THE INTERNATIONAL ACADEMY
OF FINANCIAL CRIME LITIGATORS

Bulletin

of The International Academy of Financial Crime Litigators

ANDREW T. WISE

"As litigants continue to challenge the protections traditionally afforded company investigations, and as judges continue to entertain arguments about DOJ pressure on companies, the landscape of internal investigation and self-disclosure will continue to shift and, inevitably, influence the nature and extent of future FCPA enforcement."

ISSUE 4 | FALL 2024

The FCPA at 50

A 360 review of the Foreign Corrupt Practices Act.

ANDREW T. WISE

Introduction

The Foreign Corrupt Practices Act of 1977 (FCPA) is at something of a crossroads as it approaches its golden anniversary. Since its passage, and especially in the last 20 years, the FCPA has been the impetus for multi-national companies to overhaul their corporate compliance programs. The threat of criminal enforcement (through the Department of Justice) and civil enforcement (through the Securities and Exchange Commission) has pushed companies to investigate potential wrongdoing by employees and, in many instances, to self-report findings in the hope of leniency.

Alongside these developments in companies, enforcement actions from the DOJ and SEC have produced mixed results. In cases against individual defendants, some of the government's expansive readings of the statute have been rejected by courts. Likewise, in fraud and other white-collar cases, the US Supreme Court seems increasingly skeptical of federal prosecutor's wide-ranging use of arguably vague statutory language.

In another important development, corporate internal investigations are now being scrutinized more closely, and attorney work product is being exposed to discovery due to the cooperation incentives offered in DOJ corporate leniency programs. DOJ has also given incentives to whistleblowers to report perceived misconduct. Yet, questions follow as to whether whistleblower bounties undermine the very compliance programs that DOJ policy has encouraged.

In this article I discuss these cross-currents to provide a picture of the FCPA as it nears its 50th birthday.

GUIDANCE ON THE REACH OF THE FCPA AND CONFLICTING COURT CASES

In November 2012, DOJ and SEC published the first edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. The Resource Guide was updated in July 2020 and has served as a comprehensive statement of the US enforcement agencies' view on critical questions regarding the FCPA. These questions include the jurisdictional reach of the FCPA's anti-bribery

and accounting provisions, the types of payments that constitute "corrupt" payments versus permissible ones, the application of successor liability in the mergers and acquisitions context, and the definition of key terms, including "foreign official" and "agent".

Upon publication, the Resource Guide was treated by many as the dispositive source on many key FCPA-related legal issues and thus found broad application in negotiations between DOJ and corporate or individual targets of FCPA investigations. The first edition of the Resource Guide in particular contained few citations to judicial opinions because many of the agencies' positions had yet to be challenged in court proceedings. Instead, many of the footnotes referred to negotiated resolutions, which is how most FCPA matters to that point had ended. Courts' only role in those resolutions, by and large, had been to approve the terms of resolutions when they resulted in deferred prosecution agreements.

After the first edition of the Resource Guide, DOJ increased its focus on individual culpability in corporate white-collar cases. That focus was most clearly expressed in the 2015 memorandum by then Deputy Attorney General Sally Yates, titled "Individual Accountability for Corporate Wrongdoing". The "Yates Memo" detailed steps DOJ prosecutors should consider to hold individuals accountable. The Yates Memo roughly coincided with an increase in the number of cases brought against individual employees following resolutions with those individuals' employers. A key result of these new cases was that issues the Resource Guide presented as settled became the subject of legal challenge. Individual defendants, unlike their corporate employers, had good reason to fight rather than settle; these defendants faced imprisonment, not just pecuniary and reputation harms.

One example of this dynamic was litigation over whether the FCPA could reach a foreign national who took no action in the United States but allegedly aided and abetted or conspired with an individual or company subject to the FCPA (an "issuer or domestic concern"). The Resource Guide said yes and cited as support for that proposition the charging documents from two matters in which companies had entered deferred prosecution agreements with DOJ. [Resource Guide, first, at 12, fn. 60]. That answer was tested in the high-profile case of French power and transportation company Alstom.

After DOJ reached a resolution with Alstom related to bribes paid to win a lucrative energy contract in Indonesia, DOJ commenced a criminal prosecution in 2013 of Lawrence Hoskins, a former executive of the UK subsidiary of company, who was not a US citizen and whose actions did not take place in the US. DOJ's jurisdiction argument went as follows: Alstom's US-based subsidiary violated the FCPA, and Hoskins, even though he was not an agent of that subsidiary, was liable as a co-conspirator or accomplice to that subsidiary's FCPA violation.

Hoskins moved to dismiss the indictment, arguing that FCPA liability was limited to a defined set of persons that did not include a foreign national who did not enter the US in the course of the alleged scheme, and that the government could not avoid that definition by resorting to the conspiracy statute. The district court agreed, and the US Court of Appeals for the Second Circuit affirmed that part of its ruling. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018) After trial, the district court also rejected DOJ's theory on Hoskins' status as an *agent* of the US-based subsidiary, finding that the evidence did not satisfy the common law principles that defined that term, a ruling that the Second Circuit again affirmed. *United States v. Hoskins*, 44 F.4th 140, (2d Cir. 2022).

Outside of the FCPA context, the US Supreme Court has shown growing skepticism of expansive readings of US statutes. One manifestation of that skepticism is the rejection of extraterritorial application of US law. *See*, *Morrison v. Nat'l Australian Bank*, 561 U.S. 247 (2010) (applying the presumption against extraterritoriality to limit the extraterritorial jurisdiction of US courts); *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016) (limiting the extraterritorial reach of the RICO statute); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (holding the Alien Tort Statute does not have extraterritorial application).

The Supreme Court has also rejected DOJ's construction of key elements of various domestic fraud and anti-corruption statutes. See, *US v McDonnell*, 579 U.S. 550 (2016) (narrowly defining "official act" in the context of domestic bribery), *Kelly v. US*, 140 S.Ct. 1565 (2020) (limiting reach of federal wire fraud and federal program fraud to schemes to obtain money or property); *Snyder v U.S.*, 603 U.S. _ (2024) (holding that 18 USC 666 did not prohibit gratuities to state and local government officials). Perhaps ominously for DOJ, in each of

those cases the Supreme Court rejected DOJ's arguments that prosecutors could be trusted to be reasonable and not enforce an arguably vague statute irresponsibly. In *Snyder*, for example, Justice Kavanaugh wrote the Court "cannot construe a criminal statute on the assumption that the Government will use it responsibly."

Against this backdrop, parties and counsel can fairly wonder which other legal principles that DOJ and SEC have considered settled might come under scrutiny as the agencies pursue FCPA and related actions against individuals.

COOPERATION INCENTIVES, INTERNAL INVESTIGATIONS, AND DISCOVERY

The Yates Memo, noted above, was one in a long line of DOJ guidance memoranda regarding the prosecution of corporations that started with then-Deputy Attorney General Eric Holder in 1999 and continued through subsequent Deputy AGs, including Larry Thompson (2003), Paul McNulty (2006), and Mark Filip (2008). These policy statements had a consistent theme: DOJ would consider a corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate in the investigation of its agents in evaluating whether to bring charges against the company.

Of course, corporations had incentives to investigate allegations of wrong-doing by their employees long before the Holder Memo – assessing and addressing risk created by employee misconduct, avoiding legal liability and reputational harm, and making employment decisions, among other considerations. The Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) recognized that communications between a company and its employees made for the purpose of internally investigating facts and rendering legal advice were protected by the attorney–client privilege.

The Thompson Memo (2003) changed the landscape by predicating corporate cooperation credit on a waiver of privilege -- an aggressive position that DOJ walked back in later guidance. Specifically, in 2008, DOJ required prosecutors to seek pre-approval before requesting waivers for attorney-client communications and attorney work-product and distinguished

between the approval process for legal advice and mental impressions on one hand and purely factual information on the other. By 2016, however, DOJ's position was that while legal advice was privileged, facts were not, and all relevant facts, including those learned through interviews protected by attorney-client privilege, needed to be disclosed in order to earn full cooperation credit.

As DOJ brought more individual prosecutions based on information shared by companies seeking cooperation credit, defense efforts to access internal investigation material proliferated. And DOJ's policies incentivizing corporate cooperation as a means of earning leniency have caused some judges to question whether investigations were truly "independent" and deserving of protection, or whether defendants had a right to compel production of investigation materials to use in their defense of DOJ charges.

In one recent case *United States v. Connolly*, 2019 WL 2120523, at *12 (S.D.N.Y. May 2, 2019), the district court found that DOJ had effectively "outsourced" its criminal investigation to a target company's outside counsel and noted that prosecutors are in a "uniquely coercive position *vis-à-vis* potential targets of criminal activity." The judge held that due to the extensive cooperation between DOJ and those outside counsel, statements made to those outside lawyers had been "compelled" by state action and therefore could not be used against the defendant without violating his Fifth Amendment rights.

In another case, *United States v. Coburn,* Civ. 2:19-cr-00120 (KM) (D.N.J.), the district court held extended hearings on the defendants' claim that the company essentially acted as an arm of DOJ by taking DOJ's input on who should be interviewed and what topics should be covered. While the defendants did not ultimately prevail on that argument, the judge found that the company's detailed description of investigation interviews to DOJ constituted a waiver of privilege and ordered production of outside counsel's work product to targets of the investigation. The arguments from *Connolly* and *Coburn* are certain to be repeated so long as DOJ conditions leniency on proactive cooperation and companies share investigation details in ways that fail to safeguard attorney-client privilege and work product protections.

The reasoning of the courts in *Connolly* and *Coburn* raises another important issue of particular interest to lawyers who conduct internal investigations: whether such investigations, when international in scope, would violate a country's blocking statutes. This subject was explored by Academy Fellow Frederick T. Davis in the Compliance and Enforcement Blog of the Program on Corporate Compliance and Enforcement of New York University School of Law. *See*, https://wp.nyu.edu/compliance_enforcement/2019/11/06/united-states-v-connolly-and-the-risk-that-outsourced-criminal-investigations-might-violate-foreign-blocking-statutes/.

Over the past 20 years, FCPA enforcement has been driven by corporate self-reporting; the biggest resolutions in terms of fines and penalties have all been negotiated settlements, mostly following a company's disclosure of facts developed through internal investigations. As litigants continue to challenge the protections traditionally afforded company investigations, and as judges continue to entertain arguments about DOJ pressure on companies, the landscape of internal investigation and self-disclosure will continue to shift and, inevitably, influence the nature and extent of future FCPA enforcement.

THE DEVELOPMENT OF COMPLIANCE PROGRAMS AND RECENT WHISTLEBLOWER GUIDANCE

Another important dynamic that bears watching is the emerging tension between DOJ guidance on the evaluation of corporate compliance programs and the explosive growth of whistleblower reward programs. These programs offer incentives to individuals to circumvent compliance programs in pursuit of financial bounties.

In 2017, the Fraud Section of DOJ published the first edition of a memorandum titled "Evaluation of Corporate Compliance Programs." It has since undergone numerous revisions and has served as a valuable resource for companies seeking to design and maintain effective anti-corruption compliance programs. The guidance covers a wide range of topics from program design, structure, and resourcing to continuous improvement, testing, and forward-looking risk assessment. DOJ has updated the guidance in light of new developments; for example, recent revisions have addressed the integration

of data analytics into compliance program design, the use of ephemeral messaging applications by company employees, and compensation clawbacks and consequence management systems. A foundational and consistent element of an effective compliance program has been the maintenance of confidential reporting structure through which employees could report suspected violations of law or a company's code of conduct and an investigation mechanism that would both safeguard against retaliation and allow for timely review of, and response to, findings of misconduct.

Responsible companies invested significant resources in designing, maintaining, and testing their reporting and investigations processes. As detailed in various benchmarking studies and presentations by leading Chief Compliance Officers, companies established ethics and compliance hotlines accessible to employees and business partners and publicized their existence on websites, posters in physical locations, and through trainings. Some engaged outside vendors, especially outside the US, to ensure accessibility and to assure employees of the independence and anonymity of the process. Protection of whistleblowers from harassment and retaliation and establishment of reliable and credible investigative procedures was a consistent element of DOJ guidance on effective compliance programs and companies devoted extensive time and resources to building up responsive systems.

Following the 2008 financial crisis, the SEC whistleblower program was created as part of the Dodd-Frank Act. The program was designed to encourage reporting of legal violations to the SEC by offering financial incentives and protections against retaliation. An individual who voluntarily reported original information that led to a successful enforcement action by the SEC and a fine of over $1 million was entitled under the program to 10 % to 30% of the fine as an award, and in the years after its adoption, the program paid out nearly $2 billion to whistleblowers, with an average award around $5 million.

DOJ had not maintained a similar whistleblower incentive program until 2024, when it announced a corporate whistleblower rewards pilot program intended to "supercharge" enforcement in key areas, including the FCPA. The pilot program, which was integrated into DOJ's existing Corporate Enforcement and Voluntary Self-Disclosure Policy, contained numerous definitional elements and qualification provisions similar to the SEC

whistleblower program. *See*, https://www.millerchevalier.com/publication/doj-announces-corporate-whistleblower-rewards-pilot-program-and-amends-corporate.

The pilot program provided some support to the internal reporting systems in which companies had so heavily invested. For example, making a prior report internally is a factor that can increase an award's amount. However, the pilot program also allows an employee to be eligible for an award if they make a report to the DOJ within 120 days of making an internal report. This provision significantly (and deliberately) increases the pressure on a company to self-report within that timeframe as well.

Further, while individuals who obtain information due to their roles as company directors, officers, or other fiduciaries are presumptively ineligible for a reward, they can become eligible if the company fails to act on information within 120 days, or if the whistleblower has a reasonable basis to believe immediate disclosure is necessary to avoid a set of enumerated harms, including the possibility that an individual is engaging in conduct that will impede an investigation. This broad exception language widens the list of eligible whistleblowers to a range of individuals who would ordinarily be at the heart of a company's compliance functions, and given the amount of a potential award, these exceptions are likely to be tested soon.

CONCLUSION

The ultimate impact of the whistleblower pilot program on FCPA compliance, reporting and enforcement will take some time to assess given the details of the program and the extended timeline for most FCPA investigations. The same is true for the other considerations discussed above: the legal interpretations arising from cases against individuals, and the challenges to and impact on corporate investigations and cooperation. The effects are fluid, and we will know more over time. All of these developments will influence the future of FCPA enforcement.

One final note: elections have consequences, though of course we usually do not know what they are until we have the benefit of hindsight. We can be sure that the new administration in Washington will leave its own mark on corporate enforcement, including enforcement under the FCPA.

AUTHOR

Andrew T. Wise

Andrew T. Wise is a partner at Miller & Chevalier in Washington, D.C. He specializes in white-collar criminal and civil trials, with extensive experience representing multinational companies in fraud and anti-corruption investigations. Andrew has defended clients in complex cases involving the FCPA, fraud, bribery, and tax offenses, and he has conducted high-stakes internal investigations and compliance reviews for corporate clients.