "loss" is ambiguous under the recent framework announced by the US Supreme Court in Kisor v Wilkie; therefore, "loss" can be interpreted to include intended loss, not just actual loss. Reinforcing prosecutors' recent increased use of the greater of intended and actual loss, the Sentencing Commission recently passed amendments to the USSG elevating intended loss from the commentary into the text of the relevant guideline, Section 2B1.1, effective 1 November 2024.

The USSG sentence ranges in white-collar cases, particularly in the areas of healthcare fraud and COVID-19 fraud, are frequently very dependent on the loss amount, so the inclusion of intended loss can substantially increase the sentence.

Challenges to Privacy in the Mobile Device Era

Another development with consequences across the entire spectrum of white-collar investigations is the Fourth Circuit's US v Chatrie, decision, holding that a so-called geofence warrant served on Google, which allowed the prosecution to obtain Mr Chatrie's location at the critical time, did not constitute a search under the Fourth Amendment and concluded that he had no reasonable expectation of privacy in regard to the information held by Google. The information was a crucial evidentiary link in the government's successful prosecution. One fact that reinforced the ruling was that Mr Chatrie, had opted into Google's location service, which monitors the user's location even when he or she is not using his or her mobile devices and enables Google to provide traffic updates and other information to the user.

The use of such geofence warrants is on the rise. Google reported a 1,500% increase in such warrants from 2017 to 2018 and another 500% increase from 2018 to 2019. As more and more personal information is held by various Cloud and mobile device providers, how prosecutors can access and use that information will be a continuing battle that white-collar investigation targets may well lose. Whether proving a white collar defendant attended a contested meeting or tracing his or her connections with others under investigation, detailed location data can have a huge impact. The firm expects its use to continue to rise.

Trends in the Subject Matter of White-Collar Prosecutions in North Carolina

COVID-19 fraud – loans, benefits and tax credits

Federal COVID-19 programmes disbursed over USD1 trillion dollars. In September 2024, a US House of Representatives' committee highlighted the volume of fraud in the COVID-19 relief payments. The Department of Labor has estimated that at least USD191 billion in pandemic unemployment payments could have been improperly paid, with a significant portion attributable to fraud. Separately, the Small Business Association has estimated that as of June 2023, the agency had disbursed over USD200 billion in potentially fraudulent pandemic relief loans, including Paycheck Protection Act loans.

Prosecution of those who fraudulently obtained COVID-19 relief funds through any federal programme is now, and is likely to remain, a priority of the Justice Department for the foreseeable future. Cases across all three North Carolina federal districts during 2024 demonstrate the continued focus on these frauds nationally. Business owners, Paycheck Protection Program (PPP) loan facilitators, and others are being prosecuted. Many prosecutions involve loans in the seven-figure range, some smaller.

Ordinarily, the statute of limitations for a violation of federal fraud statutes is five years, and it is now four years after the issuance of many COVID-19 loans. However, Congress extended the statute of limitations period to ten years for criminal and civil fraud cases involving COVID-19 disaster loan programmes. The targeted legislation strategy is also likely to be employed more frequently.

The volume of fraudulent COVID-19 loans issued is causing the federal government to expand its methods to recoup fraudulently obtained funds. The firm anticipates expansion of civil enforcement actions, particularly against loan recipients who received lower dollar amounts and who were not aggregators of false loans. The Department of Justice's COVID-19 Fraud Enforcement Task Force Report, released in April 2024, highlighted that as of 1 April 2024, over 1,200 civil pandemic fraud proceedings are open and over USD100 million has been recovered, but this is merely a start against fraud losses of hundreds of billions.

Fraudulently claimed tax credits received through the Employee Retention Credit (ERC) programme are a parallel priority. The Internal Revenue Service (IRS) is pursuing audits and criminal investigations of thousands of taxpayers who made questionable ERC claims, and hundreds of ERC fraud criminal cases are open. In August 2024, the IRS reopened a voluntary disclosure programme for problematic ERC claims. The reopened voluntary disclosure programme is one example of the increased use of whistle-blower programmes by the federal government in 2024. The firm anticipates that

North Carolina and the Fourth Circuit will see an increase in these cases over the next few years.

Increased focus on corporate fraud whistle-blower programmes

In August 2024, Main Justice unveiled its Corporate Whistleblower Awards Pilot Program, initially a three-year programme seeking tips on four types of crimes:

- crimes by financial institutions, their insiders or their agents involving money laundering, fraud, anti-money laundering compliance, or fraud against or non-compliance with financial regulators;
- foreign corruption and bribery, including money laundering, by, through or related to companies;
- domestic corruption, including bribes of or kickbacks to public officials or employees by companies; and
- healthcare fraud schemes involving private insurance or other non-public benefits programmes, fraud against patients, investors or other non-government entities in healthcare and any other federal violations not covered by the False Claims Act.

The incentives for tips regarding this criminal conduct are substantial – up to a maximum of 30% of the first USD100 million of net proceeds and up to 5% of the next USD400 million of net proceeds of a forfeiture. Several US Attorney's Offices announced their own whistle-blower non-prosecution programmes, but to date, no US Attorney's Office in North Carolina has announced its own programme, although such announcements would not be unexpected in the future. The Criminal Division, however, will send out leads that it receives from the programme to appropriate US Attorney's Offices, so North Carolina may receive leads in this fashion.

Given the history of similar Securities and Exchange Commission (SEC) and IRS programmes, one should expect the Department of Justice's pilot programme to result in increased white-collar enforcement against commercial entities and their directors, officers and employees facilitated by a flow of reports from insiders. The Department has incentivised information flow from companies that target individuals by announcing that, when a company receives a whistle-blower complaint and, in turn, reports the misconduct to the Justice Department within 120 days and before the Department contacts the company, that company will be eligible for a presumption of a declination of prosecution if the company "fully cooperates and remediates" with respect to identifying and providing evidence about any responsible individuals.

The Department of Justice has warned Congress of fallout from proposed budget cuts to federal agencies. Having whistle-blowers provide leads may allow the Department to grow its corporate fraud enforcement despite facing financial cutbacks. In January 2024, the US Attorney for the Eastern District of North Carolina announced enhanced white-collar enforcement through increased staffing and investigative coordination.

Focus on healthcare fraud

Federal and state agencies in North Carolina increased their focus on healthcare fraud, filing numerous civil and criminal healthcare fraud cases during 2024, including cases against major healthcare providers. In July 2024, the United States filed Sullivan v Murphy Medical Center, Inc, a civil False Claims Act complaint against Erlanger Health System in the Western District of North Carolina alleging that Erlanger, a healthcare system located in Tennessee and North Carolina, violated the Stark anti-kickback

law, resulting in false claims to the Medicare programme. The complaint focuses on the allegation that Erlanger paid its physicians well above fair market value, creating an improper financial relationship for services that the physicians referred to Erlanger.

Other healthcare areas that saw significant criminal healthcare fraud prosecutions in North Carolina during 2024 included behavioural health providers and prescription abuse. And healthcare fraud enforcement was not limited to federal cases; the state of North Carolina also focused on this issue. For example, the State announced a multimillion-dollar settlement with a diagnostics provider for submitting allegedly false claims to Medicare and Medicaid in North Carolina, Virginia and Florida.

Healthcare fraud prosecutions have continued expanding in the telehealth space as more healthcare providers provide services to patients remotely. In late 2023, a jury found a North Carolina physician who worked as an independent contractor for a telemedicine company guilty of making false statements in conjunction with a durable medical equipment scheme that defrauded federal benefits programmes of over USD5 million.

The Fourth Circuit's rulings on intended loss and the amendment to the USSG create added risks for the defendants in healthcare fraud cases, in which the accused often have varied levels of participation, knowledge and culpability. The "loss" ultimately used at sentencing for various participants in healthcare fraud schemes can vary by district or by judge, which is evidenced by the sentences received by co-defendants prosecuted in different districts. In addition, depending upon the calculation methodology, there can be huge disparities between the fraudulent claims submitted, the fraudulent claims paid and the gain to a particular participant – as a result, the firm anticipates that the loss used to calculate the sentence in healthcare fraud cases will continue to be highly contested.

Continued pursuit of securities fraud

Federal prosecution of several securities fraud cases during 2024 saw US Attorneys' offices work closely with SEC and other federal agencies. Prosecutions included Ponzi schemes, misdirection of investors' funds to personal expenses and "affinity fraud" or targeting affiliated people of entities, such as an ethnic group or affiliated social institutions.

The firm anticipates an increase in activity in the federal courts by SEC following the Supreme Court's ruling in SEC v Jarkesy. In Jarkesy, the Supreme Court held that a party against whom SEC brings a civil enforcement proceeding seeking a penalty for alleged securities fraud has the right under the Seventh Amendment to the US Constitution to a jury trial before a neutral adjudicator rather than before SEC's own administrative judges. This is a ground-breaking decision with implications across a number of federal regulatory enforcement regimes. It is possible that – forced to litigate in the federal courts to a jury instead of its own administrative law judges – SEC will decide that a better strategy is more aggressive action, which may increase criminal prosecutions or civil cases seeking greater penalties.

Cybercrimes and online fraud are increasingly the target of prosecutors

The security threats from business email compromise (BEC) schemes and other cybercrimes, and particularly those targeting the elderly with a barrage or romance scams and cryptocurrency scams, have meant a rise in prosecutions that is

certain to increase in North Carolina, as well as nationally and internationally. In 2024, North Carolina federal courtrooms saw an extradited Nigerian national plead guilty for his role in a multimillion-dollar BEC scheme following his extradition from the United Kingdom in U.S. v Adeagbo; a citizen of the Republic of India plead guilty to the theft of more than USD37 million by spoofing the website of Coinbase in U.S. v Tomar; and a US citizen operating a call centre from Costa Rico convicted of wire fraud and international money laundering for a sweepstakes fraud conspiracy targeting the elderly in U.S. v Roger in the latest of a long series of such prosecutions.

Law enforcement in North Carolina also seized cryptocurrency associated with the laundering of criminally derived proceeds stolen from victims of cryptocurrency investment scams, in one case seizing nearly USD5 million of the cryptocurrency Tether that had been linked to such fraudulent schemes. As efforts continue to try to avoid detection by law enforcement by using difficult-to-trace cryptocurrency to move money, and by operating through encrypted channels such as Telegram, the firm anticipates that complicated cybercrime investigations will continue to be a focus for US Attorney's Offices, frequently with assistance from the Computer Crime and Intellectual Property Section in the Justice Department's Criminal Division.

Continued robust criminal tax enforcement – focus on business owners

In 2024, all three US Attorney's Offices in North Carolina have pursued business owners in their tax fraud prosecutions for a variety of offences. Employment tax fraud has become a priority. Ordinarily, criminal tax cases require the highest standard of proof of intent. The government must show that income or expenses were not properly reported because the taxpayer's actions were wilful. In the employment tax context, the business owner ordinarily admits that taxes were due – purporting to withhold funds from employees' paychecks. Therefore, the government can more easily prove that additional taxes were due, enabling prosecutors to develop more straightforward criminal tax cases. The decision of whether to prosecute or to resolve the matter civilly may be made based upon the government's assessment of the type of spending done by business owners who owe employment taxes – for example gambling, travel, and personal expenditures – the amount of money involved and attempts to hide their conduct.

The 2024 employment tax prosecutions in North Carolina cross the spectrum of businesses and their owners, including the owner of a high-performance automotive services business, the owner of restaurants and nightclubs, and the owner of cabinet-making companies. Additionally, the IRS continually assesses penalties and interest on unpaid employment taxes, thereby potentially increasing the loss amount to be used under the USSG. to determine the advisory sentencing guidelines range.

Other current focuses of North Carolina tax fraud enforcement include abusive tax shelters and substantial unreported income.

Antitrust Enforcement Is Rising Dramatically but Not Necessarily Successfully

Antitrust enforcement has seen a resurgence across the United States, and North Carolina is no exception. However, the Department of Justice's Antitrust Division's ramped-up strategy has experienced some setbacks in the Fourth Circuit. For example, the Fourth Circuit overturned the antitrust conviction of a construction executive in a loss for the Antitrust Division that could curtail some classic bid-rigging cases. In

U.S. v Brewbaker, the defendant was an executive of an aluminium supply company, Contech, who collaborated with another contractor on their companies' bids for government contracts. The Antitrust Division alleged that Brewbaker caused Contech to submit non-competitive bids so that its "competitor", Pomona Pipe, would win the bid. The indictment charged that when Contech won a bid, it would hire its competitor Pomona to install the material. And, conversely, if Pomona won the bid, it would hire Contech to supply the aluminium. By both bidding, their chances of winning the bid one way or another increased. In the course of these bids, Brewbaker and Contech obtained Pomona's pricing and allegedly adjusted Contech's bids accordingly.

Contech pleaded guilty, but Brewbaker forced the government to try its case against him before a jury. A jury in the Eastern District of North Carolina convicted Brewbaker of violating the Sherman Act. However, the Fourth Circuit overturned the conviction, holding that the Sherman Act charge should have been dismissed for failure to state a per se violation of the Sherman Act. The Fourth Circuit ruled the two companies were not direct horizontal competitors to make the alleged conduct a per se violation, which by policy, and arguably by caselaw, is a prerequisite to a criminal antitrust prosecution. The Fourth Circuit panel found that the indictment alleged that Contech and Pomona's relationship had both horizontal and vertical elements that made it impossible to evaluate the conduct without detailed economic analysis under the rule of reason, because this type of relationship can have pro-competitive effects. The Fourth Circuit characterised the arrangement as a "hybrid restraint, which should be presumed not to be a per se criminal violation". Compounding the issue, Brewbaker had sought to introduce economic evidence at trial, but the District Court refused to allow him to present it. The U.S. v Brewbaker demonstrates the need for a full assessment of the overall relationship of the parties to an agreement and highlights the potential economic justifications for any restraint among companies when they have a relationship that is more nuanced than purely competitors. Apparently concerned about the precedent arising from the Brewbaker decision, the Department of Justice has sought review by the United States Supreme Court. As of this writing, the Supreme Court has not decided whether to hear the case.

Despite the government's loss on appeal, the firm expects the Antitrust Division, the Federal Trade Commission (FTC) and State Attorneys General to continue aggressive enforcement of the Sherman Act, particularly to challenge the impact of technologies on competition, as demonstrated by the expansive civil enforcement action brought in 2024 by the Antitrust Division and eight State Attorneys General against RealPage Inc – in the Middle District of North Carolina – for alleged violations of Sections 1 and 2 of the Sherman Act for its offering of a rent pricing algorithm to apartment landlords, which the FTC alleges has harmed "millions" of renters. The company has denied the allegations and indicated it will defend.

Environmental Enforcement Sees a Renaissance

While the Environmental Protection Agency (EPA), Fish and Wildlife Service, US Army Corps of Engineers, etc, may instigate an investigation, prosecution of environmental crimes falls to the US Attorneys' Offices and the Environmental Crimes Section of the Department of Justice. With few exceptions, environmental statutes require "knowing" conduct for an otherwise civil violation to be subject to criminal prosecution,

arguably a low bar that gives rise to shock when what appears to be a civil case is indicted.

There have been a number of important recent developments from EPA that will impact North Carolina and beyond. In 2024, EPA published an entirely revamped internal enforcement policy that calls for a significant increase in the collaboration and coordination of EPA's civil and criminal programmes with the Justice Department. It is widely expected that the policy will result in an increase in criminal enforcement. Criminal enforcement is on the rise in both number and severity. For FY 2023, EPA reported a 70% increase in the number of crime cases opened, with an increase in the total criminal fines, restitution and court-ordered environmental projects to over USD540.6 million – a 227% increase over the prior year.

Recent environmental criminal cases within the Fourth Circuit most commonly involve the Clean Water Act, Clean Air Act, and related criminal conduct under Title 18, such as false statement and conspiracy. EPA has also made clear that it is prioritising enforcement of cases with potential "environmental justice" concerns, releasing six priority National Enforcement and Compliance Initiatives (NECIs) for FY 2024–27. EPA is prioritising climate change, per- and polyfluoroalkyl substances (PFAS) contamination, coal ash contamination, air toxics, drinking water and chemical accidents.

Compliance Is an Emphasis Across Sectors

The Justice Department is increasing its attention on evaluations and the credits or demerits it extends for corporate compliance programmes. In recent announcements, including a September 2024 speech by the Principal Deputy Assistant Attorney General, the Department has made clear that companies will be treated more leniently if they have robust compliance programmes and processes and will be penalised if they do not. Through its Evaluation of Corporate Compliance Programs, the Department will now evaluate the technology employed by a company to conduct business, asking whether the company has done appropriate risk assessments of the company's use of that technology and, as a result, developed compliance programmes to reduce the risk associated with the technology, including AI.

As part of the Department's new whistle-blower awards programme, it will evaluate the process the company has in place to encourage employees to come forward to identify suspected misconduct and the company's responses. The extent of cooperation with the Department's investigation, especially to identify culpable individuals, has been and continues to be a critical component in reaching a white-collar settlement for the company.

The Department is delving deeply into corporate governance, requiring in each resolution it enters with a company that compliance be a feature of executive compensation and bonus structures. The Department is encouraging performance reviews that evaluate how well an officer or employee adheres to the company's values and compliance regime. And the Department is increasingly more aggressive in its expectations that a company with which it enters a settlement will claw back past compensation commensurate with the problem.

In short, the totality of these initiatives arguably forecasts the US Justice Department seeking to exercise influence over corporate conduct more comprehensively and aggressively than ever before.