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ENFORCEMENT TRENDS

Top FCPA Enforcers Discuss Evolving and Diverging Enforcement Approaches and the Defense Bar Responds

By Megan Zwiebel

International cooperation and whistleblowers are changing the government's investigations and resolutions according to top FCPA enforcers. Due to these changes – and the ever-increasing sophistication of both the SEC and DOJ – the agencies' goals, strategies and tactics continue to evolve and diverge based on their statutory remits. At this year's ACI FCPA conference, Kara Brockmeyer, Chief of the FCPA Unit of the Division of Enforcement of the SEC, and Patrick Stokes, Deputy Chief of the Fraud Section of the Criminal Division of the DOJ, distilled the government's enforcement priorities in their "Year in Review" discussion, and The FCPA Report spoke to several anti-corruption defense experts for their reactions. Stokes and Brockmeyer also discussed what they expect from compliance programs as well as the incentives they offer companies to self-report, cooperate and remediate, which will be discussed at length, with input from the FCPA bar, in our next issue. For coverage of last year's panel see "*Top FCPA Enforcers Tout Voluntary Disclosure and Warn About International Cooperation; The Defense Bar Responds*," The FCPA Report, Vol. 3, No. 24 (Dec. 3, 2014) and "*Top FCPA Officials Talk Compliance Tips and the Defense Bar Weighs In*," The FCPA Report, Vol. 3, No. 25 (Dec. 17, 2014).

Historically, the Year in Review presentation revolved around reviewing resolved cases, but for the past two years the focus was instead on SEC and DOJ policies. This has made the panel "much less engaging" to Lucinda Low, a partner at Steptoe & Johnson. James Koukios, the former Senior Deputy Chief of the Fraud Section and now a partner at Morrison & Foerster, felt similarly, explaining that "over the last two years, other than the opening statements, the panel has become less of a 'year in review' and more of a straightforward statement of various policies that really haven't changed much from year to year."

This year's panel did contain some useful information for companies and their counsel, however. The presentation "gives the audience a sense of priorities and perspectives of the key enforcement officials," said Kathryn Atkinson, a member of Miller & Chevalier. Claudius Sokenu, a partner at Shearman & Sterling, agreed, telling The FCPA Report that it was "informative and useful" to have the government representatives share "their perception of the world."

Busy Year for the SEC, But Less So for the DOJ

One of the biggest takeaways from the panel discussion was the extent to which the DOJ and the SEC are focusing their attention and resources differently. "It was a very busy year" for the SEC, Brockmeyer said, with 15 actions brought against eleven entities in fiscal year 2015. Meanwhile, the DOJ brought markedly fewer actions against companies, and Stokes reiterated that the DOJ's focus is on prosecuting individuals, a recurring theme in all recent DOJ policy statements. See "How Will the Yates Memo Change DOJ Enforcement? (Part One of Two)," The FCPA Report, Vol. 4, No. 19 (Sep. 23, 2015); Part Two, Vol. 4, No. 20 (Oct. 7, 2015).

A Year of Firsts for the SEC Signals a Broader Focus

In her opening remarks, Brockmeyer characterized 2015 as a year of firsts for the Commission. For example, the BNY Mellon settlement represented the first case the SEC brought against a financial services firm as well as the first case where the "thing of value" was a job. She also noted that the Hitachi settlement was the first case based solely on payments to political parties – all previous cases involving political donations had large payments to government officials as well.

An enumeration of those firsts is less important than the fact that Brockmeyer chose to highlight the expansion of the types of cases the SEC is willing to take on. Lillian Potter, special counsel at WilmerHale, said that the SEC appears to be working to broaden its enforcement of the FCPA wherever it can and "is taking a deliberately expansive approach in a variety of cases."

This trend towards broader enforcement by the Commission is likely to continue, according to Potter, and companies "should expect the SEC to continue to focus on bringing first-type cases where they can take new positions on the meaning of various elements of the FCPA and reach industries where there has been little or no FCPA enforcement previously."

The SEC is "always on the lookout for new bribery schemes and new industries," Sokenu said. However, he wondered whether "the legal theories underpinning these cases are sustainable."

The DOJ's Narrowed Focus Shouldn't Create a False Sense of Security

While the SEC's focus is broadening to encompass new types of bribery schemes, the DOJ has made clear that it is pursuing a narrower swath of cases. Stokes said that individuals continue to be the DOJ's "primary focus," and noted that it had charged or convicted eight individuals in the last year. However, he did assure the crowd – which he polled to see how many worked in-house at companies – that the DOJ is not targeting compliance officers. "We follow the evidence where it leads," he said, and "it rarely leads to the lawyers and the compliance professionals."

One set of individuals that will be targeted more frequently, though, are those foreign government officials who are receiving bribes. Stokes explained that the DOJ will increasingly use anti-money laundering laws to bring corrupt foreign officials under their jurisdiction so the DOJ's efforts are not just towards bribe payers "but also bribe takers when appropriate." See "*Former FinCEN Director James H. Freis, Jr. Discusses the Intersection between Anti-Money Laundering and Anti-Corruption Law (Part One of Two),*" The FCPA Report, Vol. 2, No. 3 (Feb. 6. 2013); *Part Two*, Vol. 2, No. 4 (Feb. 20, 2013).

This focus on the "demand side" is "very interesting and welcome," Low said. Enforcement officials are increasingly in agreement that corruption cannot be addressed "solely through a combination of supply-side enforcement and long-term policy efforts on the demand side," Atkinson observed. In order for there to be real progress, "there must be an immediate, tangible downside for the bribe takers," she said, and "credible enforcement against corrupt officials clearly would put a chill on the demand." See also "*The Emperor Is Far Away: The Evolving Nature of Third-Party Risk in China,*" The FCPA Report, Vol. 4, No. 18 (Sep. 9, 2015).

Beyond focusing on individuals, Stokes made it clear that the DOJ will not participate in every FCPA case. He said that the FCPA unit is focused on "more significant, larger scale bribery schemes" and that the DOJ is currently "retooling" its FCPA efforts. The Department will be involved in cases with "egregious criminal conduct," while cases lacking in criminal intent or cases where it is more "appropriate" for the regulator to bring the case will be left to the SEC.

This divergence in approach makes sense, according to Atkinson, within the context of the SEC's and DOJ's different mandates, but she wondered whether the DOJ's retreat from smaller cases "could undermine the deterrent effect it has achieved over the past decade."

Low agreed that the two agencies have different missions and authorities, and that "the increasing maturation of the enforcement regime is producing indicators in my view of a different approach to enforcement" reflecting those different statutory remits. "Perhaps because of its mandate, the SEC feels compelled to bring even the smaller cases," Sokenu suggested.

While this may represent a shift in the types of cases that the DOJ will ultimately resolve by NPA, DPA or guilty plea, Koukios believes that it does not represent a shift in the DOJ's willingness to aggressively investigate FCPA cases

so "companies should not get a false sense of security." The DOJ's desire to bring cases against individuals and bigger cases against corporations actually puts a premium on compliance programs, he said, because "you do not want your company to be on the wrong end of a 'big' resolution."

Changes in Case Origination and Investigative Processes

Another key theme of the panel was that cases and evidence are coming to the enforcement agencies in new ways. "Self-reporting cases are averaging about a third of our cases," Brockmeyer said. "That means two thirds of our cases are coming through other sources."

International Cooperation Is Increasing the Risk of Parallel Prosecutions

One way the government is able to find out about possible wrongdoing and investigate it effectively is by cooperating with foreign governments. This was a key takeaway from last year's discussion and the government's reliance on other countries for assistance in investigations has only increased in 2015. Brockmeyer said that it was a "banner year" for the SEC in terms of cooperation, and that "this is really a ground-breaking area for us because the more that we can cooperate with international authorities – people that are on the ground in the country where the conduct occurred – the faster and the better we can bring our action."

The SEC worked with 11 different countries over the course of the year, and Brockmeyer noted that the Hitachi case was the first where the SEC worked with the African Development Bank. Both government agencies are helping other countries' regulators in their investigations as well. "One thing we can offer to many regulators and prosecutors around the world is that both the SEC and the DOJ have tremendous experience doing these types of cases," Brockmeyer explained.

All of this means that it is much easier for the SEC and DOJ to investigate FCPA cases. "Five or ten years ago we were really limited in our ability to get information from overseas, which made it difficult for us to take a lot of investigative steps," Brockmeyer said. "That landscape has completely changed. There are smaller and smaller numbers of countries that do not cooperate with us, which means that the number of active investigative steps that we can take grows every year."

"This is an area that continues to evolve," Low observed. "As the U.S. authorities develop their relationships with foreign authorities, they will be more comfortable reaching out directly, engaging in joint investigative activities, and rationalizing who does what in these cases," she predicted.

Potter thought the SEC's coordination with foreign agencies was particularly notable because "they traditionally have done somewhat less of that than DOJ."

All of the defense counselors The FCPA Report spoke with warned that this is an increased area of risk for companies as they face investigation and prosecution on multiple, simultaneous fronts. "A classic example of this is the Embraer case where, with the help of the U.S. government, Brazilian prosecutors indicted several individuals on corruption charges even though the U.S. investigation is still ongoing," Sokenu said, noting that he represents one of the indicted individuals. See "*How the Expanding Petrobras Scandal May Spark a New Era of Multi-Lateral Enforcement*," in this issue.

"Companies need to think early and often about non-U.S. enforcement authorities to be certain they are managing those interactions as well," Atkinson advised. Koukios agreed, saying that "companies need to be aware that they stand an increased likelihood of being investigated by multiple jurisdictions and that the calculus for self-reporting and cooperating has become more complicated, given the increased international law enforcement cooperation."

See "*Former DOJ Prosecutors Weigh In on Self-Reporting, Individual Prosecutions, International Cooperation and Enforcement Tactics*," The FCPAR Report, Vol. 4, No. 23 (Nov. 4, 2015).

Whistleblowers Are a Growing Source of Cases

Another "significant source" of cases, according to Brockmeyer, is an increasingly sophisticated army of whistleblowers across the globe. This extends outside of the SEC's Dodd-Frank whistleblower program as well. Both the SEC and DOJ are seeing an increase in the number of reports. "We have an FCPA inbox at the Department of Justice and frequently we will receive whistleblower complaints or emails, people contacting us from around the world alerting us to bribery schemes outside of the issuer context, outside the SEC's Dodd-Frank program," Stokes said.

Stokes said that the Dodd-Frank program is known "throughout the world" and that non-U.S. employees know that there is a program where they can be rewarded for bringing corrupt activity to the attention of U.S. authorities. Brockmeyer agreed, saying that the SEC is seeing the number of whistleblowers coming in internationally "growing every year."

Additionally, whistleblowers are becoming more and more sophisticated. They understand what regulators need to bring a case and come in with specific information including where to find documents and who to interview in order to uncover corrupt schemes, Brockmeyer said, which is a "powerful tool" for the SEC.

One driving force behind this increased sophistication is the rise of law firms that specialize in finding and representing whistleblowers. "Whistleblower firms jumped into this pool almost immediately, and word has spread, particularly outside the United States," Atkinson said. Stokes said he has seen advertisements from law firms for whistleblowers on the back covers of magazines looking for informants. These firms will come in with "pre-packaged, pre-vetted" whistleblower reports that are generally of a higher quality than they have seen previously, Stokes said, because in his opinion, the law firms have separated "the wheat from the chaff."

Indeed, "whole industries are being targeted by whistleblowers and plaintiffs' firms," said Low. Companies need to recognize "that there is now an established whistleblower bar that has a tremendous economic incentive in increasing the quantity and quality of whistleblower reports," warned Koukios.

Another trend the DOJ and SEC are seeing is that whistleblowers are coming in earlier. Stokes said that he has seen whistleblowers come in while a company is investigating a case internally, which can then deprive the company of any benefits of self-disclosure. "We frequently have whistleblowers come in at that stage," he said, and "we then reach out to the company and, unfortunately for the company, if it's not alerting us to potential conduct from the investigation, it cannot receive self-disclosure credit."

Brockmeyer said that the SEC even has a case in the pipeline where the SEC brought a whistleblower complaint to a company's attention and the company said "there's nothing to see here; we don't see any violations," a claim that government investigation proved false. Such failures reflect even more poorly on a company.

This can put companies in a bind while investigating internal hotline tips. "It can be tough for companies to determine when is the right time to disclose because it often takes time to get from the hotline call stage to determining there was an FCPA violation," Potter said, "but if a whistleblower approaches the government during that critical period of time, it could significantly affect the company's ability to get credit in the resolution." See "*Top FCPA Practitioners Share Strategies for Detecting, Preventing and Responding to Whistleblower Allegations*," The FCPA Report, Vol. 2, No. 13 (Jun. 26, 2013).

The best course of action to avoid this problem entirely is to have a strong compliance program and a corporate culture that encourages employees to raise issues internally first, according to the defense experts. "Even where significant financial rewards may result, most satisfied employees who believe in their company's message are still more likely to report concerns internally, and to give the company a chance to address those concerns, than to go straight to the outside," Atkinson said.

Potter said that companies can minimize the risk of whistleblowers going directly to the government by "responding promptly and effectively to employees who raise compliance concerns, ensuring that their employees are not retaliated against, keeping their employees informed of the status of their investigation and remediation and rewarding those employees for coming forward."

If such precautions are not enough to prevent whistleblowers from going to the government, companies should have "counsel who can conduct an appropriately scoped investigation in response to such allegations, which are often quite broadly crafted, and who is in a position to make good judgments about what is worth pursuing and what is not," said Low. "Many of the allegations that are being made do not ultimately have merit."

See "*Preparing for the Increasing Role of Whistleblowers in FCPA Enforcement*," The FCPA Report, Vol. 4, No. 2 (Jan. 21, 2015); and "*Key Takeaways from the 2013 Office of the Whistleblower Report*," The FCPA Report, Vol. 2, No. 25 (Dec. 18, 2013).

More Settlements to Come in the Next Six Months

Both Stokes and Brockmeyer specifically said that their respective agencies have plenty of new cases coming down the pike. "We have a lot of cases in the pipeline, including some very large and very interesting cases," Brockmeyer said. Stokes said the DOJ also has a "healthy pipeline" of cases at the moment, many of which are focused on "significant schemes involving conspiracies, groups of individuals paying bribes as well as significant corporate investigations."

Neither Stokes nor Brockmeyer mentioned any specifics as to which investigations may be coming to a conclusion, but Koukios said that the "pipeline" comments are "consistent" with his understanding of the "state of play of FCPA investigations at both agencies."

Low pointed out that we know of at least several "significant" cases that are currently under investigation such as Wal-Mart, Petrobras and VimpelCom, while Sokenu noted that several princelings investigations are still under investigation in the financial services industry. See "*Former Prosecutor Daniel Fetterman Speaks Out About Princelings Investigations*," The FCPA Report, Vol. 4, No. 11 (May 27, 2015).

Regardless of the specific cases on deck, "the next six months are really going to be a time to watch out for," advised Brockmeyer.