

FCPA Predictions for 2012

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As part of my New Year's celebration, I thought it would be good to outline some predictions for FCPA events and trends in 2012.

The Justice Department's FCPA enforcement program will continue. The business community will complain about DOJ's policies. There will be no significant changes in enforcement priorities or in the operation of the voluntary disclosure procedure (which needs to be reviewed and reformed). The promised guidance will buy DOJ political time but will provide no real modifications or clarifications for some of the more difficult issues. With this general framework, here are some of the more specific likely events and/or trends.

1. Resumption of Collection of Large Fines – 2010 was a record setting year for DOJ when it collected \$1.6 billion in criminal fines. Total fines for 2011 were much lower because of resources dedicated to criminal trials. 2012 will see a resumption of large criminal fines and settlements. There have been significant FCPA disclosures by a large number of companies in the pharmaceutical and medical device industries, oil and gas, high tech, and global retail industries. There are a large number cases pending internal investigations by outside counsel which need to be reviewed by DOJ staff and officials.

2. FCPA Enforcement Spreads to Mid-Size and Smaller Public Companies – Most of the FCPA criminal settlements have involved large global companies. They will continue to be the focus in 2012 but more mid-size and smaller companies will fall under the FCPA enforcement axe. Mid-size and small companies have been slower to implement compliance programs. Bribery is a much greater risk in these companies. Reporting of such violations by whistleblowers and disgruntled employees will inevitably lead to more cases against these companies.

3. First FCPA Wiretap Case – The Justice Department shook up the securities industry with the use of wiretaps to build its insider trading cases. DOJ will use wiretaps during 2012 to build an FCPA criminal case which will have a significant impact in the industry. The most likely target will be companies in the oil and gas industry.

4. FCPA Settlement Case Bigger than Siemens – As everyone knows, Siemens was the largest FCPA settlement to date. That record will be eclipsed with the settlement of another case, which will be the first FCPA settlement in which the Justice Department alone collects over \$1 billion in a criminal fine.

5. Criminal Settlements in Private Equity and Hedge Funds – I have written about the significant FCPA enforcement risks facing private equity and hedge funds. The SEC's inquiry will bear fruit with some significant enforcement actions against private equity companies and their dealings with sovereign wealth funds and their failure to conduct due diligence and implement compliance among their portfolio companies.

6. Criminal Indictment of High Ranking Company Officials – With the increased focus on prosecution of individuals, the Justice Department will seek to make an example of high ranking corporate executives for criminal prosecution. The Justice Department already has increased prosecutions of individuals but has not targeted higher level corporate executives. This is a high priority item for them.

7. UK Bribery Act Enforcement – The SFO will coordinate a joint prosecution with US authorities using the UK Bribery Act to prosecute a global company in both jurisdictions. While many expected a more aggressive SFO enforcement program in 2011, the SFO and DOJ are committed to a joint prosecution and will do so against a large global company