

Dec. 20, 2023

Enforcement Trends

Coming Year's FCPA Enforcement Developments Build on Eventful 2023

By David Hill, *Anti-Corruption Report*

Anti-corruption regulators are boosting their international cooperation, intensifying their use of data analytics, and treating issuers and non-issuers more evenly. These are some of the stand-out anti-corruption enforcement trends highlighted by the government and advisory side at the turn of the year.

Discussing what is to be expected as 2023 gives way to 2024, Acting AG General Nicole M. Argentieri said a new International Corporate Anti-Bribery initiative (ICAB) team within the DOJ's FCPA unit will expand international partnerships. Meanwhile, the DOJ will step up its use of data analytics in FCPA matters, and expects companies to do so too, according to Argentieri, who was speaking in a November 2023 [keynote address](#) at the American Conference Institute's International Conference on the Foreign Corrupt Practices Act.

Reviewing some of the major cases of 2023, Argentieri highlighted fast and proactive self-disclosure and cooperation as factors that can make enforcers more likely to offer discounted penalties to companies facing investigations.

To understand what compliance professionals should expect in 2024 and what lessons they can draw on from 2023, this article distills insights from Hughes Hubbard & Reed partner Laura Perkins, Miller & Chevalier members James Tillen and Daniel Patrick Wendt, Davis Polk partners Daniel Kahn and Tatiana Martins, and chief executive of compliance software firm Kona AI, Vincent Walden. It also summarizes Argentieri's main points.

See "[Assistant AG Polite Discusses Declinations in Cases With Aggravating Circumstances and Revised ECCP](#)" (Apr. 12, 2023).

ICAB Initiative to Enhance Global Reach

The ICAB team within the DOJ's FCPA unit will "be driven by three experienced prosecutors" and build on and expand international partnerships, according to Argentieri. "Working with foreign

authorities allows us to be force multipliers. It makes evidence easier to obtain, leaves criminals fewer places to hide, and helps us recover criminal proceeds,” she said.

The team will initially focus on regions where “we can have the most impact” and on “key threats to financial markets and the rule of law,” Argentieri explained. It will collaborate across the Criminal Division, other parts of the DOJ, law enforcement and the State Department.

“This is yet another reason companies considering whether or not to disclose misconduct should take note – call us before we, or our foreign partners, call you,” Argentieri suggested.

Fits With the Trend

The ICAB initiative fits with DOJ’s ongoing efforts to build relationships with foreign counterparts and build global capacity in the fight against corruption, Perkins said. Companies should be aware of this growing cooperation, she advised, especially because “it increases the risk of regulator action in response to misconduct, both in the U.S. and abroad. Informal, ongoing communication between regulators in different countries allows for the sharing of leads and evidence.”

Thus, it becomes ever likelier that misconduct will come to the attention of a regulator with relevant jurisdiction, and that the regulator will obtain evidence allowing it to bring charges, Perkins explained.

The initiative indicates that the DOJ is “putting its money where its mouth is” by putting resources behind cooperation with foreign counterparts, something that has clearly been a priority for many years, Martins said.

Vigilance Needed

Companies that are already proactive in compliance efforts could benefit from the DOJ’s ever-growing international partner network, Perkins noted, as it may help regulators in other countries better understand best practices in compliance. Companies with less advanced compliance programs, on the other hand, may face increasing risks as knowledge of compliance best practices is more widely shared among regulators around the globe, she warned.

Companies should be prepared for the fact that U.S. authorities and their counterparts could improve their effectiveness in discovering, investigating and resolving corruption matters, Tillen advised. “Cross-border investigations are challenging, and facing prosecution in multiple jurisdictions increases the complexity and cost for companies. Companies will need to ensure [they have] coordinated defense counsel teams in multiple jurisdictions and be prepared for dealing with different legal systems,” he added.

The challenges include different standards of cooperation, different expectations for collection and production of evidence, and different methods for resolving actions, according to Tillen.

Where in the World?

The new initiative may build off recent collaborations in Latin America to strengthen relationships across other countries in that region. “Latin America is an area of significant U.S. investment and the DOJ has the language skills to facilitate collaboration,” Tillen said.

Asia Pacific may also be a region of focus, according to Tillen. China, Vietnam, South Korea and other Asian countries have been the subject of a significant number of FCPA matters, he noted.

“Although collaboration with China is unlikely given the current political relationship, the U.S. could step up efforts with other countries in the region. The negotiation of the anti-corruption pillar of the Indo-Pacific Economic Framework would support more collaboration with anti-corruption regulators in the region,” Tillen explained.

The ICAB initiative amounts to a recognition that in order to increase the number of cases it is able to pursue, the DOJ needs to develop more, and deeper, relationships with countries that hitherto have not been so much in focus, according to Kahn. He agreed the initiative might focus on countries in Asia as well as Africa.

Those continents were also highlighted by Martins. “There are areas of very untapped sources, where we know there is high corruption, particularly in Africa and Asia, where the DOJ doesn’t have the same relationships as in some places in Latin America. Developing those relationships could be quite rewarding,” he said.

See [“Exploring the Shift in the DOJ’s Prosecutorial Reach of Foreign Defendants”](#) (Apr. 27, 2022).

Data Analytics

Companies will increasingly be expected to use data analytics in their compliance efforts as regulators also deploy such tools with increasing sophistication, Argentieri said. “Just as we are upping our game when it comes to data analytics, we expect companies to do the same,” she asserted.

The DOJ will be increasingly enhancing its FCPA investigations with innovative data usage, Argentieri continued. “Let me be the first to tell you that we have proactively used data to generate FCPA cases, and we’ve only just gotten started,” she said.

The DOJ has been making investments in personnel that improved its ability to harness available data, public and nonpublic, in order to pinpoint foreign corruption, Argentieri reported. It will increase these efforts with a view to identifying even more misconduct and will deploy an ever-growing arsenal of data and tools to interpret the data, she pledged. “I suggest that companies take note of these efforts when considering the tough decision of whether or not to disclose misconduct,” she advised.

Companies have better and more immediate access to their own data, Argentieri added. “If misconduct occurs, our prosecutors are going to ask what the company has done to analyze or track its

own data — both at the time of the misconduct and when we are considering a potential resolution,” she warned.

Be Alert

Companies should be aware that the DOJ is using data analytics to develop cases, Wendt noted. They “already know that the DOJ can develop cases from press reports, whistleblowers or collaboration with other authorities. Now, problematic transactions might get on the radar of the DOJ, for example, if third parties involved make suspicious transactions that trigger the DOJ’s interest,” he added.

Regarding specific data analytics practices that are likely to be applied, going forward, in FCPA cases, Wendt said the DOJ appears to indicate an emphasis on financial transactions, suggesting that there is closer attention to correspondent banking information and transactions in and out of the U.S.

To up their own game in data analytics, companies may not be able to accomplish “the dream scenario” where compliance departments can identify potentially problematic transactions in real time, Wendt noted. “The first step is to have accessible and reliable data across all business units, and that step can be quite a challenge for many companies, especially if they have a history of growth through M&A transactions,” he said.

Prepare for Increased Data Sourcing

Regulators sometimes face difficulty obtaining the data that would yield the most effective results, as this comprises in-company information such as internal payments, Kahn said. “What data is the FCPA unit going to look at? It sounds like they are trying to expand the data sources, and increase the resources to mine that data,” he said.

There has been talk of more data sharing among agencies, according to Walden. “I’ve been hearing there is a push to break down data silos across governmental organizations bringing in both public and nonpublic data — to identify potential wrongdoing involving foreign corruption,” Walden said.

Use the Tech

Recent technical advancements have made many forms of data analytics accessible to even the smallest of companies, Perkins said. “Companies should explore how data analytics could be useful in the operation of their compliance program,” she recommended. The tools can allow companies to efficiently analyze larger sets of data, automate previously manual practices and offer compliance officers near real-time access to certain data, among other benefits, she asserted.

“Companies should evaluate their compliance program and controls to determine where the use of data analytics could best serve the company, and design or purchase analytic tools in those spaces,” Perkins suggested.

It is important for large companies to keep up with the DOJ in terms of the tools being used to address compliance matters, Walden emphasized. “This includes the use of transactional analysis around high-risk vendors, employees and customers/distributors that leverage data visualizations, anti-corruption algorithms, risk scoring, text mining and machine learning techniques to both find hidden money and keep the organization out of trouble,” he elaborated.

Companies operating globally should revisit their risk assessment process, Walden advised. He highlighted sanctions and corruption compliance as key areas in which this can be beneficial. Companies should be able to demonstrate effective preventive and detective controls, he stressed.

Companies also should move toward a more data-driven program that operates continuously, with measurable results, as opposed to backward-looking summary statistics, Walden advised. “A data-driven compliance program takes into account the company’s own risk environment, incorporating business activities around vendors, customers/distributors and employees at the transactional level,” he said.

See [“Insiders Tsao, Soltes and Kahn Share Insights on Investigations”](#) (Jan. 4, 2023).

Fast and Proactive Cooperation

Companies will need to be speedy and have a proactive attitude to receive higher discounts for self-disclosure, cooperation and remediation, Argentieri stressed. She emphasized the importance of companies cooperating in a timely way and said it can be a negative point if their response is “reactive,” rather than “proactive.”

“As searching as our investigations may be, there are some cases that we may never learn about absent a company’s voluntary self-disclosure,” Argentieri said. When disclosures are timely, it is easier for the DOJ to preserve evidence, interview witnesses and prosecute involved parties before the expiration of the statute of limitations, she noted.

To receive a Corporate Enforcement Policy (CEP) declination, a company must report misconduct to the DOJ before it learns about it from another source and fully cooperate with the DOJ’s investigation, Argentieri said. It must also enhance its in-house compliance program and disgorge profits it received from the misconduct. “All of this helps ensure that we achieve one of our main goals: to create a better culture of compliance,” she emphasized.

Message to Prosecutors

The DOJ is signaling to prosecutors about how seriously to take, and how to weigh, a variety of factors concerning a company’s cooperation in an investigation, according to Martins. It is “telling its prosecutors the kinds of questions they should be asking themselves when deciding how much credit to give,” Martins explained. Such questions include, “How much evidence was brought that I couldn’t have gotten otherwise? How timely was it, such that the prosecutor was able to consider investigative steps that would have been impossible if the information had been received later?”

For practitioners, Martins continued, such high-level communication from the DOJ is not as useful. While understanding that a company has to be timely and cooperative to receive the maximum cooperation credit possible, this is always balanced against how much information warrants coming forward to regulators. Before bringing a matter to the government, she cautioned, “you have to make sure that what you have is really something.”

Timely Communication and Improvement

“When cooperating with the DOJ, it is important to include periodic checkpoints in the investigation where defense counsel and the company can determine if developments warrant raising to the DOJ in real time,” Tillen advised. The questions to be asking, he suggested, include whether:

- key documents have been uncovered;
- interviewees raised key facts;
- there is a decision point where DOJ input could be beneficial; and
- there is a risk that employees or third parties will become unavailable unless action is taken quickly.

“Answers to these questions may warrant that defense counsel update the DOJ as soon as possible,” he said.

If processes are identified as needing improvement, it is often important to start improving them right away, without waiting until an investigation is complete, Tillen added. “Especially if a company is in front of the DOJ, a company should want to fix any system breakdowns and then test them to prove the effectiveness of the solutions before a resolution – if the investigation does lead to an enforcement action,” he explained.

Companies should act quickly upon learning of allegations of misconduct, Perkins emphasized. “They should expeditiously take steps to determine the scope and extent of the potential misconduct, and should ensure that measures are put in place to retain documents or other materials related to that conduct,” she said.

Without such preservation measures, companies may find themselves in a position where they have lost valuable evidence, which may result in the loss of cooperation credit from the DOJ, Perkins warned.

Companies may also want to establish protocols for how to handle investigations of various types of potential misconduct in advance of facing such a situation so that they are prepared to act quickly if such a situation arises, Perkins suggested. “If a company decides to self-report potential misconduct to the DOJ, it should be prepared to offer the DOJ documents related to the conduct, and should not wait for it to request the documents,” she said.

What Counts As Extraordinary?

With **revisions** to its CEP in January 2023, the DOJ created a new category of extraordinary cooperation on the part of companies, for which they may be awarded up to a 75-percent reduction in penalties in voluntary disclosure cases, rather than up to 50 percent in the case of what is deemed full cooperation, Kahn noted. The DOJ appears to define the difference between those two categories as one of degree rather than kind, he said.

SEC Guidelines Less Clear

The SEC, in its own FCPA enforcement, lacks the type of formalized guidelines the DOJ has around declinations awarded for companies' cooperation. "Although the SEC does give credit for disclosures and cooperation, it is more of a black box and more discretionary," Martins said, which "sometimes makes it difficult for white-collar practitioners to advise their clients."

The SEC has indicated that this is not likely to change, Kahn noted.

See "[SEC Enforcement Director Provides Playbook for Regulated Entities](#)" (Dec. 6, 2023).

Issuers and Non-Issuers Treated More Similarly

Something that "is now common to our FCPA corporate resolutions" is that "in addition to paying any required criminal penalty, companies must pay appropriate forfeiture," Argentieri said. The DOJ Criminal Division has been reducing the distinction between issuers and non-issuers in terms of the level of forfeiture they are expected to pay, she reported.

"To treat issuers and non-issuers alike, going forward, all companies should expect to both pay applicable fines and forego the proceeds of their criminal activity," Argentieri announced. She stressed that this remains subject to regulators' "anti-piling on" policy and guidance regarding inability to pay.

Emphasis on Compensation Incentives

Among the pertinent policy developments in 2023, Argentieri highlighted the Criminal Division's Pilot Program on Compensation Incentives and Clawbacks.

Companies should take note of the DOJ's emphasis on the need to take compliance into account when determining compensation, Perkins said. "While many companies have focused on the clawback provisions of the Pilot Program, which can be more difficult to implement, companies would be well advised not to overlook the other aspect of the Pilot Program – the need to consider compliance when determining compensation," she suggested.

Companies can meet this expectation in a variety of ways, Perkins stressed. Setting key performance indicators (KPIs) tied to compliance is one that she mentioned, while another is taking compliance considerations into account in promotion decisions. “Should a company end up before DOJ, it will be essential for it to demonstrate that it has acted intentionally when structuring its compensation program to ensure that it promotes ethical behavior,” she emphasized.

When it comes to compensation and incentives, compliance professionals should be interested in designing KPIs that support compliance, since many other KPIs for executives, such as hitting quarterly profit targets, may not encourage compliant behavior, Wendt added.

The DOJ’s emphasis on these issues has the positive effect of giving compliance personnel more leverage to raise such topics with senior management, Wendt pointed out.

See “[DOJ’s Pilot Program on Clawbacks to Foster Individual Accountability Poses Challenges for Companies](#)” (Mar. 29, 2023).

High-Impact Cases

The global and high-profile nature of the Criminal Division’s efforts during 2023 was something Argentieri highlighted as a feature that will remain in 2024.

“The Criminal Division had a banner year across its varied efforts in the fight against white-collar and corporate crime,” Argentieri reported, expressing pride in the continued investigations and prosecutions of complex schemes across a wide range of industries and geographies. “The Criminal Division continues to prioritize bringing high impact cases,” she emphasized.

“The DOJ understands the deterrent value of resolving enforcement actions and welcomes opportunities to break new grounds,” Tillen said. Examples of this, he noted, include coordinating with a new country, uncovering schemes in new industries, and prosecuting entities and individuals with limited connection to the U.S.

“Each FCPA resolution, including declinations, has valuable lessons for companies and defense counsel,” Tillen concluded.

See “[Reading the Regulators: Shifts in FCPA Enforcement](#)” (Aug. 16, 2023).