



Government Enforcement Investigations

Trends and Perspectives from the UK, US and China

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On September 20, 2016, Skadden presented a seminar titled “Government Enforcement Investigations – Trends and Perspectives from the UK, US and China” in London. The UK Financial Conduct Authority (FCA) Director of Enforcement and Market Oversight Mark Steward gave introductory remarks. A panel discussion followed, moderated by Keith Krakaur, who heads Skadden’s European Government Enforcement and White Collar Crime Group, and including partners Gary DiBianco (Washington, D.C.), Ryan Junck (London), Steve Kwok (Hong Kong), Elizabeth Robertson (London) and counsel Eytan Fisch (Washington, D.C.).

The FCA’s Role, International Collaboration and Focus on Individuals

Mr. Steward provided an overview of the FCA’s role as a financial regulator and its focus on the culture and conduct of regulated firms. He emphasized that the FCA’s priority is to be prepared to meet and address misconduct wherever it appears and to deploy all remedies and sanctions available to ensure markets work better. Increasingly, enforcement agencies in multiple jurisdictions are collaborating more consistently and efficiently in conducting investigations of potential misconduct, Mr. Steward noted. He also discussed his view that individuals, not only corporates, need to be held to account. With respect to corporates, Mr. Steward stated that firm culture and conduct is paramount to ensuring good conduct, because rules, standards and internal controls by themselves do not guarantee good conduct and might even provide a false sense of security. In closing, Mr. Steward emphasized that self-reporting misconduct immediately after its discovery reflects a company’s strong compliance culture.

US Enforcement Trends

After discussing the increasingly aggressive global enforcement environment and highlighting the premium that enforcement authorities in the US, the UK and China place on holding individuals accountable, Mr. Krakaur focused on the increasingly aggressive prosecutorial stance in the US. He highlighted the Department of Justice’s (DOJ) Yates Memorandum, which requires corporations under investigation for misconduct to identify “all relevant facts relating to the individuals responsible for the misconduct” in order to qualify for any cooperation credit. He also discussed the DOJ Fraud Section’s Foreign Corrupt Practices Act (FCPA) pilot program, which incentivizes voluntary self-disclosure in FCPA cases, and the growth in enforcement authority resources and increasingly aggressive tactics to investigate misconduct. He shared a number of real-world examples based on recent dealings with enforcement authorities.

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Key Takeaways

Mr. DiBianco discussed how the current enforcement environment in the US causes the large majority of investigations to result in settlements with limited judicial review. He explained that US enforcement agencies are able to use large penalties, the risk of reputational harm and debarment as leverage against companies. Mr. DiBianco noted that the recent DOJ focus on individual prosecutions and cooperation has led to tensions between the rights of companies and employees regarding data protection, employment and attorney-client privilege issues. In addition, he noted that US companies may find it easier to meet criteria for cooperation and remediation when operating in the US than when operating in non-US jurisdictions, which may be limited by different legal and cultural factors. For example, US enforcement authorities may expect that companies discipline culpable employees by terminating them, which is not always possible in non-US jurisdictions because of local employment laws.

US Sanctions Enforcement and Compliance Challenges

Mr. Fisch, who discussed the US government's policies and enforcement with respect to sanctions, expressed concerns about the implications of US government enforcement practices for non-US companies. For example, Mr. Fisch explained that although the US has made efforts to ease Iran and Cuba sanctions, non-US companies are often unwilling to conduct permitted business with these countries. He noted this posture is likely to continue if the US is not able to provide more predictability and assurance regarding enforcement of sanctions regulations and that these factors could affect the US government's ability to meet its foreign policy objectives.

UK Enforcement Trends

Ms. Robertson discussed UK enforcement trends, including the Serious Fraud Office's focus on prosecutions of bribery, anti-money laundering, market abuse and sanctions violations. Ms. Robertson noted that international collaboration between regulators continues to increase, which manifests itself in formal collaboration efforts, including coordinated prosecutorial and investigatory activities and secondments, as well as in informal communication. Ms. Robertson discussed businesses' growing demand for the development of an international formal framework to decide, for example, which country would lead which prosecution and how fines would be allocated.

Ms. Robertson emphasized that factors such as the rise of whistleblowers, transparency organizations and socioeconomic pressures are all contributing to more aggressive enforcement globally. She also discussed the two UK deferred prosecution agreements to date, cautioning that neither provides adequate information for extrapolating how effective such agreements will be or when and how they will be used. Ms. Robertson talked about the need to encourage more nations to sign on to

the Organisation for Economic Co-operation and Development's anti-corruption treaty. She noted that, at present, about 80 percent of world trade is conducted by signatory nations, but that current trends suggest that figure will reduce significantly over the next 10 years, potentially creating increased risks for businesses operating in an ethical and compliant way and an uneven playing field in terms of competitiveness in a world market.

China's Focus on Anti-Corruption Enforcement

Mr. Kwok explained that companies that conduct business in China are increasingly finding themselves in the position of having to respond to authorities from multiple jurisdictions given the increased cooperation between US and Chinese enforcement agencies. In addition, they face the challenge of complying with international document and information requests while also respecting Chinese state secret and data privacy laws, which are construed very broadly and can substantially increase the costs of investigations.

Mr. Kwok noted that US and Chinese interests in combating corruption issues are increasingly more aligned. He added that enforcement authorities in the US and China are beginning to "piggyback" on each other's prosecutorial efforts. For example, in a recent matter in which the SEC and DOJ settled an FCPA investigation with a Massachusetts software company over misconduct in China, Chinese regulatory authorities quickly followed up by beginning an investigation after the US settlements were announced.

Controlling Costs in Cross-Border Investigations

Given the increased enforcement activity and international collaboration described by the panelists, Mr. Junck discussed best practices for controlling the high costs associated with conducting internal and government-facing investigations. In particular, Mr. Junck emphasized strategies that companies, along with their outside counsel, can employ regarding scoping the investigation. He noted that the touchstone for every investigation will be the credibility of its approach and that, as some government officials have publicly stated, it is not necessary "to boil the ocean." Mr. Junck also highlighted various cost-saving techniques for performing investigatory work internally and with external providers.

Closing Remarks

The panelists emphasized that increased international collaboration between enforcement authorities is likely to lead to more aggressive enforcement and more "piggybacking" on each other's investigations, but that it may also lead to the US taking a step back from the prosecution of non-US companies where non-US jurisdictions are able to adequately enforce anti-corruption, tax evasion, anti-money laundering and market abuse laws.