

10 Lessons From 2011 Enforcement Activity

--By Claudius O. Sokenu and Arthur Luk, Arnold & Porter LLP

Law360, New York (February 15, 2012, 1:41 PM ET) -- A review of the enforcement actions brought by the U.S. Securities and Exchange Commission and the U.S. Department of Justice in 2011 and the lessons one takes from those enforcement actions reflect the themes that have been emphasized over the last several years.

There were no new unanticipated, ground-breaking developments. Rather, the cases brought by the SEC and filed by the DOJ in 2011 solidify the SEC's and the DOJ's well-settled positions on Foreign Corrupt Practices Act enforcement despite the constant and seemingly in vogue refrain from some quarters calling for amending the FCPA and thus yielding its place as the premier enforcement tool in the fight against worldwide corruption.

Setting aside the outlier that is 2010 (which was helped greatly by the 22 individuals that were indicted in connection with the Shooting, Hunting, Outdoor Trade Show and Conference case), 2011 was the busiest year in the history of FCPA enforcement. It boasts the most FCPA trials ever in any given year, the largest number of unsettled SEC enforcement actions ever, the longest sentence ever imposed in an FCPA enforcement action, the largest ever monetary sanction imposed on an individual, and three of the largest ever monetary sanctions imposed on a company or individual.

Among the many lessons to be garnered from the enforcement actions brought in 2011, the following stand out as key lessons that merit attention as they are likely to influence how 2012 will unfold:

- 1) Of the 13 enforcement actions the SEC brought against corporations, eight were civil injunctive actions, four were administrative proceedings, and one was resolved by way of a deferred prosecution agreement. With its new powers under the Dodd-Frank Wall Street Reform and Consumer Protection Act and its new enforcement tools, the SEC now has more ways to resolve FCPA enforcement actions.
- 2) Of the 11 criminal cases the DOJ filed against corporations, one was contested, one was pled, five were resolved through nonprosecution agreements, and five were resolved through DPAs, with one case involving an NPA for one company (Magyar Telekom Telecommunications PLC) and a DPA for the company's parent (Deutsche Telekom AG).
- 3) Under the new leadership of Kara Brockmeyer, who replaced former SEC FCPA Chief Cheryl Scarborough in September 2011, the SEC's FCPA Unit brought an unprecedented 10 contested civil injunctive actions against seven individuals implicated in the 2008 Siemens AG record settlement and three individuals associated with the SEC's settlement with Magyar Telekom and Deutsche Telekom. Whether this is a sign of new things to come from the FCPA Unit remains to be seen.
- 4) Of the civil and criminal actions filed by the SEC and the DOJ against companies, five involved foreign companies.
- 5) Thirteen of individuals charged in 2011 were foreigners and one held dual citizenship.

6) The SEC and the DOJ appear to be moving away from the mandatory imposition of independent compliance monitors in favor of self-monitoring in corporate settlements. Of the cases involving companies filed in 2011, only one involved the imposition of an independent compliance monitor (JGC Corporation), the others were largely self-monitoring.

7) Consistent with the government's position, it appears that companies that voluntarily conduct internal investigations, disclose their findings to the government and cooperate with the government's investigation tend to do better in settlements with the government.

8) The issue of territorial jurisdiction under the FCPA continues to be vexing, notwithstanding U.S. District Judge Richard J. Leon's ruling in the SHOT Show cases where he ruled in favor of Pankesh Patel and dismissed one of the counts against him because the government failed to establish under 15 U.S.C. § 78dd-3 (the 1998 amendment to the FCPA) that Patel acted "while in the territory of the United States" when he sent a package containing a purchase agreement in furtherance of the alleged corrupt payment from the United Kingdom to the United States. Nevertheless, in the Magyar Telekom settlement, the government based territorial jurisdiction on emails that were transmitted through or stored on servers located in the United States.

9) The unprecedented number of trials taking place in district courts around the country is beginning to develop a body of judicial opinions that is likely to be helpful in interpreting some of the provisions of the FCPA.

10). Undeterred by criticism from the U.S. Chamber of Commerce and others, the government continues to bring cases predicated on inadequate pre-acquisition due diligence and defective post-acquisition integration.

What appears to be clear from the 2011 docket is that the government continues to set records in the FCPA area, and we anticipate that this trend will continue in 2012 with over approximately 150 cases on the government's docket.

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