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Self-Reporting

Reading the Regulators: Shifts in FCPA Enforcement

By David Hill, *Anti-Corruption Report*

In 2023, there have been shifts in several key areas of anti-corruption expectations, and its second half might see a solidification of what is changing as more practical cases proceed. Exactly what FCPA regulators expect from companies, for example in terms of voluntarily disclosing possible problems and cooperating with investigations, might become clearer as cases develop in the coming months. So might regulators' expectations of incentive clawbacks and off-channel message retention by companies that come under investigation.

Moreover, use of data analytics is expected to become more prevalent in anti-corruption enforcement. In a firm webinar, Davis Polk partners Greg D. Andres, Sidney Bashago and Daniel S. Kahn, along with counsel Fuad Rana, discussed what to expect in FCPA enforcement in the remainder of 2023 following developments in its first few months. This article distills their insights.

See "FCPA Corporate Enforcement Actions More Than Triple in 2022" (May 10, 2023).

Sometimes Cooperation Gets a Declination

The speakers recommended keeping an eye on the SEC's increasing use of disclosure and internal accounting controls provisions in 2023. Moreover, the rest of 2023 might see new resolutions, which apply recently announced guidance on companies' self-disclosure of their own problematic issues and cooperation with investigators.

Referring to the fact that during the spring Pennsylvania-based Corsa Coal Corp. received a declination in an FCPA proceeding, Kahn said it met the standards of the Corporate Enforcement Policy (CEP): voluntary disclosure, cooperation, and remediation. Based on revisions to the CEP from January of this year, however, when aggravating circumstances are present (which includes "significant profit" to the company, although that term is not given a dollar threshold), a company is only eligible for a declination if the company voluntarily discloses "immediately," provides "extraordinary cooperation" to the DOJ, and had a pre-existing effective compliance program at the time of the misconduct. "In this case, there was about $5 million in bribes paid to win a contract that was worth

$143 million, which led to profits of over $30 million," he noted. "Are those aggravating circumstances? If they are, would this still have been a corporate enforcement declination under the new standards?"

Guidance issued by the DOJ early in 2023 on CEP provided that, where a company with aggravating factors seeks a declination, it must provide "extraordinary cooperation" and its voluntary self-disclosure must have been made "immediately." However, in March, the Assistant Attorney General at the time, Kenneth A. Polite, Jr., said this guidance does not disturb the policy that, absent aggravating factors, a company that voluntarily self-discloses misconduct, fully cooperates with an investigation, and timely and appropriately remediates earns a presumption of a declination.

Kahn noted that public information makes clear that Corsa Coal disclosed prior to the new standards. "It will be interesting to see whether those types of numbers, profits and bribes would lead to a declination in future; whether those would be considered aggravating … And whether a company in the future would be able to get a declination even with those aggravating circumstances," he said.

Regarding whether the new criteria make getting a declination easier for a company, Kahn said there are two main changes.

The first is that increasing discounts are available for companies that disclose and cooperate. "It's certainly a good development. It creates additional incentives for companies. But it is not going to move the needle much in terms of increasing the number of disclosures. Companies may not shift course if they have already decided," Kahn said.

The second big change he noted is that, even when there are aggravating circumstances and the company is locked out of presumption of declination, there is still a pathway to a declination. "The issue is that the pathway is a very tough one. The three criteria are immediate disclosure, extraordinary cooperation, and pre-existing effective compliance programs," Kahn continued. He noted that, thanks to more recent comments by David Fuhr, the new acting head of the DOJ's FCPA unit, and Glenn Leon, who heads the DOJ Fraud Section, that "immediate disclosure" means within weeks, not days or hours. "But that's still not always easy," he noted. He added that "extraordinary cooperation" and "pre-existing effective compliance programs" also leave a lot of discretion with the prosecutors to judge.

"We'll get a better sense as we start to see some of these resolve, how they work in practice, how they are applied and how companies can react as a result," Kahn predicted.

See "Assistant A.G. Polite Discusses Declinations in Cases With Aggravating Circumstances and Revised ECCP" (Apr. 12, 2023).

Evolving Interpretations of Disclosure

Rana noted the agencies' ever-expanding interpretation of what disclosure controls and internal accounting controls are required by public companies.

"In a series of cases, the SEC has used these provisions to allege misconduct by companies, even where there no allegation that there's anything wrong with the companies' disclosures or accounting. That really is a new approach by the SEC," Rana said.

"A vivid example of this is the SEC's Activision settlement from earlier this year," Rana continued. "There was a USD 35m penalty when the SEC alleged that the company had inadequate disclosure controls to handle employee complaints, even though there was no suggestion that the company's disclosure about its employees' complaints was inaccurate."

He said that for public issuers, Activision and this line of cases need to be "front-of-mind" when considering what controls one should have in place – including those on ESG, human capital, or diversity.

Rana added that the SEC appears to be recalibrating its public messaging around the benefits of cooperation.

"In several recent cases over the summer and late spring, the SEC touted the benefits of self-reporting, cooperation and remediation," Rana said. "In fact, in a couple of financial fraud matters, it imposed no penalties, to reward that type of corporate conduct."

Rana concluded that an open question to keep watching is whether the same approach is going to be extended to what he termed "the FCPA side of the house" under current leadership.

See "Revised Monaco Memo Affects Compensation, Clawbacks and Monitorships" (Oct. 26, 2022).

Three Years to Try Clawback Discounts

There are also new developments pertaining to clawbacks of executives' incentive compensation, as a form of financial penalty for misconduct.

In a pilot program. companies will receive a 100 percent credit against a fine or penalty for amounts they claw back. There will also be a credit of up to 25 percent of the value of any amount which companies unsuccessfully, but in good faith, attempt to claw back.

"This is a pilot program to expire in three years," Kahn said. "It's good that it's a pilot program. We can see how it plays out." However, he noted, there could be questions over why this specific part of the compliance program is being singled out for individual discounts.

"It could have unintended ironic consequences," Kahn continued. "People affected by clawbacks might be higher-placed officials who are usually less likely to be involved in misconduct. So the company most likely to benefit from this discount is the one whose senior-most executives engaged in misconduct and got payouts as a result." He added that the program will, unfairly, not apply to companies in countries where clawbacks are not possible.

Andres also cautioned that the DOJ might find that the initiative could get in the way of prosecution, but this remains to be seen over these three years.

The lawyers welcomed revisions to the DOJ's clawback guidance. "It's helpful to see how the DOJ is thinking about this. It gives guidance to companies as to what they should be doing," Kahn said.

The speakers referenced guidelines such as equal imposition of disciplinary measures for employees who violate applicable policies, financial rewards for compliance and penalties for non-compliance.

"It's pretty general right now, but raises commonsense questions about what companies are doing to incentivize compliance," Bashago said. "Keep in mind that this guidance is part of a much larger compliance guidance document. If companies can't claw back compensation, this doesn't mean the DOJ will determine their whole compliance program is ineffective."

See "DOJ's Pilot Program on Clawbacks to Foster Individual Accountability Poses Challenges for Companies" (Mar. 29, 2023).

Pointed Questions on Messaging Apps

New areas of focus in the DOJ's 2023 guidance include personal devices and off-system messaging.

Companies are asked to maintain effective policies and systems governing the use of personal devices and third-party messaging platforms, ensuring that all company data and communications are appropriately tracked and preserved.

"The new DOJ guidance makes it clear that the DOJ is going to be looking closely at off-system messaging. Companies should look at their policies and procedures in these areas to make sure they're consistent with DOJ's expectations," Bashago suggested.

"The guidelines are not prescriptive but there are some pointed questions. The DOJ seems to recognize it's a tough issue," Bashago added. "Using messaging apps to communicate has become second nature for people. The revisions to the guidance show that the DOJ expects companies to be aware of this, and to really understand what platforms employees are using. And it expects them to implement some commonsense policies to address the use of communication platforms and retention of business-related data."

Companies should keep in mind their preservation obligations, particularly when an investigation is launched and take steps as quickly as possible to minimize any data loss, the firm recommends. One hard question is how long companies need to be keeping messages, posed Andres.

See "SEC Remains Focused on Off-Channel Communications" (Aug. 2, 2023).

Third Parties Can Be a Risk

Third parties continue to be a focus area for FCPA enforcers, whether the third party be a contractor, sales agent, or some other partner that helps a company pursue its business, Bashago observed. Regulators have long signaled that this should be a compliance priority, and after all that

effort to get the message out, we can expect that they "will continue to expect companies to have sophisticated third-party due diligence and monitoring programs," she said.

Recent high-profile cases exemplify this, Bashago noted, such as those involving Gartner, Inc. and its private consultant in South Africa, and a subsidiary of Frank's International and its sales agent in Angola.

Rana mentioned the recent SEC penalty for Flutter Entertainment, saying it highlights the successor liability issue under the FCPA. He noted that a consultant hired by a predecessor was not subject to due diligence either in connection with the initial retention or during the acquisition, and continued to be paid after the acquisition by Flutter without conducting any due diligence. The Flutter settlement is "a good example of [the risk from] third parties that might have been retained by your predecessor," he said.

The Flutter case exemplifies an important aspect of the DOJ's guidance, added Kahn. "It makes clear that it expects companies to not just do due diligence at the outset of a relationship, but in the future too – every few years," he said.

See "Gartner's Settlement for FCPA Violations in South Africa Raises Important Issues" (Jun. 21, 2023).

Data Analytics to Aid Case Detection

The lawyers foresee an increased use of data to identify new cases.

"We can expect to see DOJ and SEC to continue to focus on data as a way to identify misconduct and to source cases," Rana predicted.

Kahn agreed. "The DOJ keeps talking about it and adding resources to identify new cases based on data. The SEC is doing the same thing," he said.

See "Insiders Tsao, Soltes and Kahn Share Insights on Investigations" (Jan. 4, 2023).

New Rules on M&A, Plus FEPA

Looking forward to likely regulatory news in the coming months, Kahn mentioned that new guidance on due diligence associated with mergers and acquisitions is anticipated.

Moreover, lawmakers are considering a bill that would criminalize the demand side of bribery. "It's called FEPA - the Foreign Extortion Prevention Act," Kahn said. "It would essentially do the flipside of the FCPA. It would allow the prosecution of officials, which, currently, the DOJ does through money laundering or wire fraud or other types of violations."

See "Red Flags and Multiple Acquisitions Yield a $4-Million SEC Penalty for PokerStars Owner" (Jun. 21, 2023).

Facing Trial Soon

There are a few trials of interest, which, Bashago said, will give DOJ a busy schedule in the fall of 2023 and probably into next year.

One trial, noted Bashago, calendared to begin on October 2, 2023, in New Jersey, involves the technology company Cognizant, which became the subject of FCPA investigation regarding payments in India.

A trial set to start at the end of October 2023 in Miami, Bashago said, is that of the former comptroller of Ecuador, Carlos Ramon Polit Faggioni. He faces accusations in connection with alleged bribes from Odebrecht, the Brazilian construction conglomerate. Also on trial in October in Miami, she noted, is Naman Wakil, in connection with payments to Venezuelan fossil fuel company Petróleos de Venezuela, and Corporacion de Abastecimiento y Servicios Agricola, Venezuela's state-owned food company.

Additionally, two trials are due to start January 2024, Bashago continued. Javier Aguilar, a former trader for commodities trading company Vitol, will face a trial in Brooklyn connected with supposed bribes paid in Ecuador and Mexico. Glenn Oztemel's trial will happen in Connecticut and concerns his former employer, oil trader Freepoint, and its efforts to win contracts with Brazilian oil company Petróleo Brasileiro.

Since Freepoint has yet to resolve with the DOJ, Bashago said, "it may be that that is also one of the corporate cases in the pipeline."

See "Cognizant Settles With the SEC and Receives a DOJ Declination, but Top Executives Face Charges" (Mar. 6, 2019).

No Surprises Expected From Interim Officials

Davis Polk's experts voiced confidence in the skill, experience and consistency to be displayed by both Nicole Argentieri, who is serving as Assistant Attorney General in an acting capacity, and David Fuhr, the new acting head of the DOJ's FCPA unit.

They both stepped up this year as temporary occupants of the spots vacated by, respectively, Kenneth Polite, Jr., and David Last.

"I would expect continued enforcement with smart, fair reasonable people at the helm," Kahn predicted, describing each of them as "a steady hand."

Of what he presumes of Fuhr, Kahn said, "I expect the FCPA will continue on the same track." He also welcomed the fact that Argentieri has tapped another experienced regulatory professional, Brent Wible, "to be her number two."

See "Cleary Gottlieb Hires Former DOJ FCPA Unit Leader David Last" (Aug. 2, 2023).