

Did I Drink the Kool-Aid, Read the Pleadings or Hear it at a Conference?

Last week the FCPA Professor wrote, in a post entitled “*Stop Drinking The Kool-Aid*”, about the Declination to Prosecute that Morgan Stanley received from the Department of Justice (DOJ) in the affair involving the Morgan Stanley Managing Director Garth Peterson and his self-admitted Foreign Corrupt Practices Act (FCPA) violation. Once again showing that sometimes the Professor and I look at (or read or hear) the same thing and come to different conclusions, as I would posit that the Morgan Stanley Declination was the most significant FCPA enforcement (or perhaps non-enforcement) matter of 2012 to date.

One of the things that I learned in my years as a trial lawyer was that in the litigation realm, every time you open your mouth to the other side, file a pleading, say something in court or in any other way communicate you are providing information to the other side. Sometimes you do so by design and sometimes not. I was taught the art of advocacy for trial lawyers but I was also taught that the art is listening is equally important. This long ago training still forms the prism of how I view things up to this day, practicing law and compliance.

One of the frustrations for any compliance practitioner or indeed business executive trying to comply fully with the FCPA is the dearth of case law precedent to draw from in guiding a *best practices* compliance program going forward. There are, however, other types of information which compliance practitioners can draw upon such as Opinion Releases, enforcement actions involving Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) and talks by DOJ and Securities and Exchange Commission (SEC) [more about the speeches later] and now we have a new source of information - Declinations to Prosecute.

In his post the Professor notes that Peterson engaged in the following conduct:

- “Peterson and Chinese Official 1 had a close personal relationship before Peterson joined Morgan Stanley.”
- A shell company used to facilitate the scheme was owned 47% by Chinese Official 1 and 53% by Peterson and a Canadian Attorney.
- “Without the knowledge or consent of his superiors at Morgan Stanley, Peterson sought to compensate Chinese Official 1”
- “Peterson concealed Chinese Official 1’s personal investment [in certain properties] from Morgan Stanley”
- “Peterson used Morgan Stanley’s past, extensive due diligence [as to certain of the investment properties] to benefit his own interests and to act contrary to Morgan Stanley’s interests.”

Penultimately, the Professor adds that in the DOJ Press Release regarding this prosecution, Assistant Attorney General Lanny Breuer said “*Mr. Peterson admitted ... that he actively sought to evade Morgan Stanley’s internal controls in an effort to enrich himself and a Chinese*

government official.” Finally, the Professor wrote “An experienced FCPA practitioner, who otherwise holds Breuer in high regard, recently told me that Breuer’s recent speeches on Morgan Stanley’s so-called declination are a “joke.” [*Italics mine*] I cannot opine on whether there were sufficient facts to support any enforcement action against Morgan Stanley. However, I can state what happened at the end of the day and that was that Morgan Stanley was not prosecuted.

Moreover after reading the Peterson Information (the Professor always embeds links to all relevant documents) it demonstrated the robust nature of Morgan Stanley’s compliance program. Most compliance practitioners are well aware of the factors set out in the DOJ/SEC Press Releases on the Declination to Prosecute, which are:

- (1) Morgan Stanley trained Peterson on anti-corruption policies and the FCPA at least seven times between 2002 and 2008.
- (2) Morgan Stanley distributed to Peterson written training materials specifically addressing the FCPA, which Peterson maintained in his office.
- (3) A Morgan Stanley compliance officer specifically informed Peterson in 2004 that employees of Yongye, a Chinese state-owned entity, were government officials for purposes of the FCPA.
- (4) Peterson received from Morgan Stanley at least thirty five FCPA-compliance reminders.
- (5) Morgan Stanley required Peterson on multiple occasions to certify his compliance with the FCPA. These written certifications were maintained in Peterson’s permanent employment record.
- (6) Morgan Stanley required each of its employees, including Peterson, annually to certify adherence to Morgan Stanley’s Code of Conduct.
- (7) Morgan Stanley required its employees, including Peterson, annually to disclose their outside business interests.
- (8) Morgan Stanley had policies to conduct due diligence on its foreign business partners, conducted due diligence on the Chinese Official and Yongye before initially conducting business with them, and generally imposed an approval process for payments made in the course of its real estate investments.

However, found in the Peterson Information is an entire treasure trove of detail. So from that Information we learn the following:

- Morgan Stanley’s Compliance Department had direct reporting lines up to its Board of Directors.
- Morgan Stanley worked with outside counsel to conduct due diligence into potential business partners.
- Morgan Stanley compliance personnel regularly surveilled and monitored client and employee transactions.
- Morgan Stanley randomly audited selected personnel in high-risk areas; Morgan Stanley regularly audited and tested Morgan Stanley’s business units.

- Morgan Stanley completed additional anti-corruption initiatives by, for instance, aggregating and evaluating expense reports to attempt to detect potential illicit payments.
- The Morgan Stanley compliance team specialized in particular regions, including China, in order to evaluate region-specific risks.
- Morgan Stanley had a hotline, monitored 24 hours, 7 days per week and such hotline could field calls in every major language including Chinese.

Regarding transaction monitoring, Morgan Stanley engaged in controls to detect and prevent improper payments. These controls required multiple employees to be involved in the approval of any payments above the specific amounts that were mandated in various contracts between Morgan Stanley and outside companies or individuals. Payments above these amounts could not be made until the following procedures, among others, were completed: an asset manager or acquisition-team member familiar with the project activities drafted a contract for the payment; a junior asset manager or junior acquisition-team manager initiated the payment process and sought approval; and an officer-level asset manager or acquisition-team manager with the title of vice-president or above had approved the payment.

How about some words on risk assessments and updating the Morgan Stanley compliance program? Consider the following from the Peterson Information. Morgan Stanley continually evaluated and improved its compliance program and internal controls. For instance beginning in 2007, Morgan Stanley engaged in risk based FCPA auditing intended to detect transactions, payments, and partnerships that suggested increased risks for Morgan Stanley to violate the FCPA. Morgan Stanley checked the efficacy of its controls through various systems including internal audits and desk reviews that included meetings between employees and compliance personnel to discuss anti-corruption risks. Morgan Stanley compliance personnel regularly reviewed and updated the company's compliance program and policies to reflect regulatory developments and changing risk. Morgan Stanley, in conjunction with outside legal counsel, also annually conducted a formal review of each of its anti-corruption policies.

Consider the specific due diligence performed on the transaction and Chinese government officials at issue in the Peterson FCPA violation by Morgan Stanley. Consistent with Morgan Stanley's established diligence practices, this due diligence included reviewing Chinese government records concerning Yongye; speaking with sources familiar with the Shanghai real-estate market; checking Yongye's payment records and credit references; reviewing litigation records concerning Yongye; conducting a site visit to Yongye's offices; searching media sources concerning Yongye; making a pre textual phone call to Yongye's offices; and running a criminal background check on Yongye's principals.

So when I look at Morgan Stanley's Declination I see information. It is information that the compliance practitioner can use in his or her company's compliance program. As for Lanny

Breuer saying *“Because Morgan Stanley voluntarily disclosed Peterson’s misconduct, fully cooperated with our investigation, and showed us that it maintained a rigorous compliance program, including extensive training of bank employees on the FCPA and other anti-corruption measures, we declined to bring any enforcement action against the institution in connection with Peterson’s conduct. That is smart, and responsible, enforcement.”*; I say that he needs to keep providing this information because these are the facts on the ground.

FCPA Conference Circuit

Which brings me to my next topic, also recently considered by the FCPA Professor in a post entitled *“It Ought To Stop”*, of the FCPA conference circuit. For the record let me say that I detest paying \$2000 to \$4000 to attend anything other than a vacation with my wife. In his post the Professor posed four questions, which I will try and answer in turn.

1. *Should public servants be allowed to speak at private conferences and events that charge thousands of dollars to attend?* Of course the answer is yes. The conferences are the crème-de la crème of the FCPA knowledge across the country. It is of great value to hear what Lanny Breuer or any other DOJ/SEC official has to say. Do they have prepared remarks – you bet they do, but they always, and I mean always, will give you some additional information in a Q&A or other informal session. But the key is that you have to listen.
2. *Should public servants be used as pawns by corporate conference organizers to boost attendance and thus revenue?* Am I am pawn if I speak at such a conference, hmmm, or am I articulating a position or am I sharing information (or am I marketing)? Perhaps all four. Should conference organizers invite public officials to conferences to articulate DOJ/SEC positions and afford the attendees the opportunity to hear such remarks. I think that is smart marketing.
3. *Should the enforcement agencies release all speeches, comments and remarks, including answers to questions posed by the audience?* Yes
4. *Do small to medium size enterprises have the resources to attend such events?* Last June, during Compliance Week 2012, the local DC Bar held a lunch event on the Gun Sting case which had on the panel the FCPA Professor, Stanley Sporkin, DOJ and SEC representatives and defense lawyers from the case. Cost - \$125. Even our local, provincial Houston Bar Association has had DOJ/SEC representatives speak at our events. But would Lanny Breuer come to Houston to speak at the Houston Bar Association Corporate Counsel monthly luncheon and talk to 35 lawyers or speak to 500 plus folks at ACI or Compliance Week or Dow Jones or Ethisphere? (Or go all out and speak to the 1000+ at the annual SCCE conference?) (I will leave that answer to you—which size audience do you think the Number 2 lawyer in the DOJ would speak in front of?)

The Professor raises another point that bears comment. That is sponsorship of events. These events are all pay-to-play and they are big bucks for everyone. Are they marketing? Absolutely. Do I hate it that sponsors can knock me off any chance of speaking because they perceive me as competition? You bet I do. For instance ACI has never even contacted me to speak at the ACI Boot Camp in Houston. You might think that for one of the top events on Houston they might at least even approach me to speak. But obviously some sponsor doesn't want me anywhere near that podium. But here is the rub; it is one of the best FCPA events held in Houston. Is it in my personal self-interest to pay and attend, absolutely and I will do so again in 2013. After all ACI is in this field to make money.

So did I drink the Kool-Aid? That is up for you to decide. But I think that the DOJ provided solid information to the compliance practitioner in the Morgan Stanley Declination and the Peterson Information. As to whether any of the DOJ/SEC folks should attend 'for pay' conferences and provide additional information to the rest of us I can only quote Captain Jean-Luc Picard-**ENGAGE**.

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