What FCPA Enforcement Is Thinking
Nov. 14, 2011

The annual National Conference on the U.S. Foreign Corrupt Practices Act (FCPA) in Washington, DC, hosted by American Conference Institute, is always a unique opportunity to hear from FCPA enforcement officials about what they are currently thinking. This year's meeting did not disappoint. Held last week, it included noteworthy statements, some of which are provided below, by numerous officials. These statements were qualified in that each represented the official's own views and not the views of his or her respective agency.

1. Neither the SEC nor the DOJ is focused on one-off, low-level conduct. Charles Cain, an Assistant Director of the FCPA Unit of the Division of Enforcement of the U.S. Securities and Exchange Commission (SEC), explained that SEC enforcement is not focused on one-off, low-level conduct. He pointed to the fact that the cases brought over the last year all dealt with improper activity that was repeated, long-term, and systemic. He said that most SEC actions have included significant activity by high-level executives. Mr. Cain stressed that officials are not looking to charge isolated conduct in an otherwise compliant corporate culture. He said that the SEC is not trying to play "gotcha." Charles Duross, the Deputy Chief of the Fraud Section of the Criminal Division of the U.S. Department of Justice (DOJ), echoed Mr. Cain's statements.

2. More declinations than one might think. Mr. Cain and Tracy Price, another FCPA Unit Assistant Director at the SEC, said that the SEC regularly declines to pursue actions. They said this happens when a company can show that it has a robust compliance environment. Denis McInerney, the Chief of the Fraud Section of the DOJ's Criminal Division, added that the DOJ's declinations are more common than one might think. He said that, though each declination considers the particular facts and circumstances, declination decisions are generally based on three factors: the adequacy of the company's compliance program, whether or not the company self-disclosed the wrongdoing, and the company's cooperation with the government's investigation.

3. "We read the blogs and journal articles." Mr. Duross said that enforcement officials regularly follow the blogs and journal articles that cover current developments regarding the FCPA. Though he did not specify which ones, he is likely referring to blogs like Richard Cassin's The FCPA Blog, Mike Koehler's FCPA Professor Blog, and Tom Fox's FCPA Compliance and Ethics Blog, all of which regularly publish helpful material. We hope they also follow the FCPAméricas Blog.

4. Trials are requiring a huge amount of effort and resources. Mr. Duross stated that the DOJ is spending significant time and resources working with the U.S. Attorneys offices on FCPA trials, alluding to the fact that this focus might be diverting time and attention away from other enforcement work. He also hinted that the increase in trials is related to the DOJ's emphasis on prosecuting individuals, as companies generally choose to settle. These perspectives tend to

support the insight provided by FCPA attorney and former federal prosecutor, Mike Volkov, who writes the Corruption, Crime, and Compliance Blog and regularly explains how more DOJ trial work can mean less ongoing investigative and settlement work, because resources are limited.

5. Definition of "foreign official." Mr. Duross said that the DOJ is closely following court opinions and jury instructions in recent FCPA cases to understand when they consider an entity to be a government instrumentality (Tom Fox has nicely overviewed that treatment here). Mr. Duross added that the DOJ currently looks to five factors to determine if a bribe recipient is a foreign official: "ownership, control, status of employee, status of company, and function." He did not elaborate on the exact meaning of each of these factors.

6. Continued focus on the prosecution of individuals. Mr. Duross said, "Just because a case against a company is resolved and it has been a few years does not mean we are done." He said that individuals will continue to be targets. He cited the LatiNode case as a good example. In that case, the company pled guilty to one count of violating the FCPA in 2009 for a Honduran bribery scheme and then, two years later, several of the responsible company executives also pled guilty.

7. Third parties as presenting most significant risk. In a comment that was picked up by other practitioners throughout the conference, Mr. Duross stressed that third party intermediaries presented the most significant risks of FCPA violations. He said that third party involvement in improper payments had been an element of almost every recent case.

8. Sweeps to continue. Enforcement officials stressed that they will continue to take industry-wide and region-wide approaches to enforcement (as discussed in a recent FCPAméricas post on the potential implications of the Embraer investigation to other Brazilian companies). Mr. Duross said, "If a market competitor has an FCPA problem, rather than opening up a champagne bottle, you should be asking yourself – are we using the same agent, operating in the same country, following the same business model?" FCPA veteran Homer Moyer, Conference Co-Chair and head of Miller & Chevalier's FCPA practice group, asked the panel of enforcement officials to explain the difference between an industry sweep and a fishing expedition. Both Mr. Cain and Mr. Duross said that their agencies would only engage in a "sweep" when they had information creating a reasonable belief of criminal activity in a specific industry or region.

9. Fewer monitors: Mr. Cain and Mr. Duross both said that their respective agencies were getting better at identifying when it is and is not appropriate to require that a company adopt an independent compliance monitor as part of an FCPA settlement. Mr. Duross highlighted that only one monitor has been required by the DOJ in the last year. Mr. Cain said that there is no "litmus test" for when a monitor will be required, but added that, if a company self-discloses, conducts an internal investigation, and takes significant remedial steps, a monitor will be less likely.

10. Enforcement trends are difficult to identify: Mr. Duross said that, because the sample size of FCPA actions is small, it is difficult to extract conclusions and identify enforcement trends by reviewing them. Given the flurry of recent studies by law, accounting, and consultant firms that seek to identify patterns in FCPA enforcement, his statement seems particularly significant. He said that the bottom line is that "We have many cases, and many people are working on them." He might be preparing FCPA watchers for the fact that 2011 might see a dip in enforcement actions and penalties as compared to previous years.

11. OECD Working Groups are working. Mr. Duross highlighted how the Working Group peer-review monitoring process under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business has achieved notable successes. He pointed to the increased promise for enforcement in Canada and the UK based on the review process. He called the UK Bribery Act a "game changer." His statements underscore the importance of the review process in other countries; in the Americas, Working Groups are monitoring the following countries: Argentina, Brazil, Chile, and Mexico.

12. DOJ guidance on its way. Assistant Attorney General of the Criminal Division Lanny Breuer announced that the DOJ plans to issue FCPA guidance in 2012. This announcement, a significant development, quickly triggered numerous press reports (see the Wall Street Journal's Corruption Currents Blog as an example).

13. Breuer's personal mission. Mr. Breuer made an impassioned speech about his own personal commitment to tackling foreign bribery: "The fight against corruption is a personal priority of mine." He responded to those, like the U.S. Chamber of Commerce, seeking to amend the FCPA, stating that weakening the law right now will send the wrong message to the world in the fight against bribery. He said that it would send the wrong signal just as other countries are moving towards criminalizing foreign bribery.