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INSIGHTS

Lifting the Fog on the Foreign Corrupt Practices Act: Enforcement and Compliance Trends to Watch in San Francisco

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As lawyers, corporate executives and federal law enforcement officials prepare to gather this week in San Francisco for the ABA's 39th National Institute on White Collar Crime, we offer our takeaways from January's Houston forum on the Foreign Corrupt Practice Act as context to help anticipate the discussions on trends related to the current state of FCPA enforcement priorities and expectations.

The most striking trend in the FCPA space is not directly about the FCPA itself, but rather about the growing whole-of-government effort to aggressively investigate and punish corporate corruption using tactics and tools that are looking increasingly similar across regulatory regimes. The Department of Justice, the Department of Commerce's Bureau of Industry and Security (BIS), and the Treasury Department's Office of Foreign Assets Control are all focusing on the same general types of conduct and swinging for the fences with penalties.

While the FCPA was the context of the discussion in Houston, the throughline was the overlap — and in the overlap companies can find efficiencies in prioritizing where to invest in compliance. Tracking and resolving murky beneficial ownership structures, preventing any suggestion of improper payments, and keeping a flag to air to see which way the winds are blowing on ESG can address numerous U.S. government priorities, from market manipulation to wire fraud.

Four topics stand out to us as areas to watch:

- Incentive Programs: voluntary self-disclosure and whistleblowing
- Enforcement Trends: nation-states, technology, and the SEC's aggressive streak
- Investment in international enforcement relationship
- The new Foreign Extortion Prevention Act

While the Houston conference rightly and reasonably provided the current landscape on FCPA enforcement, law enforcement officials mentioned multiple areas of corporate exposure in the same breath as foreign corruption, and the expectations across the board were consistent: be

prompt with voluntary self-disclosures, mind and retain your ephemeral messaging communications, and keep a close eye on how your money (whether fiat, gold or crypto) moves across borders.

Straight From the Top

It's a rare and precious opportunity to hear directly from the chief federal law enforcement official of any jurisdiction, and the guest of honor, United States Attorney for the Southern District of Texas Alamdar Hamdani, was candid and direct in his remarks in Houston. Hamdani emphasized that a written compliance policy is only the initial baseline for evaluating a company, and what really matters is what the company "has done to breathe life into that policy."

Hamdani encouraged corporations to look at themselves from an outsider's point of view, noting that it was critically important to engage with communities, listen to the public's concerns and demonstrate good corporate citizenship. He asserted that a company should "write the narrative of your own organization" rather than risking letting others do it. A good policy, he explained, is one that "will walk, talk, and change" as the company's needs change. For example, building out policies to address new forms of technology and manners of doing business, like use of ***ephemeral messaging***, is important to evolve as the government's expectations evolve.

He proposed that, in addition to investing in compliance being the "right thing to do," spending time, money and energy on a good compliance policy makes sound financial sense for a company considering the return on investment — dealing with compliance burden on the front end and thereby preventing (or detecting early) violative conduct saves companies millions, if not *billions*, of dollars in fines and disgorgement on the back end. Citing ***recent statements*** by Assistant Secretary for Export Enforcement at BIS Matthew Axelrod, Hamdani predicted that $300-$400 million fines will become "small change." Hamdani and the rest of the speakers made clear that this prediction — and warning — applies to *all* anticorruption regulation schemes, not just the FCPA.

Incentive Programs Are Spreading

As with the ***rest of the regulatory landscape***, voluntary self-disclosure programs and whistleblower provisions have an impact on companies potentially facing possible FCPA enforcement actions. In Houston, David Fuhr, Chief of the FCPA Unit at the Department of Justice, said his team recognizes that the decision to voluntarily self-disclose is a "weighty one" and provided some transparency about the benefits of VSD cooperation.

Highlighting the issue of timeliness in making a VSD, Fuhr cited the recent ***Albemarle settlement*** to emphasize that DOJ expects a company to come forward when it first identifies a likely violation, though DOJ does not expect a company to fully have its arms around the problem at that stage. He noted that while Albemarle was rewarded for withholding bonuses from implicated employees and voluntarily self-disclosing, the agreement called out that the company was *not* receiving credit for having self-disclosed in a "reasonably prompt" manner, where the VSD was made 16 months after the company first identified it might have a problem

and nine months after it was certain it did.

And it is not just Main Justice that is focused on these types of incentive programs: two notable U.S. Attorney's Offices have entered the game themselves. On January 12, 2024, the Southern District of New York (SDNY) ***announced*** a first of its kind whistleblower pilot program. Notably, however, footnote two of ***the policy*** explicitly carves out the FCPA, likely because control over that statute rests with the FCPA Unit in Main Justice. Conceding that only time will tell how the program will be implemented, panelists were skeptical of its potential efficacy, noting that the policy is "very grey" and contains no express promise by SDNY, but rather just an offer that it *may* not prosecute in exchange for the tip. Indeed, one private sector panelist noted, "for now, it seems like using this program is just putting yourself in harm's way."

Additionally, the U.S. Attorney's Office in the Southern District of Texas (SDTX) also has recently enacted its own ***voluntary self-disclosure policy*** that tracks closely to the DOJ policy. U.S. Attorney Hamdani acknowledged that the program has yet to bear much fruit in terms of disclosures, but he does think it is helping to improve the culture of collaboration between prosecutors and companies. In conjunction with the VSD policy, SDTX also implemented a ***selection policy for corporate monitorships***. Hamdani indicated that his office is looking at adopting a whistleblower program similar to SDNY's.

Members of numerous panels at the FCPA forum observed the importance of creating, maintaining, and truly giving effect to internal channels for whistleblowing, observing that the vast majority of internal whistleblowers report to an agency only after they feel the company did not adequately address their concerns. Companies should follow up with the whistleblower, informing them — to the extent possible — of the actions that the company did or did not take in response to the tip. Panelists predicted a rise in internal whistleblowing as regulators incentivize such action and generational shifts create a more activist-minded workforce.

Emerging Threats and the SEC's Proactive Approach to Anti-Corruption

U.S. Attorney Hamdani predicted a future of compliance related actions — FCPA or otherwise —focused on the threats posed by certain state actors, such as China, Russia, and Iran, and technology, pointing out Deputy Attorney General Lisa Monaco's background in National Security. Indeed, Hamdani noted that his office is part of the cross-agency ***Disruptive Technologies Strike Force*** (Strike Force). Illustrating the collaborative nature of the Strike Force, he explained the significance of his office's expertise in the energy and healthcare industries in helping the Strike Force identify key technologies and potential threats to its secure treatment.

Panelists in Houston also discussed two significant trends at the SEC. First, last year the SEC pursued several cases in which DOJ declined to press charges, resulting in only two joint actions. The consensus is that this is driven by the SEC's new approach of bringing "risk of corruption" — rather than actual corruption — cases, in which the SEC does not prove corruption but instead points to lack of adequate controls that *could result in* corruption. Another factor may be that the SEC has a lower evidentiary burden than DOJ: the books and records and internal controls provisions create strict civil liability for issuers, whereas DOJ must show intentional or willful misconduct.

The SEC's enforcement actions are notable in another respect: rather than following DOJ's lead in prioritizing ***prosecution of individuals***, the SEC has continued its traditional focus on corporate enforcement. One panel suggested that this may be because much of the violative conduct is occurring at companies in China where it is unlikely that the SEC would ever actually reach and prosecute a low-level employee, so it is better to focus human and financial resources on corporate enforcement and the general deterrent effect.

Investment in International Enforcement Relationships

As with other sanctions regimes, cross-border cooperation among law enforcement agencies remains critical to FCPA enforcement. Lance Rollins, FBI Supervisory Special Agent in the Houston Field Office, highlighted at the FCPA forum the agency's ***Transnational Anti-Corruption Partnership (TAP) Program***.

Established in March 2021, the TAP Program stations special agents in strategic international locations — such as South Africa, Bangkok, and Bogota — to work with the U.S. State Department and FBI legal attaché offices. The TAP advisors establish and strengthen relationships, provide education on anticorruption issues, and assist foreign investigators and prosecutors improve their respective capacities to investigate and prosecute international corruption matters. While not their primary aim, TAP advisors will prosecute cases as they arise, though the FBI acknowledged that the Department of Justice tends to be skeptical when a foreign official brings the FBI a lead on a domestic company, a seeming concern of mixed — if not ulterior — motives. Fuhr, the FCPA Chief, predicted that the impact of transnational law enforcement cooperation will grow, especially with the FCPA Unit's plans to expand the countries with which it is coordinating.

Foreign Extortion Prevention Act

The recently enacted ***Foreign Extortion Prevention Act (FEPA)*** was also an area of intense discussion in Houston. Meant as a complement to the FCPA, FEPA criminalizes the "demand" side of foreign bribery by specifically making it illegal for foreign officials to demand or accept bribes from any United States citizen, company, or resident in exchange for obtaining business. The law is enforceable by *any* United States Attorney's Office; DOJ declined to comment on whether and to what extent the FCPA Unit would coordinate and oversee its use, but panels speculated that any actions brought under FEPA will be "run up the flagpole" to the FCPA Unit.

DOJ, the SEC and U.S. Attorney Hamdani agreed that it is always helpful to have an additional tool, but said it is too early to predict whether and how FEPA will have an impact. Hamdani noted that it does "fill a hole," and predicted that it will help prosecutors motivate their international partners to look harder at themselves and their departments. Similarly, DOJ predicted that FEPA might make other countries reevaluate how to handle their own citizens engaged in such conduct. DOJ dismissed concerns that FEPA would create awkward dynamics between US prosecutors and foreign law enforcement, noting that U.S. regulators are already active in this space — ***prosecuting the foreign officials*** — just currently using different statutes. Nevertheless, the general sentiment among practitioners was that FEPA is

“aspirational” at best, anticipating skepticism of local authorities if the dynamic becomes one of “our law trumps your law.”

The Takeaway

Increasingly, a single act or course of conduct can land a company in hot water under numerous regulatory schemes and under investigation by numerous regulators. Between our New York, Washington, DC, London and Texas offices, Bracewell has both the legal expertise and the on-the-ground experience to navigate your company through this evolving regulatory landscape. If we miss you in San Francisco, please don’t hesitate to contact our ***government enforcement and investigation team*** with your questions.