Foreign Corrupt Practices Act and International Anti-Corruption Developments 2016: Ethical Issues in FCPA Investigations

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Overview of FCPA's Anti-Bribery Provisions

- The FCPA's anti-bribery provisions are set forth in Sections 30A, 30B, and 30C of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3

- In a nutshell, the statute prohibits covered persons and entities from:

    - "corruptly"

    - offering, promising, providing, or authorizing the provision of money or anything of value

    - directly or indirectly

    - to a "foreign official," a foreign political party or official thereof, or a candidate for foreign political office

    - to obtain or retain business, or to direct business to any person. *See* §§ 30A(a), 30B(a), 30C(a).

- Under the statute, the government has three separate bases for asserting jurisdiction over a person or entity:

    - Section 30A applies to:

        - issuers;

        - foreign issuers that are required to file reports under Section 15(d) of the 1934 Act (*i.e.*, foreign issuers with ADRs trading on U.S. exchanges);

[1] This outline incorporates material from two recent client alerts issued by Akin Gump Strauss Hauer & Feld LLP. *See* https://www.akingump.com/en/news-insights/justice-department-issues-new-policy-prioritizing-prosecution-of.html; https://www.akingump.com/en/news-insights/justice-department-updates-u-s-attorney-s-manual-to-emphasize.html. The author of the outline was one of the authors of the Akin Gump client alerts.

        - and their officers, directors, employees, and agents

    - Section 30B applies to "domestic concerns" and their officers, directors, employees, or agents. A "domestic concern" is defined as:

        - a business that is organized under the laws of any state or has its principal place of business in the United States; and

        - any individual who is a U.S. citizen, resident, or national

    - Section 30C applies to any person or entity – even those who are not issuers or domestic concerns – if the person or entity violates the statute "while in the territory of the United States"

- The statute does not apply to "any facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a routine governmental action." *See, e.g.*, § 30A(b). "Routine government action," in turn, is defined to include low-level matters such as obtaining permits or licenses, processing visas and work orders, providing police protection or mail services, and providing phone, power, water, and cargo unloading services. *See, e.g.*, § 30A(f)(3).

- The statue recognizes an affirmative defense if:

    - The payment "was lawful under the written laws and regulations" of the foreign country; or

    - The payment was "a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to" either "the promotion, demonstration, or explanation of products or services" or "the execution or performance of a contract with a foreign government." *See, e.g.*, § 30A(c).

- Under the statute, a "foreign official" is defined as any officer or employee of:

    - "a foreign government or any department, agency, or instrumentality thereof"; or

    - a "public international organization" (itself a defined term). *See e.g.*, § 30A(f)(1).

- The FCPA is enforced jointly by the SEC and the Department of Justice.

    - The Department of Justice has sole authority to bring criminal charges for violations of the FCPA; the SEC is limited to bringing civil enforcement actions.

    - In practice, it is common for both agencies to conduct parallel investigations of the same conduct. In a parallel investigation, the agencies typically conduct joint interviews of witnesses and may hold joint meetings with defense counsel.

Although the Department of Justice is prohibited from giving the SEC access to documents that it has obtained through a grand jury subpoena, *see* Fed. R. Crim. P. 6(e), the SEC will generally share documents that it has obtained with the Department of Justice.

- Under longstanding DOJ policy, the Fraud Section in Washington must participate in any case in which criminal FCPA charges are filed. A U.S. Attorney's Office cannot independently bring an FCPA case without participation by the Fraud Section.

Current Environment: The Yates Memo and Its Implications

- For many years, the DOJ has published the *Principles of Federal Prosecution of Business Entities* (the "Principles"), non-binding guidelines that inform the Department's decision-making on whether to prosecute business entities for criminal activity undertaken by their employees or agents. *See* U.S. Attorney's Manual § 9-28.000. The Principles have been enormously influential in white collar practice and have guided defense counsel, in-house lawyers, and prosecutors and regulators in how to approach suggestions of potential wrongdoing within a business entity.

- It has long been understood that cooperation can be a mitigating factor in the DOJ's prosecutorial decision-making and that, as a practical matter, if a corporation wishes to avoid prosecution (or to secure the best possible outcome in the event of prosecution), it must be prepared to offer full and complete cooperation to the government. Thus, although the Principles recite a list of factors that inform the Department's discretionary decisions about prosecuting corporations – including the nature and seriousness of the offense, the corporation's history of similar conduct, and collateral consequences to innocent third parties that would result from prosecution of the entity – for many years the Department has placed a premium on a corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." *See* Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of DOJ Components and U.S. Attorneys regarding "Principles of Federal Prosecution of Business Organizations" (Jan. 20, 2003) at 3; *see also id*. at 1 (noting "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation").

- On September 9, 2015, Deputy Attorney General Sally Quillian Yates issued the latest DOJ guidance in this area in a widely-circulated memorandum entitled "Individual Accountability for Corporate Wrongdoing" (the "Yates Memo"). *See* http://www.justice.gov/dag/file/769036/download. On November 16, 2015, the DOJ formally incorporated the key aspects of the Yates Memo into the Principles themselves. *See* http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0.

- The Yates Memo strongly emphasizes the importance of pursuing individuals – and not just companies – in cases of corporate misconduct. In doing so, the memorandum acknowledges that the Department has historically faced challenges in pursuing

individuals for corporate wrongdoing. As explained by the memo, in large corporations "responsibility can be diffuse and decisions are made at various levels," sometimes making it difficult to determine those individuals who had the requisite knowledge and criminal intent to prove criminal culpability. *Id*. at 2. The Yates Memo asserts that this "is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs," making the job of the prosecutor and investigator more difficult. *Id*.

- The guidance set forth in the Yates Memo is intended to address these challenges through six specific provisions:

    1. To receive *any* cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct.

    2. Criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

    3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

    4. Absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation.

    5. Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and they should memorialize any declinations as to individuals in such cases.

    6. Civil attorneys should consistently focus on individuals, as well as the company, and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

- Some of these provisions (e.g., the mandate that department attorneys communicate with one another) merely reflect common sense. Others restate established practice (e.g., the statement that the Department will not immunize or release culpable individuals when a corporation enters into a resolution, except pursuant to well-established programs such as the Antitrust Division's Corporate Leniency Policy). However, several aspects of the Yates Memo warrant closer analysis.

- *To receive <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct*.

    - Perhaps the most heralded aspect of the Yates Memo is the requirement that a corporation must provide to the Department *all* relevant facts relating to *all* individuals responsible for the misconduct in order to obtain *any* cooperation credit. In other words, a fulsome disclosure of all facts relevant to individual

misconduct is a gating factor that must be satisfied for a corporation to obtain any cooperation credit. This marks a change in Department policy.

- Prior to the Yates Memo, it was generally understood that cooperation credit would be given on a sliding scale, based on the prosecutor's assessment of the extent, timeliness, and value of the corporation's cooperation. Under the Yates memo and newly-revised § 9-28.700 of the Principles, however, corporations must disclose to the Department *all* relevant facts specifically focused on the individuals responsible for the misconduct in order to receive *any* credit for cooperation. As stated in the Yates Memo (and as now codified in the Principles), "[i]f a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about" individuals involved in wrongdoing, it will not be given any mitigation credit for its cooperation. *See* Yates Memo at 3; Principles § 9-28.700(A).

- Notably, the difficulties that the Yates Memo recognizes that prosecutors face in investigating and prosecuting individuals in corporate cases are the same ones that often make it challenging—and sometimes impossible—for companies themselves (and their counsel) to identify which individual(s) are responsible for corporate wrongdoing. Indeed, the peculiar characteristics of corporate investigations (i.e, shared and diffuse decision-making responsibility; siloed information flows; reliance on lawyers, accountants or other professionals; and long-standing business practices, coupled with a lack of clear legal or regulatory standards) in many cases are precisely the factors that would tend to make an individual prosecution unjust and ill-founded.

- In particular, the dividing lines between negligence, recklessness and criminal intent can sometimes be murky and difficult to discern. Experienced corporate counsel have been cautious about drawing overly definitive inferences from ambiguous or uncertain facts.

- For companies, there can be a tension between seeking to be a good corporate citizen and disclosing wrongdoing to the government (with the benefit of credit for the company's cooperation) and the inherent difficulties of identifying specific individuals responsible for the conduct. Nonetheless, with the changes imposed by the Yates Memo, corporations are under pressure to deliver the identification of responsible individuals to the prosecutors—or to justify the lack of evidence of culpable behavior by individuals.

- *Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.*

    - The Yates Memo introduces a new requirement under which prosecutors must articulate, in writing, their plan to investigate and prosecute individuals at the time they enter into a corporate settlement. Further, if the prosecution team ultimately

concludes that individuals should not be charged, it must prepare a written memorandum justifying its decision, and the memo must be approved by a senior Department official. These provisions have now been incorporated into the Principles at § 9-28.110(B).

- At first blush, these requirements might appear to be relatively insignificant. They are applicable to only internal department procedures and decision-making, and it may turn out, in the fullness of time, that the changes are not consequential.

- However, there is reason for concern that the requirement of written investigation plans focused on individuals and written declination memos (which must be approved at senior levels of the Department) may tend to introduce rigidity and bureaucracy into a process—the decision whether or not to indict an individual—that should be immune from such influences. Bringing criminal charges against an individual is perhaps the most extreme exercise of government power in civilian life (short of the application of deadly force by a police officer). The decision to pursue individual charges in white collar cases—or to refrain from doing so—is often nuanced and difficult. The Department has a long-standing and noble tradition of making charging decisions based on fair-minded, objective consideration of the evidence, the law, and a thoughtful, case-by-case assessment of relevant facts and circumstances. Over the years, Department attorneys have rightly taken as much pride in their principled decisions to decline prosecutions as in their trial victories.

- In today's environment, with seemingly incessant (and often highly politicized) demands for more "scalps" in corporate investigations, it is critical for the Department to maintain the traditional process of sober and objective consideration that has traditionally attended charging decisions. As in many areas of government, procedures matter a great deal, and it remains to be seen whether the changes in the Department's internal procedural processes will alter the balance.

- In the wake of the Yates Memo, there has been a lively debate in some quarters as to whether the memo actually reflects a change. The picture will no doubt become clearer over time, but as of now there is good reason to believe that, in fact, the Yates Memo has had a significant impact on day-to-day practice in corporate investigations.

- In particular, and as Ms. Yates herself has noted, the focus on investigating individuals may raise actual or potential conflicts of interest between the corporation and its individual employees and agents. *See* Remarks of Sally Quillian Yates at American Banking Ass'n and American Bar Ass'n Money Laundering Enforcement Conference (Nov. 16, 2015) ("I will acknowledge that our focus on culpable individuals may make some employees nervous. Some may have reason to be nervous. But to the extent that there's a tension between the interests of the company and the interests of individuals in an internal investigation, that dynamic is nothing new.") Given the intense governmental scrutiny on internal investigations – and the potential consequences for both corporations

and individuals – counsel must be sensitive to the risks and challenges presented in these situations.

Multiple Representation – Entity and Individuals

- When is it appropriate for company counsel to also act on behalf of individuals in an FCPA investigation? This scenario can arise in different contexts, including private litigation and regulatory matters. Especially under the Yates Memo, it has potential for serious problems if not handled with care. *See United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev'd, United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (serious ethical issues raised when company counsel interviewed officer without proper warnings at a time it represented him in private class action litigation).

- What are the pros and cons of representing an entity and individuals in a FCPA investigation?

    - Advantages

        - Efficiency
        - Common strategy
        - Coordination
        - Avoid perception of diverging interests

    - Disadvantages/Risks

        - Risk of loss of credibility in government's eyes
        - Potential for diverging interests and adverse effect on lawyer's judgment
        - Thorny questions about client confidences
        - Ability to focus properly on interests of individuals

- ABCNY Formal Opinion 2004-02; "Representing Corporations and Their Constituents in the Context of Government Investigations" (June 2004)

    - Two pronged test:

        - (1) Disinterested lawyer would conclude that multiple representation is in interests of both clients; and
        - (2) Both clients give informed consent after discussion.

    - Under Rule 1.7(b) of the Rule of Professional Conduct, consent must be confirmed in writing if the representation will involve the lawyer in representing "differing interests."

        - Under Rule 1.0(f), "differing interests" are defined to include "every interest that will adversely affect either the judgment or the loyalty of a

lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

- As a practical matter, Rule 1.7(b) suggests that written consent should be obtained in most circumstances where a lawyer undertakes to represent an entity and an individual who is associated with the entity.

- In gathering facts to assess whether multiple representation is possible, corporate counsel must be vigilant about giving *Upjohn* warnings to ensure that individual does not believe that statements are protected by a personal attorney-client privilege. *See* Rule 1.18(b) (lawyer who has had discussions with prospective client generally "may not use or reveal information learned in the consultation").

- Additional important topics to consider and discuss thoroughly

  - Express agreement regarding confidences. Individual client must understand that counsel is free to share all information from individual client with entity and that entity may choose to waive privilege and disclose information to third parties. Such an agreement is crucial in order to permit counsel to effectively represent entity client.

  - Express agreement regarding advance waivers. Individual must agree that if conflict requires withdrawal of representation of individual, counsel may continue to represent entity.

    - Under Rule 1.9(a), a lawyer cannot represent a client in a matter where he has formerly represented another client in "the same or a substantially related matter" where the interests of the two clients are "materially adverse" unless the former client gives informed written consent.

    - Similarly, under Rule 1.9(c), a lawyer cannot use a former client's confidential information to the disadvantage of the former client without informed consent (which need not be in writing).

    - In light of these rules and case law, there may be a question about whether advance waiver will be effective. It is important to include as much detail as possible in outlining potential conflicts, and it may be necessary to secure a "second waiver" if the conflicts that actually develop are different than those envisioned at the time of the advance waiver.

    - It is also important to be specific, in the advance waiver, regarding individual client's prospective consent to cross-examination and use of client confidences.

        - Important to monitor situation over time and revisit discussion and conflict analysis periodically

- Additional thoughts on this subject

    - Conflicts may be less pronounced when individual is the principal of a closely-held entity. In that situation, interests of individual and entity are generally aligned more closely.

    - In situations where the interests of the entity and the individual seem to be aligned but a conservative approach is warranted, the use of "shadow counsel" can be advisable. Shadow counsel serves as co-counsel for the individual, but only represents the individual and does not represent the entity. Shadow counsel typically doesn't make a public appearance, at least initially.

    - In situations where company counsel wants to take extra precautions, it may be advisable to make counsel available to individuals for the limited purpose of counseling them about conflicts, waivers, and representation issues.

Multiple Representation – More Than One Individual Client

- This situation occurs more frequently than joint representation of entity and individual client. What are the pros and cons of one lawyer representing multiple individuals in the same FCPA investigation?

    - Advantages

        - Efficiency
        - Counsel has a more informed perspective through access to additional documents and more "touch points" with the facts and with the investigation

    - Disadvantages/Risks

        - Risk of diverging interests
        - Possible dilution of counsel's advocacy
        - Protection of client confidences

- Conflicts analysis is similar to that discussed in the ABCNY opinion – i.e., disinterested lawyer test plus informed consent – but as a practical matter the discussion may be simpler when the proposed clients are individuals.

- Traditionally, it has been the view that detailed oral discussions and consent are sufficient in at least some cases. However, as noted above, under Rule 1.7(b) of the Rule of Professional Conduct, consent must be confirmed in writing if the representation will involve the lawyer in representing "differing interests."

- Under Rule 1.0(f), "differing interests" are defined to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

- Assessing potential conflicts is inherently fact-specific, but the following factors should be explored:

    - Views and impressions of company counsel
    - Counsel's assessment of each individual's possible exposure
    - Degree of factual overlap among individual clients
    - Whether the individuals have a subordinate/supervisor relationship

- In some instances, it may be worth considering whether to obtain advance waiver designating one client as "first client" and agreeing that if conflict requires withdrawal of representation of one individual, counsel may continue to represent the "first client."

    - As noted above, advance waivers should be as detailed as possible and may not be enforceable depending on the circumstances.

- In all multiple-representation scenarios, it is important to monitor situation over time and revisit discussion and conflict analysis periodically

Interviews of Individuals by Entity Counsel

- If the individual has personal counsel, entity counsel may not interview the individual about the subject of the representation unless personal counsel is present or consents to the ex parte interview. See Rule 4.2(a).

- Before beginning interview, it is important to give and document thorough *Upjohn* warnings. See Rule 1.13(a) (when lawyer representing entity deals with individuals (termed "constituents" under the rule) whose interests may differ from those of the entity, "the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the "constituents").

- Key elements of proper *Upjohn* warning are the following (*see* report of ABA White Collar Crime Committee Task Force on "Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees (July 17, 2009)).

    - Counsel represents the entity and does not represent the individual.

    - Counsel is conducting the interview to gather facts to assist in counsel's representation of the entity.

    - The interview is protected by the attorney-client privilege, but the privilege belongs solely to the entity. As a result, the entity, and only the entity, controls the

decision about whether to maintain or waive the privilege. As a practical matter, this means that the entity may decide to reveal the information provided in the interview to third parties, including the government, without notifying or obtaining consent from the individual.

- The individual should treat the interview as confidential and should not divulge its contents to anyone except the individual's personal counsel.

- Counsel should ask if the individual has any questions.

- Counsel should make a contemporaneous note of the *Upjohn* warning and then include a detailed account of the warning in the interview memo. As noted in the ABA Task Force report, "using a written warning is not common practice" and "can have a chilling effect on the [individual's] willingness to share information, which defeats the fact-finding purpose of the interview, especially if the [individual] has no reason to believe that counsel personally represents [him or her]."

- If the individual asks "Do I need a lawyer?" best practice is to say "I can't provide advice on that question but if you want to have a lawyer you can do so." *See* ABA Task Force Report at 6; *see also* ABCNY 2004-02 ("Because affirmatively advising a corporate employee to secure counsel may work against the interests of the corporation, we believe it is appropriate for corporate counsel to be reluctant to render that advice – at least in the absence of the consent of his client to do so").

- In some situations, an interview will be conducted by a non-lawyer (e.g. a compliance officer or a forensic accountant) as part of an internal investigation that is overseen by lawyers and that is being undertaken in order to gather facts so that the company's counsel can give legal advice. In these scenarios, the witness should be given an *Upjohn* warning at the beginning of the interview even though the person conducting the interview is not a lawyer. *See* Defending Corp. & Indiv. in Gov't Invest. § 3:31 ("Whether or not the interview is a lawyer, he or she should at the outset of the interview provide Upjohn instructions and keep a record that the instruction was given, acknowledged, and understood").

    - In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014), a landmark decision on the attorney-client privilege in internal investigations, the D.C. Circuit held that a corporation's internal investigation was covered by the attorney-client privilege even though "many of the interviews in KBR's investigation were conducted by non-attorneys." The court upheld the privilege because the interviewers were "serving as the agents of attorneys" who, in turn, were directing the internal investigation to gather facts so that they could give legal advice. *See* 756 F.3d at 758 ("communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege"). In analyzing the facts, the D.C. Circuit noted that the employees were given a form of *Upjohn* warning prior to their interviews. *Id*. ("here as in *Upjohn* employees knew that the company's

legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected"; the employees "were also told not to discuss their interviews 'without the specific advance authorization of the KBR General Counsel'").

- By contrast, the failure to administer an *Upjohn* warning can weigh in favor of a finding that an internal investigation interview is not privileged. *See Wartell v. Purdue Univ.*, 2014 WL 4261205 (N.D. Ind. Aug. 28, 2014), at *7 (holding that interview was not privileged, in part, because the fact that the interviewer did not deliver an Upjohn warning "was evidence that he was acting merely as an investigator, rather than as Purdue's attorney").