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5 Anti-Corruption Developments To Expect This Year

Law360, New York (February 03, 2014, 2:55 PM ET) -- Anti-corruption enforcement remained active in 2013. We saw the return of nine-figure settlements in anti-corruption enforcement actions, including two of the 10 largest settlements in the history of the Foreign Corrupt Practices Act. This past year also was marked by a continued focus on individual conduct, with U.S. Department of Justice prosecutors announcing FCPA charges against a number of individuals. Outside of the United States, 2013 will be remembered for increased global attention to anti-corruption issues, including a growing focus by Chinese enforcement authorities on the activities of multinational pharmaceutical companies, Brazil's enactment of a new anti-corruption law applicable to companies, India's creation of an anti-graft watchdog, and an expansion of Canada's foreign anti-corruption law.

This year, we can expect the following developments:

1. Introduction of DPAs in the U.K.

In April 2013, the U.K. passed legislation authorizing the use of deferred prosecution agreements in certain economic crimes, including bribery, fraud and money laundering, which is scheduled to take effect in February 2014. Under the new U.K. law, organizations entering into DPAs will be required publicly to admit certain facts indicating wrongdoing and to comply with rigorous conditions, such as the payment of a financial penalty, implementation or updating of a compliance program, payment of compensation to victims, and disgorgement of profits. In return, the U.K. Serious Fraud Office and Crown Prosecution Service will agree to suspend criminal charges.

The U.K. version of DPAs envisions an early and active role for judges, in contrast to the less active role traditionally played by judges in the U.S. in reviewing and approving DPAs. The U.K. process also requires that any alleged breaches of a DPA be reviewed by a judge. Again, this differs from the U.S., where the enforcement agency generally determines in the first instance whether a breach of a DPA has occurred, as well as how such a breach should be remedied. The effect of DPAs on the U.K.'s anti-corruption enforcement efforts will be an interesting development to watch in 2014, particularly in light of the SFO's announced intention to focus on big cases.

2. SFO Emphasizes Its Commitment to "Striking Tigers as Well as Flies" and Announces Its Intention to Conduct Sector Sweeps

The SFO's joint head of bribery and corruption announced in November 2013 that the SFO is committed to focusing its efforts and resources on tackling the most complex cases of economic crime. In December 2013, the SFO demonstrated that commitment when it announced the launch of a criminal investigation into allegations of bribery and corruption at Rolls-Royce, following Rolls-Royce's December 2012 announcement that it passed information to the SFO regarding alleged bribery and corruption involving its intermediaries in overseas markets, including Indonesia and China.

Perhaps as part of the SFO's commitment to "striking tigers," the director of the SFO announced in October 2013 that the SFO intends to focus on sector sweeps, which have been a fixture of U.S. enforcement for several years. The construction, public contract, extractive and oil and gas sectors were specifically mentioned as SFO targets due to their vulnerability to economic crime.

3. FCPA Allegations by Dodd-Frank Whistleblowers Increase While Judicial Decisions Limit the Scope of Anti-Retaliation Provisions

The 2013 annual report from the U.S. Securities and Exchange Commission Office of the Whistleblower announced an increase of FCPA-related whistleblower reports, from 115 tips (3.8 percent of total tips) in fiscal year 2012 to 149 (4.6 percent of total tips) in fiscal year 2013. The report also highlights a record $14 million award to a whistleblower, although the SEC has not disclosed what type of case led to the award or other details which could potentially reveal the whistleblower's identity.

2013 also saw another federal court determine that the anti-retaliation provision of the Dodd-Frank Act has no extraterritorial application. In October 2013, Judge William H. Pauley III of the Southern District of New York held that the anti-retaliation provision is "purely a domestic concern" without extraterritorial application, applying the presumption against extraterritoriality adopted by the Supreme Court in Morrison v. National Australia Bank, Ltd., and the reasoning of Judge Nancy F. Atlas of the Southern District of Texas in a June 2012 decision construing the same provision.

While commentators have suggested that these decisions may have a chilling effect on foreign whistleblowers, we do not foresee a precipitous decline in whistleblower reports. First, the decisions on the extraterritoriality of the anti-retaliation provision of Dodd-Frank do not apply to the separate Dodd-Frank whistleblower bounty provisions; a foreign national may be eligible for whistleblower awards even if he or she cannot bring suit under the anti-retaliation provisions. Second, many whistleblowers are not employees of the company about which they are making a report, and thus are not concerned about retaliation.

Third, and most important, companies would be ill-advised to retaliate against whistleblowers regardless of the applicability of Dodd-Frank anti-retaliation protections. Local labor laws may bar such actions, and many companies have compliance policies that prohibit retaliation against whistleblowers, regardless of whether they are covered by Dodd-Frank's anti-retaliations provisions. Moreover, retaliation against a whistleblower could have severe consequences in any SEC or DOJ enforcement action, including preventing a company from receiving credit for an effective compliance program under the U.S. Sentencing Guidelines.

Thus, as a practical matter, decisions addressing the extraterritorial application of the anti-retaliation provisions should not change how companies act with respect to whistleblowers. In fact, the chief of the

SEC's Office of the Whistleblower has indicated that his office will pursue enforcement actions against companies who retaliate against whistleblowers, noting that "[e]mployers who retaliate against individuals who report to us in good faith do so at their peril." As whistleblower bounties are publicized, we expect whistleblower reports will continue to rise.

4. Recent Developments Suggest Trend Toward Increased Judicial Scrutiny of Settlements

Three 2013 cases — DOJ v. HSBC Holdings PLC, SEC v. Tyco International Ltd., and SEC v. IBM Corp — suggest 2014 may see increased judicial scrutiny of negotiated settlements with federal enforcement authorities. Judge John Gleeson of the U.S. District Court for the Eastern District of New York, reviewing the deferred prosecution agreement that DOJ filed against HSBC for anti-money laundering and sanctions violations, invoked authority to approve and oversee the implementation of the DPA pursuant to the court's "supervisory power," a position that he acknowledged to be "novel." Although Judge Gleeson ultimately afforded "significant deference" to the government's prosecutorial discretion and approved the HSBC DPA "without hesitation," this ruling still could be significant if other federal judges begin to assert the same supervisory power but choose not to afford the same degree of deference.

Judge Richard J. Leon of the U.S. District Court for the District of Columbia also has shown that judges may adopt a more proactive and searching review of FCPA-related settlements. Nine months after Tyco and the SEC announced a $13.1 million foreign bribery settlement, Judge Leon finally approved the final judgment in the action, imposing a two-year reporting requirement under which Tyco must submit to the court and to the SEC: (1) annual anti-bribery compliance reports, (2) immediate disclosures of potential FCPA violations, and (3) disclosures within 60 days of learning that it is the subject of a federal criminal investigation, federal administrative proceeding, or major civil lawsuit.

Similarly, Judge Leon took more than two years to approve a $10 million FCPA settlement between the SEC and IBM. The settlement terms include enhanced reporting by IBM to the court over the next two years regarding its compliance program and potential FCPA violations. Both IBM and Tyco have been the subject of prior enforcement actions, settling cases with the SEC in 2000 and 2006, respectively. Increased judicial scrutiny of FCPA settlements is a trend to watch in 2014.

5. First Appellate Decision Construing Scope of "Foreign Official" Expected in 2014

In 2014, we expect to see an appellate decision construing regulators' broad definition of "instrumentality," under which employees of state-owned or state-controlled enterprises qualify as "foreign officials." This interpretation is currently being challenged before the Eleventh Circuit in United States v. Esquenazi, No. 11-15331. Briefing on the appeal was completed in October 2012; oral argument took place in October 2013. Although the Esquenazi case stems from alleged improper payments in the telecommunications industry, any ruling on the definition of "instrumentality" and "foreign official" under the FCPA will affect enforcement actions in other industries.

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