ARE WE LIVING IN THE GOLDEN AGE OF COOPERATION OR NOT? THE IMPLICATIONS OF SEC CHAIR JAY CLAYTON'S RECENT COMMENTS CHALLENGING PERCEPTIONS OF CROSS-BORDER COLLABORATION IN FCPA ENFORCEMENT

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In a speech to the Economic Club of New York on September 9, Securities and Exchange Commission ("SEC") Chair Jay Clayton lamented foreign regulators' inconsistent enforcement of their own anti-corruption laws that impose civil or criminal sanctions for domestic and offshore corruption. Clayton described U.S. enforcement of the Foreign Corrupt Practices Act ("FCPA") as "unique" in its "vigorous" level of enforcement yet also "limited" both by the reach of U.S. jurisdiction and by what he described as the economic incentives of foreign enforcers opting out of a cooperative, cross-border anti-corruption strategy.

While few would argue that the United States is not leading the charge in combatting global bribery and corruption, Clayton's comments stand in stark contrast to the recent trend articulated by both U.S. enforcement officials and commentators alike that political will, the implementation of new and robust anti-bribery legislation, judicial independence, and enhanced information-sharing methods among foreign jurisdictions have ushered in a new era of cross-border collaboration and cooperation. For example, only nine months ago during a speech at Harvard Law School, Co-Director of the SEC's Division of Enforcement Steven Peikin highlighted that the SEC has "[f]or many years…cooperated extensively with international partners" and that the "the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory, particularly in matters involving corruption." Citing the joint settlement of VimpelCom with the SEC, the Department of Justice, and Dutch regulators and settlements with Brazilian companies like Petrobras, Braskem, and Embraer, Peikin noted the prominent, and monetarily staggering, results that recent collaboration efforts have yielded. Clayton's words seemed to run contrary to those of Peikin and others when he said: "[T]he response to this observation has long been to acknowledge the need for greater international cooperation and cite a few isolated indicia of improvement. Speaking for myself, I have not seen meaningful improvement."

Does this mean that U.S. companies should no longer expect to deal with multiple jurisdictions for anti-bribery and corruption matters? The answer to that question remains the same: companies should not expect that foreign governments will not enforce their domestic laws simply because the U.S. government wants to see increased cooperation and assistance in its own investigations. Cross-border cooperation is a tricky subject and can vary based on personalities, politics, the political climate of the day, and the status of the entity under investigation. While results can vary, no company should expect that foreign regulators and criminal authorities will not enforce

their domestic anti-corruption laws simply because they have not done so consistently in the past. In addition, foreign enforcement is different than foreign cooperation with a U.S.-led investigation. While a foreign country may not directly prosecute or charge a company based on conduct that occurs within its borders, that does not mean the country's regulators and criminal authorities are not cooperating with U.S. requests for information. Bank records, financial information, flight records, ownership documents, witness interviews — all of this information is available to U.S. investigators following the proper channels if they are patient enough and have a strong enough argument to request it.

In addition, Clayton's comments should not be viewed as a signal that the SEC's enforcement of the FCPA will diminish. Clayton himself announced that he does "not intend to change the FCPA enforcement posture of the SEC." By extension, companies and individuals who might be subject to the jurisdiction of the FCPA should remain mindful of the SEC's continuing efforts to investigate foreign bribery.

Instead, Clayton's comments should be viewed as a response to calls to utilize SEC enforcement tools for issues beyond corruption and bribery, such as environmental issues. For example, proposed legislation in the U.S. Senate — the Climate Risk Disclosure Act of 2019 — would require public companies to disclose the business risks from climate change to the SEC, and commentators have called for the SEC to partner with the Environmental Protection Agency to enhance enforcement efforts to test the veracity of such disclosures. As Clayton referenced in his remarks, the SEC will weigh its experience with foreign regulators in the FCPA context when evaluating other potential cross-border enforcement initiatives, such as those targeting environmental or human rights violations. Based on these comments, it appears plausible that Clayton will look to his foreign counterparts for firm commitments of a level playing field before SEC enforcement efforts abroad of other substantive areas mirror the primacy of the FCPA.

The moral of this story? Foreign cooperation in U.S.-led investigations will never be seamless or universal. Nevertheless, companies should expect the U.S. government to continue to use all the tools at its disposal, including mutual legal assistance treaties, cooperation requests, and other methods, to combat bribery abroad. Whether those requests result in foreign governments taking an increased role likely will continue to depend on the circumstances and scope of the conduct at issue.

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