Cross-Border Regulation and Enforcement: Developments and Trends You Need to Know

May 1, 2019, 12-1 p.m. EDT
Introduction

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Overview

“Anyone who considers committing fraud with the hope of hiding their misconduct in foreign jurisdictions, should know that the arm of American law enforcement is long. We work every day with partners around the globe to root out and punish misconduct that distorts markets and corrupts political systems.”

– Deputy Attorney General Rod J. Rosenstein
U.S. Developments
Cross-Border Enforcement Trends

- Cybercrime
- Trade Secrets Theft / Economic Espionage
- Anti-Corruption / Anti-Money Laundering
- Trade Sanctions Violations
- “Spoofing”
- Securities Fraud
- Benchmark Rate Manipulation
- Accounting Fraud
Anti-Corruption Enforcement

- CFTC to investigate and prosecute alleged violations of Commodity Exchange Act carried out through foreign corrupt practices.
  - According to CFTC Enforcement Director James M. McDonald, foreign corrupt practices could include corrupt payments to secure business, corrupt practices to manipulate benchmarks that serve as basis for related derivatives contracts or other corrupt practices to alter prices in commodity markets that drive U.S. derivative prices.
  - CFTC will not “pile onto other existing investigations.”
  - Absent aggravating circumstances, presumption of resolution with no civil monetary penalty if company “timely self-reports a violation of the CEA involving foreign corrupt practices, fully cooperates, and appropriately remediates.”

- DOJ revises FCPA Corporate Enforcement Policy.
  - In connection with mergers and acquisitions, codifies presumption of declination if company “uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy.”
  - Codifies relaxation of key component of “Yates Memo” – FCPA Policy now only requires disclosure of all relevant facts about all individuals “substantially” involved in or responsible for violation of law.

- DOJ continues to prioritize prosecution of individuals.

- Focus on South America and creation of Miami International Corruption Squad.
Aggressive Cross-Border Enforcement Continues

• DOJ continues to assert jurisdiction based only on minimal U.S. contacts (e.g., correspondent bank account transactions in U.S.).
• Cooperation with foreign regulators continues to increase.
• DOJ will bring cases that foreign regulators decline to charge.
Swiss Developments
Corporate Liability

• Article 102 of Swiss Criminal Code provides for corporate offense of failure to prevent bribery and money-laundering (“failure to take all required and adequate steps to prevent …”).

• Jurisdiction asserted if executive management (global, regional or local) or any compliance personnel employed in Switzerland.

• On the books since 2003, but historically low number of prosecutions against corporations.
Corporate Liability

- Recent trend shows increased enforcement activity against corporations.
  - Five major federal convictions, including Alstom and Odebrecht SA, and a handful of cantonal convictions, including HSBC (mainly by the Ministère public of the Canton of Geneva) – Total fines roughly CHF 5m, total disgorged profits roughly CHF 400m, total blocked bank accounts > CHF 1bn.
  - Currently at least 2 banks and handful of other corporates under criminal investigation – focus on foreign bribery and/or money-laundering.
Corporate Liability

• Corporates under pressure to introduce (better) risk and compliance management systems.
  – Swiss Confederation bases its entire risk management on ISO Standard 31000 (including Swisscom, Swiss Railways, Swiss Post, Skyguide, RUAG/Federal Defence Company).
  – Many companies now upgrading the Three Lines of Defence Model by systematic compliance management, primarily based on ISO Standard 19600 (Compliance management systems), in some cases based on German or Swiss Audit Standards 980 for assessment and audit of compliance management systems.
Director & Officer Liability

• 2018 saw several corporate scandals:
  – 3-month’s custody of leading former Swiss bank CEO (allegation: systematic front running on M&A transactions);
  – 200’000 false account entries at Swiss Post in order to maintain level of public funding (undue public subsidies of CHF 200m);
  – Money-laundering allegations and FINMA investigations at a number of Swiss banks (of all sizes); and
  – Management decisions at some banks to dispute (rather than settle) claims by foreign enforcement agencies and subsequent increase of risk profile.
Director & Officer Liability

• These recent corporate scandals and controversial management decisions led shareholders to take new view on Board and Executive Management liability.

• Foreign institutional shareholders now inclined to refuse discharging management at forthcoming shareholder meetings and to potentially sue management for breach of duty, i.e. failure to fulfil their management duties “with all diligence” (as required by law).

• Next five years will most likely confirm increased public and shareholder scrutiny of management performance and show significant raise in lawsuits against managers for negligence or willful blindness.
U.K. Developments
Deferred Prosecution Agreements (Generally)

- Four DPAs entered into by SFO thus far. Three include failure to prevent bribery offences and one relating to false accounting.
- Only Standard Bank Plc completed its DPA with formal expiration of terms (after 3 years) ending on 30th November 2018.
- Since then, Standard Chartered has had to pay significant fines to U.S. authorities for sanctions violations.
Deferred Prosecution Agreements
(Issues that may arise regarding individual references)

- In U.K., DPAs only available for corporates (not individuals).
- Particular issues – individuals do not have mechanism to redact references in DPAs.
  - Prosecution of corporate for bribery/fraud offences (not failure to prevent offences) requires a “directing or controlling mind” (the identification principle) to be capable of prosecution.
  - DPAs for those offences often identify and name “controlling minds” to justify case against corporate.
  - DPAs often concluded prior to proper investigation and later prosecution of individuals.
  - Identified individuals have no ability to intervene and make representations as to content of DPA. Individuals may then be prosecuted and acquitted (see SFO case against Tesco Stores Limited where all three “controlling minds” were later acquitted in retrial).
  - Individuals have no ability to apply to redact DPAs after acquittals as there is no power under relevant legislation for judges to render such orders.
- Problems between a corporate’s internal investigation and findings and a prosecutor’s adoption of those findings and later trial of individuals where arguably disclosure broadens and corporate’s narrative may be discredited.
Deferred Prosecution Agreements
(Issues that may arise from Tesco case)

- Will the collapse of the recent Tesco trial due to lack of evidence have an effect on SFO investigation/prosecution strategy causing it to offer DPAs only in cases of possibly easier to prove "failure to prevent" corporate offences to mitigate potential reputational risk that arises from the Tesco case?
- In cases which do not involve "failure to prevent" offences, will corporates be more hesitant to enter into DPA given difficulties of prosecuting these offences and fines and/or costs that can result from a DPA?
- Currently, failure to prevent offences extend only to failure to prevent bribery and failure to prevent facilitation of tax evasion. Will the above issues renew and increase calls to expand "failure to prevent" offences to other economic crimes such as fraud?
- Will there be more employment disputes where corporate has named individuals in DPA only for those individuals to be later acquitted?
Privilege

• Serious Fraud Office and Crown Prosecution Service Joint DPA Code of Practice at paragraph 2.9.1 emphasizes that company must ensure in its provision of material as part of self-report that it does not withhold material that would jeopardize effective investigation and, where appropriate, prosecution of those individuals.

• History of SFO “attacking” legal professional privilege in corporate criminal cases.

• SFO v. ENRC:
  – SFO sought disclosure of documents that internal corporate investigation had produced and which company claimed were privileged.
  – At first instance, High Court rejected claim of litigation privilege; Court of Appeal overturned High Court decision and upheld claim of litigation privilege.

• SFO Director Lisa Osofsky recently said it was not enough for company to "call in a team of lawyers," only for them to cover incriminating material with legal privilege.

• Ms. Osofsky said her office would regard waiving of privilege as "strong indicator" of co-operation that may enable company to enter into DPA with SFO, in which company can avoid trial if it fulfils certain requirements.

• SFO will soon issue guidance on what companies could expect if they decide to waive privilege and self-report to SFO.

• The battle on privilege is far from over and corporates should be aware that it is still a very live issue.
Q&A

Please email your questions to kgould@bakerlaw.com or use the GoToMeeting question bar on the right side of the screen.