

What FCPA Enforcement Is Thinking in 2012

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A year ago, FCPAméricas provided an [overview](#) of FCPA enforcement officials' thinking at the time based on their comments at the 2011 National Conference on the U.S. Foreign Corrupt Practice Act, hosted by American Conference Institute (ACI). Last week, ACI held its 2012 national conference. Once again, FCPA enforcement officials shared their current thinking. Here are highlights. (Note that they stated that these were their own views and not the official views of their respective agencies.)

Expect reasonableness when companies voluntarily disclose. Such was the assertion of Charles Duross, the Deputy Chief of the Fraud Section of the Criminal Division of the U.S. Department of Justice (DOJ). Given that the recent [FCPA Guidance](#) puts a premium on self-reporting, it made sense for Mr. Duross to address the topic. He cited [Morgan Stanley](#) and [BizJet](#) as examples of fair treatment. Morgan Stanley got a declination. Even though BizJet's conduct was egregious, the DOJ did not push for a guilty plea or a monitor. Mr. Duross also told of a situation where he asked a company to perform an internal investigation that had a scope that was much more narrow than the one already recommended by the company's outside counsel. He cited [Pfizer/Wyeth](#) as an example of a reasonable approach to successor liability. That case shows that, since companies cannot "merge their way out of liability," the ones that conduct due diligence, remediate, and inform the DOJ are treated fairly. Kara Brockmeyer, the Chief of the SEC's FCPA Unit, added that it is much better if regulators hear from companies first than if they hear from a whistleblower or the New York Times.

Prosecution of individuals will continue. Mr. Duross acknowledged that the DOJ had experienced setbacks in its efforts to pursue individuals for FCPA violations. But he added, "We will not shrink from the fight." He explained that prosecutions of individuals are challenging and highly resource-intensive. He said that it is not always easy for the Government to establish corrupt intent. But he reminded participants that the government has won cases too. Both he and Ms. Brockmeyer acknowledged that guidance from the courts is a "good thing." Ms. Brockmeyer pointed to Siemens and Noble as examples of cases where the Government is pursuing individuals after having dealt with their companies. To assist with prosecutions against individuals, the DOJ is reportedly bringing on board highly seasoned criminal attorneys back from private practice with significant prior prosecutorial experience.

Emerging markets are in the enforcement spotlight. Ms. Brockmeyer said that emerging markets are of growing importance to the global economy and also tend to present greater risks. She suggested that enforcement will continue to focus on these countries. She said that, at times, domestic bribery cases in these countries

lead to FCPA investigations. For example, the SEC has experienced situations where companies disclose violations to U.S. authorities after their employees have been arrested in developing countries.

Financial controls and monitoring are essential. Ms. Brockmeyer emphasized that compliance programs should not just be administered by a company's Legal and Compliance departments. Internal financial controls are a crucial "third prong." Above and beyond trainings and certifications, companies must have mechanisms in place designed to catch employees who are violating policies. Audit departments must track payments and verify that they are supported by proper documentation. When companies go to the SEC to discuss an issue, they should expect to answer questions about how they are testing controls and where internal audit fits into the compliance program. "Bribery cannot happen if the company has control over where the money is going." She cited Morgan Stanley as a firm that went "out of its way" to ensure policies were being followed. The DOJ's Assistant Chief of the FCPA Unit, James Koukios, added that companies must ensure there is a sufficient number of auditors on staff to monitor compliance. He said, for example, a major multinational would likely need well more than a dozen internal auditors to adequately identify and follow up on all red flags.

Employees are only "rogue" if compliance programs are otherwise adequate. Mr. Duross said that enforcement officials will assess the state of the compliance program at the time of the violation to determine if the actor was really rogue or not. He said that, if a company claims to have a rogue employee, and an investigation then reveals violations in five other countries, that claim will seem less credible. He said that, if a company claims its employee was rogue but cannot show internal controls at the time, the company has a problem. If a program has failed to catch a decades long corruption scheme, then the program probably will not be considered effective.

Periodic risk assessments are necessary. Ms. Brockmeyer explained that compliance programs should be "dynamic." This means that the company should take into account the shifting risks it faces. She cited [Watts Water](#) as an example. Its business model changed when it acquired a Chinese subsidiary that interacted with foreign officials. But its compliance program did not.

Declinations will not usually be published. Mr. Duross said that the DOJ declines to enforce the FCPA on a "regular basis." It just does not publicize it. He said that maintaining the confidentiality of declinations is a standard policy at the DOJ for all crimes, not just the FCPA. The DOJ does not intend to change years of policy just for FCPA cases. Morgan Stanley's declination was publicized because its employee was subject to enforcement action.

Enforcement is more likely to detect violations. Mr. Duross said that the likelihood of getting caught is "greater today than at any other time." Mr. Brockmeyer said that, in fact, less than half of SEC cases are now based on self-

disclosures. Other sources for learning about violations are growing in importance. These include newspaper articles, whistleblower tips, information from agents, and anonymous emails sent directly to enforcement officials themselves.

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