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SEC And DOJ Officials Discuss Foreign Corrupt Practices Act Enforcement Trends And Priorities

Wynn H. Segall
Nicole H. Sprinzen

AKIN GUMP STRAUSS HAUER &
FELD LLP

On November 19 and 20, 2013, the American Conference Institute held the 30th annual U.S. Foreign Corrupt Practices Act (FCPA) conference outside of Washington, DC. Keynote addresses were given by U.S. Department of Justice (DOJ) Deputy Attorney General James Cole and U.S. Securities Exchange Commission (SEC) Co-Director of the Division of Enforcement Andrew Ceresney. Other speakers included current and former senior-level officials from the DOJ and SEC units responsible for bringing FCPA enforcement cases, outside defense and compliance counsel and investigative and compliance firms engaged in providing compliance and investigative services to corporate clients.

The comments of U.S. officials and others at this event provide a critical snapshot of the current state of play in still increasingly stringent U.S. enforcement of the FCPA and growing international coopera-



Wynn H. Segall

tion to pursue anticorruption law enforcement well beyond U.S. borders. During one session, Kara Brockmeyer, chief of the SEC's FCPA Unit in the Division of Enforcement, and Charles Duross, deputy chief in the DOJ's Fraud Section and head of the FCPA Unit, reviewed key anticorruption enforcement in the past year and discussed priorities for future enforcement efforts. U.S. officials at the conference also described increasing international cooperation and coordination of FCPA enforcement efforts with enforcement officials in other countries. Although their comments were delivered with the customary disclaimer that their statements were not binding on their agencies and that the views they expressed were their own and not those of the agencies where they work, these comments provide a valuable window into the focus and direction of FCPA enforcement in the months ahead.



Nicole H. Sprinzen

SEC Year-in-Review And Enforcement Priorities

Ms. Brockmeyer told conference participants, who included primarily corporate in-house counsel, compliance and ethics officers and outside defense and compliance counsel, that cases are coming into the SEC's FCPA Unit through a variety of channels, including agency referrals, whistleblower reports and compliance reviews by other SEC divisions. Ms. Brockmeyer gave the example of the Direct Access Partners ("Direct Access") case, in which the SEC filed a complaint in the Southern District of New York in May 2013 against four traders and other individuals for their involvement in a scheme to pay bribes to a Venezuelan finance official in order to obtain the bond trading business of a state-owned Venezuelan bank. With respect to the fraud charges brought in that case, Ms. Brockmeyer noted that Direct Access is a broker-dealer, not an issuer, and that the case came into the

Akin Gump
Strauss Hauer & Feld LLP

Please email the authors at wsegall@akingump.com or nsprinzen@akingump.com with questions about this article.

FCPA Unit through a compliance review conducted by another SEC division. In this regard, she said that the SEC is spending increased time training its staff in other units and divisions on the FCPA so that they will know what to look for in their work that might indicate an FCPA problem. These units and divisions are also referring cases to the Enforcement Division for investigation and the bringing of civil enforcement claims, where appropriate.

In discussing going-forward trends, Ms. Brockmeyer said that the SEC can be expected to increasingly settle administrative procedure cases because under Dodd-Frank, the SEC can now obtain civil penalties in such cases. As examples of this trend, Ms. Brockmeyer pointed to the Total S.A. and Stryker Corporation (“Stryker”) cases, which were both resolved by administrative settlements in 2013.

Ms. Brockmeyer also noted that increased enforcement of the so-called books and records provision of the FCPA also can be expected. That provision provides that a company that is a securities issuer or must file periodic reports with the SEC pursuant to the Exchange Act of 1934 is required to maintain books and records that accurately and fairly reflect the transactions of the corporation in reasonable detail. She stated that although the SEC is not looking for books and records deficiencies, where it finds them in the course of the agency’s compliance work or in enforcement investigations, it will take enforcement action.

Addressing the question of the most significant recurring issues that the SEC is seeing in cases that they investigate, Ms. Brockmeyer highlighted companies’ use of third-party intermediaries. In the past two years, up to 70 percent of the cases in the SEC’s FCPA Unit have involved joint ventures, vendors, suppliers or other third parties. She noted that the SEC is bringing the bright-line cases in this area, not the small grey area cases. She also emphasized that common red flags for these relationships include:

- A lack of a business purpose for the third-party relationship, or the offering of duplicative services already being provided to the company from another source;
- A higher discount or a lower price offered by the third party to the principal company than other third parties providing similar services or goods to the company or in the industry;

- No infrastructure in place that would permit the third party to deliver the agreed services; and

- Problematic travel and entertainment, e.g. the *Stryker* case.

Ms. Brockmeyer indicated that when a company has identified a problem with a third-party agent and is remediating it, law enforcement officials will expect that the company will not use the agent anymore, and will assess other similar third-party relationships.

Mr. Duross noted that two-thirds of the top 20 largest criminal FCPA case resolutions have occurred in the last three and one-half years, and that three of the top five largest penalties ever issued have been in the last three years. He highlighted that 2013 was the fifth biggest year in terms of penalties, and that the number could be expected to increase before the end of the year. Overall, he said that companies are doing better with their compliance, but that the DOJ caseload is still large, including more than one hundred and fifty cases in progress. Mr. Duross gave five key characteristics of criminal FCPA enforcement:

- (1) The FCPA is here to stay
- (2) It applies to every business sector
- (3) Enforcement continues to focus on individuals
- (4) FCPA enforcement has gone global
- (5) Corporate monitors (including the newly employed hybrid-monitorship where after eighteen months or so, the monitorship can convert to self-reporting) will continue to be required when appropriate

Mr. Duross emphasized that the DOJ continues to encourage companies to self-disclose FCPA problems sooner rather than later. Mr. Duross and Ms. Brockmeyer also indicated that although company leadership and counsel must make the difficult decision as to the right time to self-disclose, the DOJ and SEC would rather be involved on the front end when the work plan and scope of the company’s internal investigation is being developed. Companies that wait to report until the internal investigation is “done” run the risk of going to meet with the government to make their report and with enforcement officials having questions that were not asked during the investigation. They pointed out that, based on past experience, this can ultimately result in a company being compelled to go back and retrace

ground that has already been covered, through witness interviews, document collection or otherwise.

In addition to the importance of self-disclosure, Mr. Duross highlighted that compliance is a way to mitigate penalties, so that conduct that might otherwise have resulted in a guilty plea may result in a deferred prosecution (DPA) or non-prosecution agreement (NPA) instead. DPAs and NPAs are often considered lesser corporate penalties than a guilty plea. Compliance is also critical for the remediation of FCPA problems, and investigators will focus on the question of “What have you done since discovering this problem that would have prevented it from happening in the first place?” Mr. Duross noted that good compliance remediation efforts will result in a clear answer to this question, including the implementation of appropriate controls, along with testing and periodic reviews of the effectiveness of those controls, in addition to any increased training that may be implemented. The SEC and DOJ officials noted that they recognize and expect that corporate FCPA compliance is a risk-based approach, which is about risk management, not risk elimination.

Both Mr. Duross and Ms. Brockmeyer also highlighted that their agencies have been involved in international cooperation in FCPA enforcement with countries with which the U.S. has not cooperated before. They pointed to India, Brazil, Ukraine and Canada as examples of countries that have cooperated closely in recent investigations and said that this trend can be expected to continue. Moreover, they highlighted increasing focus on anticorruption enforcement by other countries. For example, Canada recently amended its foreign corruption law to give Canadian authorities broader jurisdiction and authority to impose greater penalties. In addition, U.S. officials have provided training on anticorruption enforcement to their counterparts in other countries, including Japan, Brazil and Mexico. The SEC and DOJ officials who spoke at the program generally advised that companies should anticipate that international enforcement of the FCPA will continue, with increased coordination with foreign regulators in a growing number of countries that have not worked with U.S. officials in this way in the past.