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DOJ and SEC Representatives Tackle Pressing Anti-Corruption Issues in 2014

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On March 20th and 21st, U.S. regulators, practioners, and other anti-corruption industry professionals gathered in Washington, D.C. for the Second Annual Global Anti-Corruption Congress. The Congress featured speakers, panels, workshops, and roundtable discussions that addressed current anti-corruption issues and offered practical advice regarding compliance with anti-corruption laws and, specifically, the Foreign Corrupt Practices Act ("FCPA"). During the Congress, we heard from representatives of the U.S. Department of Justice ("DOJ" or "Department") and U.S. Securities and Exchange Commission ("SEC"), who provided valuable insights into the respective agencies' views on FCPA enforcement, policies, and best practices. The regulators' messages were delivered through DOJ's Criminal Division Acting Attorney General, Ms. Mythili Raman, who delivered the Congress' keynote address,[1] as well as the DOJ's Criminal Division Fraud Section Chief, Mr. Jeffrey H. Knox, and the SEC's FCPA Unit Deputy Chief, Mr. Charles Cain, who participated on a panel assembled to address the "most pertinent" FCPA questions.

Collectively, these officials delivered a clear message: Enforcement of the FCPA continues to be a top priority of the U.S. government, and enforcement authorities are engaging in multi-faceted approaches to not only detect corruption, but to hold all participating parties accountable for their corrupt activities. Furthermore, although U.S. regulators continue to bring enforcement actions against both companies and individuals in a variety of industries and locations, these same regulators will credit and reward companies through declinations, or at least recommending reduction of penalties, for those deemed to have a sufficiently robust anti-corruption program and who also report, cooperate, investigate, and remediate corruption issues meriting such treatment.

Keynote Address: Enforcement of the FCPA is "Key Priority"

During her keynote address, Ms. Raman stated "fighting global corruption continues to be one of the Department's key priorities." She reiterated that fighting corruption is just as important to the Department as fighting violent crime, white collar crime, and organized crime. She explained that the effects of corruption are "corrosive" and felt not just overseas, but here in the United States. Although the consequences of foreign bribery may not be felt as directly in the United States, American companies feel the indirect effects and are harmed by transnational corruption. Ms. Raman added that corruption makes countries less safe, reduces faith in political institutions, and allows organized crime and terrorist networks to flourish as respect for the rule of law and civilized society falters.

According to Ms. Raman, the Department is fighting corruption in "real time" and taking a multi-faceted approach by using a variety of legal and investigative tools. The Department is using criminal and civil forfeiture to seize the proceeds of corruption, employing undercover agents, and cooperating with other governmental agencies, including the Federal Bureau of Investigation ("FBI"), Department of Homeland Security, Internal Revenue Service-Criminal

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Investigations, U.S. Attorneys Offices, and foreign regulators to detect, investigate, and prosecute corruption. Ms. Raman emphasized that the Department has tried to be "nimble" in its fight to ensure that all parties are held accountable for their participation in corrupt activities even if the FCPA does not apply. The Department is employing other U.S. laws (e.g., wire fraud, money laundering, obstruction of justice, and the Travel Act) to punish not only the bribe maker, but the bribe taker. Ms. Raman noted that although the Department is "pursuing more [FCPA] cases than ever before," the Department often exercises its discretion and sometimes declines to prosecute companies which have implemented strong compliance programs, and which have reported, investigated, and remediated corruption when appropriate. Indeed, Ms. Raman's address highlights the importance of implementing robust anti-corruption policies and procedures, and the need to assess on a regular basis their efficacy in deterring and detecting corruption-related risks. Moreover, it highlights the need to adequately remediate any detected corruption-related problems.

FCPA: Impact of the Guide

Following Ms. Raman's remarks, the DOJ's Mr. Knox and the SEC's Mr. Cain took the stage to address "the most pertinent" questions involving FCPA enforcement, policies, compliance, and investigations. First, the two gentlemen discussed the impact of the recently published FCPA Resource Guide (the "Guide").[2] Mr. Cain stated that the Guide is a "positive development" and serves as a "useful tool" to companies developing robust anti-corruption compliance programs. According to Mr. Cain, the Guide will not be revised anytime soon, calling their development a "once-in-a-career" project. He speculated, however, that the Guide may be revised in five to ten years, especially if there are significant developments in the law.

Mr. Knox echoed Mr. Cain's praise for the Guide, stating that, in his view, the response to the Guide has been "overwhelmingly positive." Moreover, the Guide provided the Department with the opportunity to disabuse the public of incorrect information regarding the FCPA and to provide a detailed description of its view of the law and how it is enforced. Indeed, the Guide allowed the Department to articulate its law enforcement priorities and to disclose information regarding how the Department makes charging decisions and exercises prosecutorial discretion.

On a related note, Mr. Knox stated that companies continue to request specific information regarding the Department's declinations, but that it is the Department's long-standing practice not to publish details of declinations without a company's permission, which is rarely given. According to Mr. Knox, however, over the last two years, the Department has declined to prosecute dozens of cases. Notably, Mr. Knox stated that, aside from finding no evidence of criminal conduct, the Department may issue a declination when a case involves an isolated incident, the company had a strong compliance program, and the problem was remediated.

U.S. Government is Cooperating with Domestic and Foreign Authorities

Mr. Knox also noted that the Department works regularly with other government agencies and regulators to enforce the FCPA and other anti-corruption laws. Echoing Ms. Raman's keynote address, Mr. Knox explained that the Department is teaming up with other regulators

and enforcement authorities to detect, investigate, and prosecute cases. He specifically mentioned that the Department continues to cooperate with the SEC, FBI, and foreign regulators. Additionally, he stated that most FCPA cases involve an "equal partnership" between the Department and the U.S. Attorney's Office in the district where the domestic concern resides.

Executive and Audit Committees, plus Internal Audit, Must be Invested in FCPA Compliance Issues

In addition to enforcement and interpretation issues, Mr. Knox and Mr. Cain addressed FCPA compliance issues, including a company's board of directors' and audit committee's roles in anti-corruption compliance. Mr. Cain explained that, in his experience, successful compliance regimes normally have the chief compliance officer directly reporting to the head of the audit committee or to the entire audit committee. Mr. Cain emphasized that a company's audit committee members should be actively involved in compliance issues.

According to Mr. Knox, the company's board and audit committee should at least serve an "oversight function" on anti-corruption compliance issues. Referencing the Siemens case, Mr. Knox explained that failure to implement strong anti-corruption compliance programs, ignoring evidence of systemic corruption, and failing to remediate corruption problems could not only create liability for the company itself, but also create individual liability for board and audit committee members. Mr. Knox countered the Siemens example with the Morgan Stanley declination: according to Mr. Knox, the Department declined to prosecute Morgan Stanley because the company had a robust compliance program and the top of the organization displayed a strong commitment to anti-corruption compliance issues.

On a related note, Mr. Knox touched on the role of internal audit in anti-corruption compliance. He stated that a company's internal audit department must be committed to detecting, reporting, and remediating corruption. Internal audit failures which do not detect or remediate corrupt activities may turn one isolated incident into a larger, pervasive corrupt practice. Such pervasive practices are more likely to draw the Department's attention and result in an enforcement action.

Small Companies Must Do Their Best to Deter and Detect Corruption Risks

Next, Mr. Cain and Mr. Knox addressed the plight of the small- and/or mid-cap company with respect to anti-corruption compliance. Both acknowledged that small companies may have little money to build state-of-the-art compliance programs, but stated that these companies still need to find ways to manage their corruption risk profiles. Mr. Cain urged small companies to reference the Guide's hallmarks of an effective compliance program and creatively employ corporate resources to address and mitigate corruption-related risks.

Mr. Knox focused on the role of senior management in anti-corruption compliance. He stated that the overwhelming majority of cases involving small companies include senior management's participation in or at least awareness of corrupt conduct. According to Mr. Knox, the Department tends not to pursue actions involving isolated incidents by low-level employees, but will pursue actions involving pervasive conduct where senior management is involved, aware, or willfully blind.

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When deciding whether to prosecute a small- or mid-cap company, the Department also evaluates whether, based upon the available resources, the company did its best to detect and avoid corruption. Specifically, small companies should exercise transaction-specific due diligence and evaluate and mitigate risks posed by foreign business transactions and partners (e.g., ask questions about compensation and discounts, request information about potential connections to government entities and/or foreign officials, and monitor business in high-risk countries and markets).

High-Priced Hospitality Not a Per Se Violation, but Need to be Cautious

Messrs. Knox and Cain quickly touched on the issue of appropriate entertainment and whether certain high-priced sporting events (e.g., tickets to the World Cup or Super Bowl) would be considered "reasonable hospitality" under the FCPA. Mr. Knox stated that it is very tough to draw a line as to what types of high-priced entertainment, specifically sporting events, would be appropriate under the FCPA. Mr. Knox stated that the issue comes down to whether there is "corrupt intent" behind providing that kind of hospitality and whether the entertainment is "reasonable and customary." Mr. Knox added that he could not think of an instance where the Department brought an enforcement action against a company where the conduct involved only one isolated sporting event. Instead, enforcement actions involving gifts, travel, or entertainment typically involve pervasive conduct that spans over a number of years or gifts, travel, and entertainment which coincides with other corrupt conduct. Notably, however, Mr. Cain added that as the price of the event increases, so does perception that there is corrupt intent. Ultimately, these issues are viewed through the lenses of amount, timing, and frequency.

"Industry Sweeps"—U.S. Government Follows the Lead

Despite appearances to the contrary, Mr. Knox denied that the Department engages in "industry sweeps;" instead, the Department begins investigating one company in a particular industry and subsequently learns that competitors in the same region are engaged in similar conduct or have engaged the same corrupt intermediary. Consequently, the Department simply follows its various leads during investigations, which may give rise to the appearance of an industry sweep. Successive investigations in a certain industry or region are, however, just natural outgrowths of the initial investigation.

Companies Should Apply "Common Sense" on Decision of Whether to Self-Disclose

Mr. Cain started by stating "there is no perfect compliance program;" therefore, companies will always have some "background issues" which need to be addressed, especially as business and risk profiles change. Mr. Cain does not expect companies to disclose these "normative" problems; however, companies should disclose "significant problems." These "significant problems" are the types of issues which may end up being enforcement actions if the SEC learns of them through means other than self-disclosure.

Mr. Knox took the position that it would be "very reckless and foolish" for him "to try and draw a line between matters which should be self-disclosed and matters which shouldn't." In making the decision of whether to self-disclose, he advised companies and counsel to apply

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"common sense" and ask whether this is "something that [the Department] would be interested in hearing about?" According to Mr. Knox, if the answer to that question is "yes," then the Department would "probably want [a company] to self-disclose it." Nonetheless, there are instances which are not worthy of self-disclosure because the conduct is "minor" and "isolated" or the allegation of wrongdoing is "much too vague." Mr. Knox advised companies to "be thoughtful" when making disclosure decisions and carefully document any decision not to disclose.

Mr. Knox expanded on his explanation, stating that if the Department learns of the incident later on and asks the company why it did not self-disclose, the company should have the precise reasons documented. According to Mr. Knox, "if [the company's] explanation is reasonable," the Department will likely credit the company in its overall assessment of the matter, even if the Department cannot apply self-disclosure credit under the Sentencing Guidelines. Mr. Knox emphasized that the company's decision not to self-disclose must be "reasonable at the time" of the decision, not the company simply "sweep[ing] something under the rug," hoping the Department never learns about it.

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[1] Ms. Raman left the Department effective March 21, 2014.
[2] In November 2012, the DOJ and the SEC jointly issued *A Resource Guide to the FCPA.*