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FCPA Alert

A Newsletter Covering Developments in Criminal and Civil Enforcement of the FCPA

US and UK Regulators Speak Out on Anti-Corruption Enforcement Trends and Priorities

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A number of key trends and priorities in international anti-corruption enforcement emerged last week at the 33rd ACI International Conference on the Foreign Corrupt Practices Act, held November 29 – December 2 outside of Washington, DC. Leading prosecutors and regulators from the US and UK described skyrocketing international law enforcement coordination, announced both "sticks" and "carrots" to encourage self-disclosure and cooperation, and pledged again to hold individuals accountable for anti-corruption violations. Officials from the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and the UK Serious Fraud Office (SFO) repeatedly emphasized these points in both their prepared remarks and their responses to questions.

International Cooperation

International cooperation was a favorite topic among the conference's government speakers, who highlighted tremendous gains over a few short years. Kara Brockmeyer, Chief of the SEC's FCPA Unit, described how meetings among international financial regulators previously resembled US-led anti-corruption instructional clinics. Now, however, all sides have the knowledge and depth of experience to contribute their own advice, observations, and lessons learned. Daniel Kahn, Chief of the DOJ's FCPA Unit, echoed this sentiment, noting that foreign regulators recently had become increasingly more active.

Andrew Weissmann, Chief of the DOJ's Criminal Fraud Section, expanded on this theme, explaining how the increased capacities of foreign enforcement agencies has led to greater collaboration. When asked whether companies should assume that information provided to the DOJ will be passed on to partners overseas, Weissmann answered with an unequivocal "Yes."

Nearly all government speakers at the conference cited this year's VimpelCom settlement as a model of international cooperation. The investigation, which involved allegations of at least $114 million in bribe payments to a government official in Uzbekistan, spanned over a dozen jurisdictions and resulted in a $795 million resolution split among regulators in the United States and the Netherlands. Weissmann highlighted the case as an example of different countries working collaboratively together to reach a global settlement with appropriate penalties across jurisdictions, rather than different regulators "pilling on top" of each other and driving up a

settlement amount. Andrew Ceresney, Director of the SEC's Division of Enforcement, pointed to Embraer's $205 million settlement as another example of successful international cooperation. In that case, the DOJ and SEC worked closely with Brazilian authorities, which allowed Embraer ultimately to obtain an $18.5 million "credit" with the US regulators after settling for that amount with the Brazilian authorities.

Self-disclosure and Cooperation

Speakers from both the DOJ and the SEC stressed the benefits that can be obtained by voluntarily reporting potential FCPA violations and cooperating with government investigations. Ceresney, for example, held out the possibility of reduced charges and penalties for companies that self-report misconduct and provide meaningful cooperation. Consistent with the SEC's policy of reserving Non-Prosecution and Deferred Prosecution Agreements (NPAs and DPAs) for parties that self-report violations, Ceresney underscored two 2016 NPA resolutions with Akamai Technologies and Nortek, both of which he said made voluntary disclosures. Ceresney claimed that "significant credit" had been provided to over a half dozen other companies for their cooperation.

SFO Director David Green similarly emphasized the benefits of voluntary self-disclosure in the United Kingdom, and provided guidance to companies on how to maximize the utility of their disclosures. Green stated that the SFO is concerned about two specific issues: (i) outside counsel "plowing up the crime scene"; and (ii) companies that self-report only after their outside counsel has finished all of its work. When asked, Green denied that the SFO had a policy of discouraging companies from conducting internal investigations prior to their disclosure of an issue to the SFO, and noted that the SFO itself benefits from the work done by a company's lawyers. However, in his view, prompt voluntary disclosure can ameliorate concerns about "plowing up the crime scene" and help strike the right balance between reporting and conducting a proactive internal investigation. More specifically, Director Green explained that a company should self-disclose when it "becomes aware that it has a problem," not "when the glossy report has landed on the CEO's desk."

Focus on Individuals

An increasingly prominent variable in the cooperation equation is a company's disclosure of information bearing on individual responsibility. Discussing DOJ policy on this subject (as reflected in last year's "Yates Memo"), Deputy Attorney General Sally Yates made clear that "providing information about individual wrongdoers is a threshold requirement for any corporate cooperation – without it, no cooperation credit is available." Yates also explained that the Department has made concrete changes to its principles of federal prosecution of business organizations, also known as the "Filip factors." These changes clarify that companies that voluntarily self-disclose potential violations—including information bearing on individual misconduct—will be treated differently than companies that begin cooperating with the government only after learning of an ongoing government investigation. That is, companies that report potential violations early and voluntarily will receive more favorable treatment than companies that provide cooperation at a later stage.

Finally, both Ceresney and Kahn cited the recent Och-Ziff settlement as an example of enforcement agencies holding individuals to account. That case involved allegations that the hedge fund paid bribes in multiple African countries to induce investments in its funds and to secure mining rights. Ceresney highlighted the SEC's Order finding that CEO Dan Och knew of the significant corruption risks of doing business in the Congo, and received due diligence reports raising substantial corruption risks in connection with a business partner operating in that country. And although Och-Ziff's senior compliance and legal personnel recommended against proceeding with certain transactions, Och decided to move forward. Similarly, Kahn remarked that the Och-Ziff settlement was the first action against a CEO for failing to heed red flags or ensure that internal controls were being followed.

Conclusion

As expected, the 33rd annual FCPA conference gave key government officials a platform to announce their enforcement priorities and provide guidance on what they believe are emerging trends. The statements made by these officials give FCPA practitioners a road map for how they, or their clients, can meet the high expectations set by both US and UK enforcement agencies.

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