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Is Your Institution Immune from the College Admissions Scams? Thorough Self-Audit is the Only Way to Know

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March 21, 2019

On March 12, documents were unsealed in federal court in Boston, Massachusetts, disclosing that significant criminal charges were filed against dozens of people, from a variety of backgrounds and with varying degrees of involvement, for their alleged participation in a nationwide college admissions scam. Among those indicted were nine college coaches and 33 parents who sought admissions of their children into college outside the traditional application and admission process, in what was nicknamed by the FBI as "Operation Varsity Blues." The charges come on the heels of a two-year FBI investigation in a "pay for play" scheme in school basketball programs that touched several colleges and universities.

These high-profile prosecutions highlight the Department of Justice's (DOJ) willingness to aggressively review the conduct of employees and associates of colleges and universities. Where the federal investigation uncovers criminal conduct, prosecutors are charging those individuals responsible for the fraud and seeking recovery of any ill-gotten gains. Colleges and universities can be sure to see a rise in similar investigations, and subsequent civil lawsuits, throughout the country, including class action lawsuits filed by former applicants against colleges and universities alleging that they were denied a fair opportunity for admission. Of course, such suits are likely to carry with them a request for punitive damages. To avoid being the next school in the unwanted spotlight, colleges and universities should undertake a self-audit now to identify and correct such behaviors.

In the Boston indictment, most of the defendants were charged with Conspiracy to Commit Racketeering in violation of 18 U.S.C. Section 1962(d). The Racketeering Influence and Corrupt Organization Act (RICO) has long been reserved for the prosecution of gangs, organized crime, and major white collar cases. In addition to the limitation on the scope of matters previously considered RICO cases, the DOJ has historically used the charge sparingly and only after a thorough and rigorous vetting of the case through an entirely separate RICO division in Washington. RICO, however, is significant both in its scope and its penalties, and is being stretched in a variety of ways to prosecute crime and fraud not traditionally considered to be covered by RICO.

In bringing the recent charges, the DOJ signaled a further shift in its willingness to use one of its most potent resources to address fraud within colleges and universities. The DOJ can use RICO in this way because the statute allows prosecutors to rely on acts that occur outside of their jurisdictions in order to bring charges. Most of the defendants and schools named in the indictments had little to no connection to Boston, or to Massachusetts for that matter. Eight of the nine coaches who were named worked at colleges and universities outside of Massachusetts, and most, if not all of the parents, lived in other states. Nonetheless, the RICO statute allows for the connection of illegal relationships outside of the charging jurisdiction. In finding one guilty of violating RICO, the government does not need to prove that a defendant agreed with every other person, had full knowledge of all of its details, or knew of all of the people in the RICO conspiracy. Instead, the government only has to prove, in part, that an individual or an organization participated, either directly or indirectly, in a "racketeering activity." Hence the indictments (and arrests) of Felicity Huffman and Lori Laughlin, who both reside in California.

In understanding the broad scope of the criminal charges, it is worth noting that a RICO charge allows federal prosecutors to use both federal and state offenses to support a single federal charge. This flexibility allows federal prosecutors to investigate and prosecute people for state offenses that are normally outside their jurisdictions. The prosecutors in Boston based their racketeering activity on "mail fraud," "wire fraud," and "money laundering." These broad criminal statutes allowed the prosecutors to pursue, in a single RICO charge, a variety of criminal acts that occurred over an extended period of time.

Convictions under RICO can carry much higher prison sentences than many of the underlying white collar crimes that often trigger the statute. The statute carries a possible maximum period of incarceration of up to 20 years for each count, plus some hefty financial penalties. Notably, the statute specifically allows the federal government to seize any assets that are considered "ill-gotten gains" by pursuing such assets in either a criminal or separate civil proceeding. For example, the charitable donations received by the colleges and universities from the parents involved, and that are alleged to have actually been bribes, are subject to seizure under RICO.

In addition, colleges and universities need to be mindful that RICO has a civil component that allows private individuals to use the statute against those people and organizations involved in a "pattern of racketeering." Civil RICO lawsuits, if successful, allow for recovery of up to three times the actual damages. While courts have restricted the reliance on RICO in civil matters, plaintiffs lawyers have been resourceful in finding new avenues to pursue colleges and universities allegedly involved in fraud. In fact, a class action lawsuit has already been filed in California against the colleges and universities named in the indictment. The complaint filed in federal court alleges that the applicants were denied a fair opportunity for admission into the named universities. The lawsuit seeks not only the sum of the admission fees for the entire class, a relatively nominal amount, but also punitive damages, which could reach into the multiple millions.

How to Protect Your School

In the aftermath of this shocking news, colleges and universities are left wondering how to protect themselves from these kinds of bribery scandals going forward. The best response is a thorough and proper review and audit of their admissions programs. The DOJ relies on eight factors that must be considered by federal prosecutors in deciding whether RICO charges should be brought against an organization. One factor that must be considered is the pervasiveness of the wrongdoing within the organization, including whether management was complicit or somehow condoned the inappropriate conduct. A second factor is the adequacy of the organization's compliance program. Both of these considerations require organizations – colleges and universities included – to have an active system in place that oversees its legal and ethical obligations. Without good practices, organizations place themselves at risk that the DOJ and other agencies will hold them accountable for fraud and abuse.

The bribes highlighted in "Operation Varsity Blues" underscore the perception that institutions have a paucity of oversight and review in the areas of gift-giving and charitable donations. The indictments allege that some of the defendants, many of whom were school employees, disguised bribes as charitable donations to the colleges and universities. For example, the charges assert that one California university received nine charitable grants totaling more than $550,000. One grant might not be suspicious, but nine grants totaling such a vast amount should have set off alarm bells. Prosecutors certainly questioned whether the colleges and universities had any review processes in place, and if they did, the levels and quality of those processes.

Given the far reaching arm of RICO, colleges and universities should do a self-audit, directed by experienced attorneys, sooner rather than later. The audit should focus on a review of compliance policies, recruiting practices, and admissions practices, and a cross-referencing of charitable donations to the institution given by the parents of students to ensure that those students' admissions were based on legitimate standards and not fraud. A comprehensive audit should also involve interviews of relevant employees – including those in the

athletic departments – involved in recruiting and admissions. More importantly, doing such an audit would identify sources of exposure for correction and could serve as a defense by demonstrating to prosecutors that the college or university was not complacent or complicit in its actions, but instead affirmatively sought to identify and correct any improper behaviors. A proactive self-audit would also demonstrate that the institution thoroughly vetted its compliance program and reporting procedures to ensure that they are fully operating and adequate to protect against this type of fraud. The cost of a self-directed audit would be far less than the civil and criminal penalties noted above.

If you would like more information regarding an audit at your institution, please contact Angie Davis, Jennifer Curry, or any of the members of Baker Donelson's Government Enforcement and Investigations Group or the Labor & Employment Group.