TAKEAWAYS FROM THE 34TH INTERNATIONAL CONFERENCE ON THE FOREIGN CORRUPT PRACTICES ACT

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At the 34th International Conference on the Foreign Corrupt Practices Act held last week in Washington, D.C., industry executives, members of the defense bar, and regulators examined developments in the enforcement of the Foreign Corrupt Practices Act ("FCPA") over the past year and in the 40 years since its inception. Attendees heard from leaders at the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), including Sandra Moser (Acting Chief of the DOJ's Fraud Section), Daniel Kahn (Chief of the DOJ's FCPA Unit), Steven Peikin (Co-Director of the SEC's Division of Enforcement), Charles E. Cain (Chief of the SEC's FCPA Unit), and Tracy L. Price (Assistant Director of the SEC's FCPA Unit).

Deputy Attorney General Rod Rosenstein gave the keynote address and, with his announcement of the FCPA Corporate Enforcement Policy, set the focal point for the Conference. In addition to offering insight into the Policy announced by Mr. Rosenstein, the government faculty identified key issues in the investigation and prosecution of FCPA violations. Their collective comments signal an intent by the government to continue combatting corruption through vigorous enforcement of the FCPA.

THE KEYNOTE ADDRESS OF THE DEPUTY ATTORNEY GENERAL

Mr. Rosenstein began by commenting on the revolutionary nature of the FCPA, which, forty years ago, represented the first effort in the world to criminalize the bribery of foreign officials. He stressed that this effort would continue, calling the FCPA "the law of the land" and confirming that the DOJ "will enforce it against both foreign and domestic companies that avail themselves of the privileges of the American marketplace." [1] Mr. Rosenstein noted the recent victories of the DOJ's FCPA Unit and credited collaborations with the Federal Bureau of Investigations, U.S. Attorneys' Offices, and foreign authorities. Overall, he stated, 19 individuals pleaded guilty or were convicted in FCPA-related cases so far this year. He reiterated the DOJ's commitment to holding individuals criminally accountable. In his view, the prosecution of culpable individuals is necessary to deter corporate corruption.

Mr. Rosenstein maintained that companies also have a role and that the government should seek to incentivize ethical corporate behavior. This was the goal of the FCPA Pilot Program introduced on April 5, 2016. [2] During the year and a half that it was in effect, the Pilot Program led to 30 voluntary disclosures, nearly twice as many as the previous 18-month period. With the Pilot Program, Mr. Rosenstein said, the DOJ took "a step forward in fighting corporate crime."

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Mr. Rosenstein then announced a revised version of the Pilot Program to be codified in the United States Attorneys' Manual as the FCPA Corporate Enforcement Policy. [3] According to Mr. Rosenstein, the Policy will "reassure corporations that want to do the right thing" by providing "greater clarity" about the DOJ's decision-making process and the benefits of complying with the Policy's requirements. At the same time, Mr. Rosenstein predicted the DOJ will receive a larger volume of voluntary disclosures, allowing for further investigation and punishment of culpable individuals.

Mr. Rosenstein highlighted three "enhancements" of the Policy that go toward these reciprocal goals. First, a company that satisfies the requirements of the Policy—which correspond with those of the Pilot Program, i.e., self-disclosure, full cooperation, and timely and appropriate remediation—will presumptively receive a declination. That presumption may be rebutted by aggravating circumstances based on the nature and seriousness of the offense and whether the offender is a recidivist. Second, if an enforcement action is deemed necessary against a company that has otherwise met the Policy's requirements, the DOJ will recommend a 50% reduction off the low end of the U.S. Sentencing Guidelines penalty range. Third, the Policy specifies "hallmarks" of an effective compliance program, which account for size and resources.

Mr. Rosenstein concluded by encouraging companies to maintain effective internal controls and compliance programs and to choose business associates cautiously. These steps, he emphasized, will help companies "protect themselves" and "pose a meaningful deterrent to corruption."

INTERVIEW WITH STEVEN PEIKIN

Steven Peikin offered commentary on trends from the SEC's perspective. He made clear that the SEC intends to apply the same level of resources to FCPA cases as in the past and noted the recent appointment of FCPA Unit Chief Charles Cain as evidence of that dedication. Mr. Peikin defended the shared competence of the SEC over FCPA actions, stating that registrants who have committed FCPA violations fall squarely within the SEC's jurisdiction. Furthermore, he said, the dual nature of FCPA enforcement allows the SEC to take action civilly in cases that may be difficult to establish under a criminal burden of proof. He noted in particular the SEC's work in connection with the books and records and internal controls provisions of the FCPA.

Mr. Peikin does not foresee a great change in the FCPA landscape and identified three areas of focus going forward:

- International Cooperation. In 2017, the SEC acknowledged 19 jurisdictions in FCPA matters, and, according to Mr. Peikin, this global approach to corruption will expand further. He noted that the SEC is unlikely to defer entirely to another country in a multijurisdictional investigation, especially when U.S. registrants are involved.
- Individual accountability. In every case, the SEC considers whether prosecution against culpable individuals is appropriate. This mindset will continue.
- *Kokesh v. SEC*. [4] Mr. Peikin explained that the Supreme Court's decision in *Kokesh* has particular relevance in the FCPA space, where the development of a case can take substantial time. *Kokesh* has brought greater focus to the SEC's consistent objective to complete investigations swiftly. Mr. Peikin commented that, unlike the DOJ, the SEC cannot toll the statute of limitations unilaterally, and so the

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practical implications of the decision remain to be seen. Currently, Mr. Peikin said, the SEC has no plans to resort to the "reflexive serving" of tolling agreements at the start of an investigation.

With respect to Mr. Rosenstein's announcement, Mr. Peikin remarked that the Policy is similar to the Pilot Program and that he does not expect a shift in the way the SEC uses declinations. He added that the SEC will evaluate the Policy programmatically and consider whether parallel guidelines should be implemented.

KEY TOPICS OF DISCUSSION

A number of themes can be gleaned from the regulators' cumulative discussions.

Prioritization of the FCPA

As an initial matter, representatives from both the DOJ and SEC rejected the premise that the recent decrease in FCPA resolutions equates to disinterest by the administration. In fact, though 2017 has seen fewer corporate resolutions than 2016, Daniel Kahn stressed that the DOJ has had more convictions and guilty pleas by individuals this year than ever before. Mr. Kahn cautioned against putting weight in statistics, and Charles Cain agreed, noting that the extended timeline of FCPA investigations makes annual data less meaningful.

Expectations for the FCPA Corporate Enforcement Policy

The FCPA Corporate Enforcement Policy was discussed at length in the panel that followed the keynote address. Mr. Kahn said the Policy expands upon the Pilot Program, which he regards as a success, having led to additional self-disclosures and improved consistency among prosecutors. Primarily, Mr. Kahn explained, the Policy is meant to encourage the early reporting and cooperation necessary to investigate and prosecute culpable individuals.

Mr. Kahn commented that, as compared to the Pilot Program, the Policy also sets clearer expectations for companies contemplating self-disclosure. For example, the Policy states that DOJ "will" recommend a 50% penalty reduction in enforcement actions against qualifying companies, whereas the Pilot Program stated that the DOJ "may" accord such a reduction. Furthermore, under the Policy, the fact that disclosure is legally required no longer prevents a company from receiving credit for self-disclosure. Sarah Moser added, however, that the Policy is not part of a "leniency program."

Ms. Moser also emphasized that, as with the Pilot Program, a key element of cooperation under the Policy is de-confliction, meaning that a company must halt its investigation if requested to do so by the DOJ. In her view, this allows the DOJ to investigate individuals without company interference. Ms. Moser acknowledged the difficulty this request may pose and explained that the DOJ does not take de-confliction lightly.

Additionally, Mr. Kahn noted that, although the Policy is not binding on the government with respect to investigations brought under the Pilot Program, he anticipates pursuing resolutions of pending cases in accordance with the terms of the Policy. Ms. Moser suggested that companies look to previous resolutions and non-prosecution agreements for additional guidance. From an SEC perspective, Mr. Cain added, a declination by the DOJ does not mean that no violation took place. As a result, declinations under the Policy may be relevant to the SEC but not determinative.

Continued Development of International Efforts

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The government panelists universally recognized the rise in international cooperation in FCPA actions. Several pointed to the OECD Anti-Bribery Convention, which now has 43 country members. Mr. Kahn observed that, with more countries engaged in the fight against corruption, the United States has strengthened its relationships with foreign counterparts, leading to increased opportunities to exchange information formally and informally. Mr. Cain agreed, noting that the number and depth of the SEC's connections with foreign partners have meaningfully changed how the SEC investigates cases. By way of example, Mr. Kahn specifically referenced Brazil's successful "Operation Carwash" investigation. He foresees continued coordination with Brazil in connection with that matter and others.

At the same time, the panelists acknowledged the challenges to multijurisdictional investigations and enforcement. For example, if a foreign country collected evidence in a manner that conflicts with the U.S. Constitution, the DOJ must find ways to avoid contamination of its investigation. [5]

Remediation and Internal Corporate Discipline

Both Mr. Cain and Mr. Kahn emphasized that the government does not seek to involve itself in a company's decision with respect to the discipline or termination of culpable individuals. Internal discipline measures, however, are relevant to the government's evaluation of remediation credit. According to Mr. Cain, failing to discipline high-level misconduct suggests to the SEC that the company is not committed to taking meaningful remedial steps.

The Importance of Robust Compliance Programs and Internal Controls

As in the past, the SEC and DOJ will probe companies' compliance programs as part of FCPA investigations. Mr. Kahn stated that the questions outlined in the DOJ's guidance document on this issue remain relevant. [6] Mr. Cain added that the SEC expects companies to be asking themselves the questions set forth in the guidance when structuring their compliance programs.

Ms. Price remarked that FCPA problems often arise in connection with a company's allocation of resources. In her view, a company should direct resources toward implementing a compliance program and tracking it through the documentation of payments and coordination with audit and accounting professionals. According to Mr. Kahn, the DOJ's evaluation will take into account the size and risk profile of the company at issue.

Mr. Kahn also stated that he does not necessarily interpret the recent increase in monitorships as a trend. In short, the imposition of a monitor is intended to avoid repeated incidents of misconduct. The DOJ's decision generally turns on whether the company's compliance program is fully implemented and fully tested at the time of resolution. Mr. Kahn added that self-disclosure and cooperation may be indicators of a full compliance program. Mr. Cain stated that the SEC avoids a "one-size-fits-all" approach to monitors and considers, on a case-by-case basis, the seriousness and duration of the misconduct, the involvement of upper management, and the likelihood of recurrence, among other things.

The panelists also considered a recent non-prosecution agreement in which the DOJ found a company's internal accounting controls to be criminally deficient under 15 U.S.C. § 78m. [7] Mr. Kahn noted that bribery is not required to show a violation of the FCPA's internal controls provisions. Evidence that the company knowingly and

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willfully falsified books and records can give rise to criminal liability. The company had also reached a settlement with the SEC. In Mr. Cain's view, the SEC's mission of investor protection is advanced by pursuing cases where a company puts investor assets at risk through internal controls violations.

Ultimately, Mr. Kahn stated, the compliance culture of a company should be supported not only by the "tone at the top" but also by the "conduct at the top." This amendment in terminology, he explained, reflects the importance of management encouraging compliance while also being *engaged* in compliance efforts.

CONCLUSION

These initiatives and practices correspond with the DOJ's longstanding approach to FCPA cases. The FCPA Corporate Enforcement Policy also appears to incorporate key elements of the Pilot Program and incentives that consistently have been part of FCPA enforcement. Indeed, the Policy's "presumption" may prove to be dismantled by the caveats that surround it. Based on the comments of the regulators who spoke at the Conference, companies should not expect significant changes in the force with which the government pursues its anti-corruption goals. Accordingly, companies should remain steadfast in their compliance efforts and, in the event of a potential violation, weigh their options under the Policy while also taking steps to remediate fully.

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[1] *Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act*, U.S. DEPARTMENT OF JUSTICE (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[2] Memorandum from Andrew Weissmann, Chief (Fraud Section), *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance,* U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION (Apr. 5, 2016), https://www.justice.gov/opa/file/838386/download.

[3] The Policy was posted to the DOJ's website soon after its announcement. *See FCPA Corporate Enforcement Policy* (USAM 9-47.120) (Nov. 29, 2017), https://www.justice.gov/criminal-fraud/file/838416/download.

[4] 137 S. Ct. 1635 (2017) (holding that a claim of disgorgement is subject to the five-year statute of limitations applicable to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise").

[5] This discussion was in reference to *Allen v. United States*, in which the U.S. Court of Appeals for the Second Circuit held that "the Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony." 864 F.3d 63, 68 (2d Cir. 2017).

[6] *Evaluation of Corporate Compliance Programs*, U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION (Feb. 8, 2017), https://www.justice.gov/criminal-fraud/page/file/937501/download.

[7] *Las Vegas Sands Corporation Agrees to Pay Nearly $7 Million Penalty to Resolve FCPA Charges Related to China and Macao*, U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION (Jan. 19, 2017), https://www.justice.gov/opa/pr/las-vegas-sands-corporation-agrees-pay-nearly-7-million-penalty-resolve-fcpa-charges-related.

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