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More Clarity on the Horizon for FCPA Resolutions? DOJ and SEC Officials Discuss Enforcement Trends

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On November 28–30, 2023, the American Conference Institute's 40th International Conference on the Foreign Corrupt Practices Act ("FCPA"), held in Washington, D.C., brought together prosecutors, regulators, corporate compliance officers, external advisors, and outside counsel for a robust dialogue on FCPA-related trends and issues. The conference featured discussions with numerous senior U.S. government officials responsible for criminal and civil enforcement of the FCPA, including Charles Cain, Chief of the Securities and Exchange Commission's ("SEC") FCPA Unit, and David Fuhr, Chief of the Department of Justice's ("DOJ") FCPA Unit. The conference also featured a keynote speech from DOJ's Acting Assistant Attorney General ("AAG") Nicole Argentieri and a fireside chat with Glenn Leon, Chief of DOJ's Fraud Section. Overall, the senior officials offered insights into how DOJ and SEC approach some of the most complex challenges associated with pursuing FCPA cases, and shared their perspectives on recent and upcoming enforcement actions, compliance program best practices, and foreign coordination, among other topics.

While many of these issues have been discussed in the past, DOJ officials raised a number of new and important points. Most notably, these officials suggested that there will be additional FCPA resolutions to close out 2023, which may provide companies with much-needed clarity on how prosecutors are applying the Criminal Division's recently revised Corporate Enforcement Policy governing voluntary self-disclosures, cooperation, and remediation (see our previous client alert on this topic here).

Our key takeaways are summarized below.

Full Enforcement Pipeline and Priorities

- While there have been several media reports this year suggesting that the enforcement pipeline for corporate FCPA matters has generally slowed down, SEC's Cain and DOJ's Fuhr affirmed the U.S. government's continued commitment to, and interest in, combating corruption by bringing additional enforcement matters. Noting that it typically takes years to investigate and build a case, particularly where coordinated global resolutions are involved, both officials indicated that there will likely be more resolutions in the coming months. DOJ's Leon, in fact, expressly stated that more corporate FCPA resolutions will be made public before the end of 2023, and that the number of resolutions this year will outpace the number in 2022.

- DOJ and SEC officials discussed their continued focus on bringing the most impactful cases in the global fight against corruption, including cases involving high-ranking government officials

and senior corporate executives, as well as cases where misconduct occurred across multiple jurisdictions.

- Fuhr added that DOJ continues to seek to hold culpable individuals accountable for their actions. Timely voluntary self-disclosure is thus deemed critical, as it allows prosecutors to investigate and take appropriate action against culpable individuals more quickly and effectively.

Post-Settlement Obligations: Lessons from Recent Settlements

- Citing a telecom-related guilty plea from March 2023, where the company was found to have breached the terms of its 2019 deferred prosecution agreement ("DPA") with DOJ, both Fuhr and Leon made clear that prosecutors expect companies to follow through on the requirements set forth in criminal resolutions, and warned that breaches will result in real consequences. Specifically, Fuhr emphasized that companies must act in good faith, adhere to the language of settlement agreements, and err on the side of disclosing potential misconduct when in doubt.

Trying to Define When a Voluntary Self-Disclosure Is "Reasonably Prompt"

- Under the Criminal Division's revised Corporate Enforcement Policy, DOJ continues to evaluate voluntary self-disclosure, cooperation, and remediation as key factors in determining the potential outcome of an FCPA matter. Nevertheless, there have been concerns raised over the uncertainty surrounding the policy's application among the members of the defense bar. For example, in September 2023, DOJ entered into a non-prosecution agreement ("NPA") with Albemarle. Although Albemarle voluntarily self-disclosed misconduct to DOJ, the company did not qualify for a presumption of declination because it failed to disclose in a "reasonably prompt" manner.

- At the conference, Fuhr emphasized that it took Albemarle 16 months from the receipt of the allegation of misconduct—and 9 months from when it essentially substantiated that allegation—to disclose to the relevant authorities, which, according to Fuhr, is "too long." Fuhr contrasted the Albemarle case with the more recent Lifecore declination, noting that it took Lifecore only 3 months from when it learned of potential misconduct—and less than a day from when it confirmed that misconduct—to disclose the information to DOJ.

- Cain added that companies are "always better off" coming in early with voluntary self-disclosures to the SEC, and are "not ever harmed" for doing so.

Emphasis on Timely and Appropriate Remediation

- DOJ and SEC officials stressed the importance of timely and appropriate remediation of misconduct, in addition to voluntary self-disclosure and cooperation. Both Cain and Fuhr noted that while it is important for companies to have the right policies in place, such policies must be tested regularly to confirm that they are effective and work in practice. Cain took particular note of SEC's recent enforcement cases, where companies' internal audit functions identified key control weaknesses but no action was taken at the corporate level to address those deficiencies. Fuhr echoed that remediation is significant because it is what "allows a company to become a better company."

- DOJ's AAG Argentieri similarly emphasized the importance of remediation in her keynote address, adding that continuous testing, monitoring, and improvement of policies—as well as efforts to understand the root causes of the underlying misconduct—are key factors in determining whether a company is engaged in effective remediation. Notably, the AAG highlighted the speed of a company's actions and its willingness to "act with urgency" as critical indicators of responsible corporate citizenship that can result in larger fine reductions.

- Leon revisited the Albemarle case, noting that the company received a discount of 45 percent off the bottom of the U.S. Sentencing Guidelines fine range due to, in significant part, its extensive remediation measures. At the same time, Leon made clear that DOJ is "not afraid" to give companies a much lower discount (e.g., 5 or 10 percent) where prosecutors are not seeing timely and appropriate remediation, and suggested that examples of such cases will soon be made public.

Monitorships Aren't Dead Yet

- Despite acknowledging fewer independent compliance monitorships in recent years, Cain and Fuhr rejected the notion that monitorships have become relics in corporate FCPA resolutions. Instead, Cain stated that he views fewer monitorships as a "success story," as companies nowadays have much more sophisticated compliance programs in place that often render monitorships unnecessary.

- Fuhr agreed with Cain and said: "Monitorships have been used, are being used, and will be used in appropriate circumstances." Fuhr explained that DOJ imposes monitorships when it believes companies, especially those that have significant history of misconduct, are unable to correct problems without help and oversight. According to Fuhr, monitorships are not punitive in nature but rather designed to help companies navigate their post-settlement obligations.

Risk-Based Approach to Compliance

- Asked by a moderator about compliance program best practices, Fuhr noted that he finds it "impressive," "honest," and "refreshing" when companies are realistic about their compliance programs, including acknowledging that no program is perfect. Fuhr said he is impressed when a compliance officer can identify and articulate two to five key risks that the company is facing, and explain what steps it has taken to mitigate such risks. Factors that tend to impress prosecutors include the compliance officer articulating the risk analysis that informed the design of the company's compliance program and any changes made over time in response to how those risks have evolved.

Ongoing Use of Data Analytics

- AAG Argentieri shared that DOJ has been proactive in using data to generate FCPA cases and expects companies to do the same. Prosecutors will ask what the company has done to analyze and track its data both at the time of misconduct and at the time of potential resolution. Albemarle's use of data analytics to monitor and measure the effectiveness of its compliance program serves as a notable example.

- Leon also emphasized that DOJ has invested substantial resources into increasing its data analytics capabilities, and noted that a specific case had recently been identified by DOJ through the use of data analytics.

Personal Devices and Retention of Ephemeral Messaging

- Although Cain and Fuhr acknowledged that the use of personal devices and ephemeral messaging applications is pervasive and unavoidable in certain regions of the world, they made clear that companies are nonetheless expected to have policies in place outlining record-keeping requirements for all business records, including those that are on messaging applications. Cain and Fuhr also noted that such policies should address the consequences for non-compliance of the retention of business records. Companies that develop and enforce these policies are in a "much better position" if a situation arises before DOJ and/or SEC.

Importance of Clawbacks and Employee Compensation

- Despite recognizing concerns from the in-house community regarding both legal and practical challenges associated with implementing clawbacks, particularly for large multinational corporations with a significant number of foreign employees, Leon pointed back to the Albemarle case where the company received a generous credit for withholding bonuses from more than a dozen employees. Leon indicated that at least one more corporate FCPA resolution is on its way where the company similarly withheld funds for employees found to have played a role in carrying out misconduct.

- Fuhr took a similar position, stating that while he recognizes the difficulties of implementing clawbacks and other compensation-related remedial measures, he believes it is "not impossible."

Increasing Coordination with Foreign Authorities

- In her speech, AAG Argentieri emphasized DOJ's continued focus on complex schemes that span multiple industries and countries across the globe, and the importance of working with foreign enforcement authorities. She highlighted the Corficolombiana DPA from August 2023 as a "perfect example" where DOJ, for the first time, executed a coordinated resolution with Colombian authorities.

- Against that backdrop, AAG Argentieri announced DOJ's new International Corporate Anti-Bribery Initiative ("ICAB"), through which DOJ will seek enhanced cooperation with foreign enforcement authorities, as well as with the Department of State and other domestic agencies, to identify and prosecute more foreign bribery offenses. DOJ will start by focusing on regions of "most impact" to assist with case generation and coordination.

- Leon added that ICAB is about formalizing and deepening DOJ's existing relationships with foreign authorities, and building an internal program to allocate more resources to improving cross-border coordination. According to Leon, at least three experienced members of DOJ's FCPA Unit with relevant language skills and regional expertise will be designated as leads to facilitate information sharing and assist foreign authorities in their parallel investigations.

What Does This Mean for Corporations?

Despite speculation about the enforcement slowdown in 2023, DOJ and SEC both emphasized that the year will end with more corporate FCPA resolutions and that the trend of increased enforcement activity will continue into 2024. Given that substantial uncertainty still remains over how DOJ will apply its recently revised Corporate Enforcement Policy, we hope that these additional resolutions will provide companies with greater clarity over how DOJ will reward voluntary self-disclosures, cooperation, and

remediation, and equally importantly, how DOJ will punish companies that do not engage in these steps. DOJ officials have suggested that such guidance is forthcoming, and we will be watching closely.

In anticipation of increased enforcement activity, companies should consider the following implications:

- Compliance remains a central focus. DOJ and SEC repeatedly emphasized that companies should develop and implement effective, risk-based compliance programs with empowered compliance professionals, and subject these programs to regular monitoring and testing in order to ensure that they are working in practice and fully remediating the root causes of misconduct. Companies should consider the regulators' focus on compliance in making their own decisions about investing in compliance resources. If anything, given DOJ and SEC comments regarding the increased sophistication of current compliance programs, regulators may have heightened expectations for what constitutes an effective compliance program.

- Voluntary self-disclosures are key to FCPA settlements. DOJ and SEC stressed the importance of voluntary self-disclosures on corporate resolutions, touting the benefits of making disclosures in a reasonably prompt manner. However, until more resolutions are announced confirming the actual benefits of making a voluntary self-disclosure, companies should continue to carefully consider whether to make a voluntary self-disclosure.

- Foreign coordination will expand even further. With increased coordination and cooperation among global enforcement authorities, companies' decisions on whether to voluntarily self-disclose—and if so, to whom to disclose—is becoming increasingly complicated. Companies also need to be prepared to defend themselves in government investigations on multiple fronts, including dealing with conflicting requests from different agencies and jurisdictions. In such cases, companies should consider working with counsel who is experienced in handling multijurisdictional investigations.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C., lawyers:

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