

Listening in with the FCPA Professor: A Tale of Two Perceived Responses

This week I attended the Hanson Wade FCPA Compliance in the Oil and Gas Supply Chain conference here in Houston. Also attending, as well as presenting, was the FCPA Professor, Mike Koehler. The evening before the start of the conference I was lucky enough to attend an Astros game with the Professor. In between sharing stories of watching baseball growing up in either the Midwest or the South, we debated all manner, shape and form of the Foreign Corrupt Practices Act (FCPA). It was a great time and I learned quite a bit, even if it is that we can look at the same item and see two different things.

Have you ever experienced the phenomenon where two people can hear the same answer to a question yet discern that the speaker said two different things? Maybe it is just like *déjà vu* all over again because it happened to me yesterday while attending the Conference and today when I read the **FCPA Professor**.

As reported in the FCPA Professor Blog today, the Keynote Speaker was Todd Harrison Chief Counsel, Oversight and Investigations, Energy and Commerce Committee, US House. The FCPA Professor posed questions to him regarding successor liability, which Harrison had termed in his presentation as the Chamber of Commerce's number one reform issue for the FCPA. In his blog post today, entitled "*FCPA - A View From The Hill*", the Professor said that "Harrison said that this concern was hypothetical because as a "practical matter the DOJ has not been bringing prosecutions under this theory." The Professor then followed up with "During the Q&A I asked him whether anyone on the Hill is actually reading the enforcement actions because recent DOJ or SEC enforcement actions based on successor liability theories include Alliance One, General Electric and Watts Water Technologies." In response, the Professor said that "Harrison backtracked and said "no one has come to me about those particular cases" and that "none of these particular cases have become prominent on Capitol Hill."

However, what I heard Harrison say between the quoted phrases "no one has come to me about those particular cases" and "none of these particular cases have become prominent on Capitol Hill"; was that "those fact patterns have not come up." With this third phrase it did not sound like to me that Harrison backtracked at all but was explaining why the issue of successor liability had not been raised to his attention.

The reason that I do not think these fact patterns have come up in any discussion of successor liability is that they were either (1) outliers and not applicable as precedent to argue that the FCPA needs amendment with regard to successor liability or (2) the conduct which violated the FCPA continued after the acquisition was made by the companies continued after the acquisitions were concluded and therefore there were new and additional FCPA violations under their ownership.

In his blog post, the Professor linked to the three mentioned cases. In his article on the General Electric (GE) case, entitled "*General Electric Settles Iraqi Oil For Food Matter*", he stated "The

GE enforcement action, like other Iraqi Oil for Food enforcement actions with a few exceptions, does not allege FCPA anti-bribery violations presumably because the alleged payments were made directly to the Iraqi government or government ministries – not to specific “foreign officials” as prohibited by the FCPA’s anti-bribery provisions. The GE enforcement action is also an outlier of sorts in that it is merely a SEC enforcement action with no parallel DOJ enforcement action – a fact mentioned in GE’s press release...”

In the Alliance One case, the company was not prosecuted to criminal prosecution but the company received a Non-Prosecution Agreement (NPA). The final case, Watts Water purchased a Chinese company which was engaged in bribery and corruption and the conduct continued after the acquisition. In a FCPA mergers and acquisitions first Watts Water recently filed a malpractice claim against the law firm of Sidley Austin, which handled its pre-acquisition due diligence for the transaction in question, alleging that the law firm discovered the egregious conduct in the pre-acquisition due diligence, but failed to turn this information over to Watts Water. (Sidley Austin has yet to publicly respond to these allegations.)

So by looking at the substance of these three cases named by the Professor in his question to Harrison, what I heard in Harrison’s response that “those fact patterns have not come up” and that they were so far outside of the mainstream of FCPA enforcement actions that they were not brought up as examples of successor liability cases. But as I now understand, sometimes you can hear the same thing that another listener hears but perceive it in a different manner.

Happy Friday and a good weekend to all.

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