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DOJ and SEC Officials' Recent Conference Remarks

On November 18-21, 2013, in what is now a fall ritual, anti-corruption practitioners gathered in Washington, D.C. for the American Conference Institute's 30th International Conference on the Foreign Corrupt Practices Act. As usual, this event provided a forum for officials of the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC") to provide their views on a range of FCPA enforcement issues.[1] The major theme throughout comments by U.S. government officials was that, notwithstanding the perceptible decline in FCPA resolutions in 2013, neither companies nor individuals should become complacent about anti-corruption compliance.[2]

Deputy Attorney General Cole and SEC Co-Director of Enforcement Ceresney

Deputy Attorney General James M. Cole and SEC Co-Director of Enforcement Andrew J. Ceresney noted, as U.S. officials customarily do, the United States' leadership in anti-corruption enforcement, while also highlighting significant collaboration with non-U.S. counterparts, including those in the United Kingdom, Germany, and France. They stressed the impact of the 2012 joint Resource Guide to the U.S. Foreign Corrupt Practices Act[3] in promoting greater transparency in how the FCPA is enforced; their commitment to prosecuting individuals; the importance of preventing corruption through compliance best

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1. *See* ACI Conference Agenda, http://www.fcpaconference.com/agenda.html (last visited November 25, 2013). Debevoise attorney Steven S. Michaels attended the conference. This report is based his notes and on the copies of prepared remarks made by Deputy Attorney General James M. Cole and SEC Co-Director of Enforcement Andrew J. Ceresney posted to their agencies' websites.
2. *See* DOJ Justice News, Deputy Attorney General James M. Cole Speaks at the Foreign Corrupt Practices Act Conference, (Nov. 19, 2013), www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html; Andrew J. Ceresney, Co-Director of Enforcement, SEC, Keynote Address at the International Conference on the Foreign Corrupt Practices Act, (Nov. 19, 2013), www.sec.gov/News/Speech/Detail/Speech/1370540392284. Other U.S. government officials appeared on panels addressing various topics including enforcement trends, voluntary disclosure, third party and merger and acquisition due diligence, internal investigation best practices, and relevant legal developments in the United Kingdom. The DOJ was represented by DOJ Fraud Section Chief Jeffrey Knox, as well as FCPA Unit Deputy Chief Charles E. Duross; DOJ Fraud Section Deputy Chief Daniel Braun; and DOJ Fraud Section Assistant Chiefs Jason Jones, James M. Koukios, and Matthew S. Queler. The SEC was represented by FCPA Unit Chief Kara N. Brockmeyer; FCPA Unit Deputy Chief Charles E. Cain; and FCPA Unit Assistant Director Tracy L. Price. With the exception of Deputy Attorney General Cole, the U.S. officials prefaced their comments with the customary disclaimer that the views they expressed were their own and did not necessarily reflect those of their agencies.
3. *See* U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (Nov. 14, 2012), www.justice.gov/criminal/fraud/fcpa/guide.pdf.

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practices; and the benefits to individuals and corporations alike from voluntary disclosure and cooperation.

Deputy Attorney General Cole bluntly stated that, because the DOJ "understand[s] that even the best compliance program will not prevent every violation of the FCPA … when a violation does occur, we frankly expect you to tell us about it and cooperate in investigating it." Noting the DOJ's offer of reduced monetary penalties in certain cases, Cole cited other steps to "incentivize" self-reporting beyond those set out in the U.S. Sentencing Guidelines. These include "declinations like that in the Morgan Stanley case, resolutions short of a guilty plea like deferred prosecution agreements and non-prosecution agreements, and allowing companies to self-report their remediation efforts instead of being subject to the oversight of a corporate monitor." But Cole also said the DOJ would "pressure test" the results of company internal investigations and be "unrelenting" in the case of companies that violate the FCPA, and, after becoming aware of the misconduct, do not engage in "true voluntary disclosures and actual cooperation."

Co-Director of Enforcement Ceresney made a similar argument in favor of self-reporting: "The answer is simple – if we find the violations on our own, the consequences will surely be worse than if you had self-reported the conduct. Companies must keep in mind that the risk of not coming forward grows by the day as our whistleblower program continues to pick up steam."

Panel Comments by DOJ and SEC Attorneys

General Enforcement Statistics and Trends

DOJ's FCPA Unit Deputy Chief Charles E. Duross and SEC FCPA Unit Chief Kara N. Brockmeyer discussed their agencies' respective pipelines of cases. Duross said that the DOJ has approximately 150 "open" FCPA investigations, a figure that has remained roughly constant for the past several years. Duross noted that the 150-case figure represented a "flow" of cases under investigation and that matters would come on and go off the DOJ's list of open files virtually weekly. Brockmeyer estimated that the SEC had about 100 open investigations and that the SEC's figure is also based on a flow of cases. Duross and Brockmeyer each said they have opened and declined cases in a day, and that their agencies' responses each depend on the facts.

Brockmeyer stated that two-thirds or more of her team's cases involve allegations that potential improper payments have been routed to foreign officials through intermediaries. She also noted that travel and entertainment issues continue to be the subject of enforcement actions, citing both the *Diebold* and *Stryker* settlements.[4] Brockmeyer also noted the importance of the Dodd-Frank Act's expansion of the SEC's authority to issue penalties in administrative proceedings, which has encouraged the agency to resolve a

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4. *See* SEC Press Rel. 2013-225,SEC Charges Diebold With FCPA Violations, (Oct. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539977273; SEC Press Rel. 2013-229, SEC Charges Stryker Corporation With FCPA Violations, (Oct. 24, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540044262.

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greater number of matters through such proceedings.[5] In his separate panel remarks on the emergence of deferred prosecutions in the United Kingdom, DOJ Deputy Fraud Section Chief Daniel Braun relatedly suggested that more active judicial review of Deferred Prosecution Agreements ("DPAs") was increasing the attractiveness of Non-Prosecution Agreements ("NPAs") for both sides in FCPA criminal cases.

Discussing the SEC's determination to address commercial bribery issues as a matter of an issuer's internal controls obligations, such as in in the *Diebold* settlement, Brockmeyer observed that the SEC's FCPA Unit was not focused in the first instance on commercial bribery matters. However, she noted that where such matters come to the attention of the agency, they very well can be factored into an internal controls and books-and-records analysis.[6]

Due Diligence

Speaking on a panel related to due diligence of third parties, DOJ Fraud Section Chief Jeffrey Knox said that many companies have excellent due diligence programs on paper, but nevertheless get into trouble in the investigation of their third-party relationships. He stressed that there is nothing inherently wrong in a third party having access to a foreign official; it is what the company does with that access that is critical, and that issue, as well as other red flags, should be resolved during the course of due diligence.

Similarly, on a panel devoted to due diligence in the merger and acquisition context, DOJ Fraud Section Assistant Chief James M. Koukios emphasized that, while a merger or acquisition "cannot create FCPA liability retroactively," the rule of inherited liability requires close attention. Companies looking to reduce their M&A risks should consult the *Resource Guide's* sections dealing with merger activity, the *Halliburton* Opinion Release (Op. Rel. 08-02), and M&A remediation terms in FCPA resolutions.[7] He said that, in appropriate cases, the DOJ would decline prosecution if a buyer voluntarily disclosed a bribery issue that had been identified in pre- or post-closing due diligence, provided the remediation was sufficient. To maximize the odds of a declination, he said that a company will want to "do everything right," from real-time reporting to prompt and full remediation of the issues identified.

"Perhaps no other topic generated as many comments by the U.S. officials as voluntary disclosure and the issue of whether, when, and how a company should self-report."

Voluntary Disclosure, Internal Investigations, and Cooperation

Perhaps no other topic generated as many comments by the U.S. officials as voluntary disclosure and the issue of whether, when, and how a company should self-report. Noting that companies have a variety of approaches on self-reporting, and that some have developed regular practices to make such reports, Duross and Brockmeyer each emphasized that early self-reporting and cooperation are genuinely received positively by the government, especially when that disclosure puts relevant documents in the hands of the U.S. enforcement agencies sooner than otherwise would take place.

In a panel devoted to voluntary disclosure, SEC Deputy FCPA Unit Chief Charles E. Cain noted that early self-reporting can have significant benefits beyond the self-reporting credit it generates. Asked to comment on the results of an audience poll in which more than fifty percent of respondents agreed a self-report should not be made until "the [company's] internal investigation has progressed enough that the company understands the nature and scope of the conduct," Cain said that he found the results unsurprising, but urged companies to report earlier. Cain said companies that self-report "often have a much bigger problem," and early disclosure enables the agency to help the company identify the full scope of issues and remediate quickly. Cain acknowledged

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5. For a broader discussion of the SEC's incentives to pursue administrative proceedings, *see* Paul R. Berger, Sean Hecker, Erin W. Sheehy, & Natalie E. Gray, "The Total S.A. Action: Are Administrative Orders the SEC's FCPA Resolution of Choice for the Future," *FCPA Update* Vol. 4, No. 12 (July 2013), http://www.debevoise.com/files/Publication/3e511c8c-de2b-414d-91e1-f2efbf339f0a/Presentation/PublicationAttachment/0fe134c8-4fd1-4061-b22d-00bdc48bceb9/FCPA_Update_July_2013.pdf.

6. *See* Bruce E. Yannett, Paul R. Berger, Sean Hecker, Andrew M. Levine, & Philip Rohlik, "The Government's $48 Million Withdrawal: Is it Time to Start Sweating Again," *FCPA Update* Vol. 5, No. 3 (Oct. 2013), http://www.debevoise.com/files/Publication/ce6ecae6-cb9a-4fb1-b6fc-eac2b973e57a/Presentation/PublicationAttachment/2625ea7a-d0c2-4d3c-9af6-c65aece443f3/FCPA_Update_Oct2013.pdf.

7. *See, e.g.*, DOJ Press Rel. No. 11-446, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations, (Apr. 8, 2011), http://www.justice.gov/opa/pr/2011/April/11-crm-446.html.

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that he would be surprised to hear from a company if it determines after a reasonable effort that an issue is "small and discrete," but that he would expect a self-report in any case involving more significant kinds of alleged misconduct.

DOJ Fraud Section Assistant Chief Jason Jones, who appeared on the panel with Cain, emphasized that self-reporting is particularly relevant to the government's determination of the kind of disposition it will seek in settlement. He and Cain said self-reporting must be genuinely voluntary to generate credit. Reporting after receiving notice that an article disclosing a corruption issue would appear in the press the next day would not suffice.

Once a decision to self-report has been made, Brockmeyer noted that communication with the government should be frequent enough to adequately set and meet expectations for both sides. Although every case is different, Brockmeyer said the SEC's baseline expectation is that documents, once requested, should be produced on at least a rolling basis within three months. During his separate panel, Cain also emphasized this point, noting that self-reporting and cooperation were highly intertwined.

Brockmeyer said that best practices for internal investigations involve early production of documents, provision of translations, and arrangements for witnesses to be interviewed in the United States. Duross emphasized that often the worst thing a company can do is investigate internally and disclose only after the fact what was done, thinking that doing so will end the case. He emphasized that an earlier discussion with DOJ will reduce the likelihood of needing to re-do investigative work. DOJ staff inevitably have their own ideas about how to investigate an issue, and engaging early and getting buy-in on the work plan are key, in Duross's view. Duross likewise identified the Siemens matter as a case that was resolved in an accelerated manner, explaining: "You don't finish a case like Siemens in two years by looking under every rock," but the DOJ has to trust the work plan the company puts forward.

In a panel dealing specifically with internal investigations, SEC FCPA Unit Assistant Director Tracy L. Price emphasized that FCPA Unit members possess both experience and knowledge of evidence from related investigations, which can assist a company conducting an internal investigation to focus on the issues that genuinely matter. DOJ Assistant Fraud Section Chief Matthew S. Queler cautioned against scoping an internal investigation (including document preservation efforts) too narrowly, noting the DOJ had heard the argument that a case involved a "rogue employee" far more often than was justified. In considering whether under the Principles of Federal Prosecution of Business Organizations[8] it was appropriate to charge a company, the DOJ would need to gain an understanding of how high up in an organization knowledge of misconduct and red flags had been escalated – and what was done by senior management in the face of the information that it received – before a case can be properly resolved.

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Remediation and Resolution; Monitors

Duross and Brockmeyer each recognized that a company's remediation efforts played a significant role in how their agencies responded to evidence of misconduct, and that the "compliance presentation" made to the government, usually at the close of an investigation, to demonstrate those efforts is a company's "chance to shine." Duross observed that some of the worst remediation approaches he has seen involve a company's waiting until the end of the investigation before initiating remediation efforts. If a case is serious, he said that a company should be revising its systems

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8. *See* Principles of Federal Prosecution of Business Organizations, USAM Title 9, Chapter 9-28.000, http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

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and taking other action from "Day 1." Brockmeyer echoed this point and said that in a case that has resulted in a government investigation, remediation that consists of simply more training is insufficient. Duross and Brockmeyer agreed that a genuine remediation of internal controls deficiencies, including testing of the new controls, as well as auditing and discipline, are important.

> "Duross said that companies need to show concretely how remediation efforts would have prevented the problem that generated the misconduct under investigation."

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Both Brockmeyer and Duross noted that the best compliance presentations were those in which key company personnel with direct knowledge of the compliance remediation efforts participate. Such personnel could include, among others, the Chief Compliance Officer, the Chief Financial Officer or Head of Accounting, or the Head of Internal Audit. Compliance presentations made exclusively by counsel can be less effective than a robust presentation by those enmeshed in the actual operation of the compliance program.

Remediation of relationships with third parties, if they were the source of violations, can be tailored to the problem found, Brockmeyer said. A problem with a classic business consultant in Africa, for example, would not require stopping all third-party hiring in its tracks. But if there are custom broker problems (or other issues affecting a broader array of third parties) a broader remediation fix may be needed. All companies, Brockmeyer stated, need a plan for third-party due diligence, but pre-hiring due diligence, she suggested, is not required for all third parties; back end or post-hiring due diligence for lower-risk third parties can be sufficient.

On the topic of whether a company will be required to retain a corporate monitor as a condition of resolving an FCPA case, Duross noted that there is a greater flexibility now; a new tool that the DOJ is exploring more often is a "hybrid" monitor with provisions for a short initial monitorship (18 months vs. the "standard period" of three years) and a potential early end to the monitorship if the monitor certifies the lack of need after the 18-month period. Jones said that those looking to understand how self-reporting, cooperation, and remediation affect a case's result can find some guidance in the DOJ's settlement documents. He described the recent *Diebold* matter as a case that involved self-reporting, but where remediation could have been better, and the company accordingly was required to retain a "hybrid" compliance monitor for an 18-month period.

During a panel discussion of U.K. enforcement, Braun also noted that the United States' current approach in deducting penalties paid abroad when considering the penalty that should be paid pursuant to settled U.S. proceedings was generally "dollar for dollar." Once the DOJ determines the appropriate U.S. penalty, it generally offsets that amount by penalties paid overseas. Stating that this was not required by U.S. law, insofar as U.S. criminal law operates under the assumption of dual (or, in the case of interests by several nations, multiple) sovereignty, Braun stated that achieving just results in terms of the amount of monetary penalties was a continuing challenge, and that there are ongoing discussions between even the SEC and the DOJ to assure consistent and fair outcomes reflecting the fact "we are a single government" when it comes to U.S. enforcement.

Cross-Border Investigations and Data Protection

Duross and Brockmeyer each acknowledged the significant challenges that non-U.S. data protection regimes and blocking statutes can play in hindering a company's efforts to conduct an internal investigation of alleged FCPA violations and other cross-border wrongdoing. Nevertheless, they stressed that their respective agencies would look to companies seeking cooperation credit to work towards "creative solutions" to the impediments posed by these non-U.S. laws. Although Duross agreed that the policy of the United

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States is to respect the sovereignty of other nations just as the United States expects its sovereignty to be respected, solutions such as producing documents to a foreign government in order to facilitate a request by the DOJ pursuant to a Mutual Legal Assistance Treaty request was one solution that accommodated the concerns of both the United States and a foreign country operating a data protection regime. Production to the U.S. agencies of redacted documents in compliance with data protection laws was noted as another way to accommodate the varying interests of U.S. and non-U.S. governments.

Duross advised against companies failing to comply consistently with data protection regulations in the ordinary course of business, but then, in the midst of a DOJ investigation, insisting that data protection requirements must be observed strictly. Duross said that such inconsistency could lead to a determination of "bad faith" and seriously undermine the efforts by the company to obtain credit for its cooperation.

Conclusion

The recent comments of U.S. law enforcement personnel reinforce several enduring facts about FCPA enforcement. Above all, once a violation occurs and comes to the government's attention, a company's or individual's fate is significantly in the hands of law enforcement personnel with broad discretionary authority and the ability to require significant corporate expenditures, as well as to prosecute companies and individuals criminally, civilly, and administratively. Nevertheless, as government representatives candidly acknowledge, they cannot (and should not) prosecute every case where a conviction could be obtained. The most effective ways to avoid being at the wrong end of a decision to prosecute include undertaking robust and effective compliance measures well before an issue arises, and, when violations do occur, quickly and efficiently gathering the necessary information to make an informed decision about whether to self-report, and remediating any compliance deficiencies.

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SFO Director Addresses Corporate Self-Reporting

Approximately one year ago, the Serious Fraud Office ("SFO"), under its then incoming Director, David Green QC, withdrew a three-year-old policy on corporate self-reporting of overseas corruption.[1] Although stating that no prosecutor "can ever give an unconditional guarantee that there will not be a prosecution," the old policy nevertheless made it clear that, in cases in which the corporate clearly indicated an intention to co-operate, the SFO would "want to settle self referral cases … civilly wherever possible."[2] Green has indicated that the old policy was not in line with his conception of how the SFO should approach corporate offences, as it "contained an implied presumption that self-reported misconduct would be dealt with by civil settlement rather than prosecution."[3] In his view, "no prosecutor should appear to offer such a guarantee in advance."[4] And Green has been clear that the SFO should be just that, a prosecutor: "We are not a regulator, a deal-maker or a confessor."[5]

In two recent speeches, Green has addressed the role of corporate self reporting in the SFO's enforcement regime.[6] Against a background of corporate uncertainty over the benefits of self-reporting under the new policy, Green has sought to demonstrate that, even without the near-promise of a civil settlement, there are numerous benefits to self-reporting – and risks in failing to do so.

Benefits of Self-Reporting

In a speech on 24 October 2013, Green set out five reasons why corporates should self-report:

First, self-reporting "at the very least mitigates the chances of a corporate being prosecuted [and] opens up the possibility of civil recovery or a DPA [Deferred Prosecution Agreement]."

Second, "it is the right thing to do and it demonstrates that the corporate is serious about behaving ethically."

Third, when a corporate does not self-report wrongdoing, "the risk of discovery [by the SFO] is unquantifiable."

Fourth, if a corporate does not self-report wrongdoing that is later discovered, "the penalty paid … in terms of shareholder outrage, counterparty and competitor distrust, reputational damage, regulatory action and possible prosecution, is surely disproportionate."

Fifth, burying information on wrongdoing "is likely to involve criminal offences related to money laundering under sections 327-9 of the Proceeds of Crime Act."

In short: in considering how to deal with a corporate offender, the SFO will, other things being equal, treat one that has self-reported in a timely fashion more leniently than one that has not.

Public Interest Test

These factors must be considered in conjunction with the SFO's current official guidance on corporate self-reporting,[7] which casts the self-report as a factor, important but not determinative, in the prosecutor's determination whether a prosecution would be in the public interest – *i.e.*, the second limb of the so-called Full Code Test for whether a prosecution should be brought.[8] Quoting the Guidance on Corporate Prosecutions, the new approach

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1. *See* Lord Goldsmith QC, John B. Missing, Karolos Seeger, John C. Dockery & Matthew H. Getz, "Serious Fraud Office Issues New Policies on Self Reporting, Facilitation Payments and Business Expenditures" (Client Update, 12 October 2012), http://www.debevoise.com/clientupdate20121012a/; Lord Goldsmith QC, Karolos Seeger, John C. Dockery & Matthew H. Getz, "U.K. Serious Fraud Office Issues New Bribery Act Policies," *FCPA Update*, Vol. 4, No. 3 (Oct. 2012), http://www.debevoise.com/fcpa-update-10-23-2012/.
2. U.K. Serious Fraud Office, "The Serious Fraud Office's Approach to Dealing with Overseas Corruption" (21 July 2009) ¶ 5 (on file with the authors).
3. David Green QC, Speech at the Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference (24 October 2013), http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference-.aspx ("24 October Speech").
4. *Id.*
5. David Green QC, Speech at the Cambridge Symposium, Jesus College (2 September 2013), http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2013/cambridge-symposium-2013.aspx ("2 September Speech").
6. *See* 2 September Speech, note 5, *supra*; 24 October Speech, note 3, *supra*.
7. U.K. Serious Fraud Office, Guidance on Corporate Self-Reporting (9 October 2012), http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx.
8. The first limb of the Test – the evidential test – requires the prosecutor to be satisfied that there is sufficient evidence for there to be a realistic prospect of conviction. In his 24 October speech, Green stated that the SFO will consider this "after our own investigation," which may or may not include an analysis of any self-reports that have been received by the SFO. 24 October Speech, note 3, *supra*.

SFO Director Addresses Corporate Self-Reporting ■ Continued from page 7

states that "for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a 'genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.'"[9]

In this context, Green's position is that the SFO will approach purported "self reports" with a critical eye. In order to be a real factor in the SFO's public interest consideration, the corporate needs to have made "a genuine self-report." Green defines a genuine self-report as one that "told us something we did not already know and did so in an open-handed, unspun way." Then, if the corporate is "willing to cooperate in a full investigation and to take steps to prevent recurrence," Green takes the view that "it is difficult to see that the public interest would require a prosecution of the corporate."[10]

> "The importance of self-reporting sooner rather than later is underlined by Green's operating definition of a 'genuine self-report' as something that provides the SFO with information it did not already have."

When to Self-Report

Green's strong recommendation is to make "an initial report of suspected criminality … as soon as it is discovered," which "protects the company against the SFO finding out by other means whilst the company investigates further."[11]

The importance of self-reporting sooner rather than later is underlined by Green's operating definition of a "genuine self-report" as something that provides the SFO with information it did not already have. With time, the chances of the SFO becoming aware of wrongdoing increase, with a corresponding decrease in the opportunity for the corporate to provide a "genuine self-report" and, consequently, the chance of affecting the SFO's public interest calculation.

Conclusion

Corporates and their lawyers will have noticed that, notwithstanding Green's view that the SFO should not rely on self-reporting as an evidence-gathering tool, the evidential test applicable to deferred prosecution agreements in the draft DPA Code of Practice allows for the SFO to do precisely that.[12] Time will tell how the DPA will fit into the SFO's enforcement armoury but it is clear that a "genuine self-report" will dramatically increase a corporate's chances of being considered for one.

Green's interventions certainly highlight many of the very real risks faced by a corporate that discovers wrongdoing within its organisation. The chances of being found out are significant and will increase with time: the SFO is further bolstering its Intelligence Unit and, as time passes, the chance that someone, somewhere decides to blow the whistle increases. In addition, the risk of collateral liability under money laundering legislation is an important consideration in cases in which a corporate continues to receive or hold the proceeds of a transaction potentially tainted by wrongdoing.

These speeches therefore contain valuable indications for corporates and their advisers when they analyse indications of corporate wrongdoing and weigh the pros and cons of engaging with the prosecutors and the scope of any such engagement. As such, they also serve further to underline the grave responsibility of corporate management and their advisers as they approach this always delicate task.

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9. Guidance on Corporate Self-Reporting, note 6, *supra*.
10. 24 October Speech, note 3, *supra*.
11. *Id.*
12. *See* Lord Goldsmith QC, John B. Missing, Karolos Seeger, Matthew H. Getz & Robin Lööf "Deferred Prosecution Agreements in the UK Draft Code of Practice Published" (Client Update, 3 July 2013), http://www.debevoise.com/clientupdate20130703b/.

Recent Surveys Highlight Increased Compliance Efforts and Ongoing Risks

Several firms recently released surveys that canvassed corporate executives for their views on anti-corruption compliance programs and the greatest risks facing their organizations. Not surprisingly, these surveys indicated that bribery and corruption risks remain present worldwide and throughout all sectors, though the perceived risks appear most acute in the natural resource industry and in rapid-growth countries. The use of third parties continues to present a significant vulnerability in corporate efforts to comply with anti-corruption laws, especially given that most survey respondents indicated that they do not train these third parties on their anti-corruption policies. Questions also remain as to the overall effectiveness of most firms' anti-corruption policies.

Kroll Advisory Solutions' 2013-2014 Global Fraud Report, entitled *Who's Got Something to Hide? Searching for Insider Fraud*, asked 901 senior executives worldwide for information on fraud their company has experienced over the past year.[1] Ernst & Young's *2013 EMEIA Fraud Survey: Navigating today's complex business risks* surveyed over 3,000 corporate executives in Europe, the Middle East, India, and Africa about unethical responses to the pressures they face in today's challenging economic environment and the effectiveness of programs to combat these responses.[2] E&Y also released *Asia-Pacific Fraud Survey Report Series 2013: Building a more ethical business environment*, a similar report compiled with responses from 681 corporate executives and employees from eight countries in the Asia-Pacific region.[3] PricewaterhouseCoopers' *Deeper insight for greater strategic value* discusses the structure and function of compliance departments globally, based on around 800 responses from U.S. and U.K. company executives across 19 industries.[4] Finally, Control Risks released *International Business Attitudes to Corruption*, a survey of general counsel, senior corporate lawyers, and compliance heads from 316 international companies that examines the respondents' attitudes towards bribery and corruption.[5]

Bribery and Corruption: A Continuing Significant Risk

Bribery and corruption continue to be identified as significant risks by the respondents of all five surveys. In the Control Risks report, although only about 4% of respondents thought there was a 90% to 100% chance that their company would be required to investigate allegations that an employee violated anti-bribery laws in the next two years,[6] respondents in 60 organizations – or about 19% of respondents – thought that outcome was "somewhat likely," and 21% stated that it was "possible."[7] The E&Y AP report found that 21% of the corporate employees surveyed believed that corrupt practices occurred frequently in their country.[8] This statistic is unsurprising, given that the report included a large number of respondents from countries where corruption is considered common, such as China, Indonesia, and Malaysia.[9]

Perceived bribery and corruption risks are highest in certain industries. The Kroll survey found that 19% of natural resource

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1. Kroll Advisory Solutions, "Who's Got Something to Hide? Searching for Insider Fraud," Global Fraud Report 2 (2013/2014), http://www.kroll.com/media/KRL_FraudReport2013-14_USLetterPRESS_REVISED_10182013.pdf [hereinafter "Kroll Survey"].
2. Ernst & Young, "Navigating today's complex business risks," Europe, Middle East, India and Africa Fraud Survey 2-3 (2013), http://www.ey.com/Publication/vwLUAssets/Navigating_todays_complex_business_risks/$FILE/Navigating_todays_complex_business_risks.pdf [hereafter "E&Y EMEIA Survey"].
3. Ernst & Young, "Building a more ethical business environment," Asia-Pacific Fraud Survey Report 1 (2013), http://www.ey.com/Publication/vwLUAssets/2013_Asia-Pacific_Fraud_Survey/$FILE/EY-Asia-Pacific-Fraud-Survey.pdf [hereafter "E&Y AP Survey"].
4. PricewaterhouseCoopers, "Deeper insight for greater strategic value: State of Compliance," 2 (2013), http://www.pwc.com/us/en/risk-management/assets/soc-survey-2013-final.pdf [hereafter "PWC Survey"].
5. Control Risks, "International Business Attitudes to Corruption," Survey 1 (2013), http://www.controlrisks.com/Oversized%20assets/International_business_attitudes_to_corruption.pdf [hereafter "Control Risks Survey"].
6. *Id.* at 16.
7. *Id.*
8. E&Y AP Survey at 7.
9. *Id.* at 23 (stating that 307 of 681 respondents were from China, Indonesia, or Malaysia).

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firms reported fraud due to corruption and bribery – the highest percentage in any sector.[10] The second highest level of fraud attributed to corruption and bribery was identified in construction, engineering, and infrastructure, with 18% of respondents in this sector reporting that they have experienced such fraud in the last year.[11] Retail, wholesale, and distribution firms were third, with 15% of respondents from this sector reporting fraud due to corruption and bribery.[12]

The current global economic climate continues to affect whether corporate employees view unethical practices as justifiable if these practices ultimately help a business to survive. Sixteen percent of respondents to the E&Y EMEIA survey felt that offering cash payments to win or retain business would be appropriate, and 17% thought that offering personal services or gifts was justified.[13] In the E&Y AP survey, 4% of respondents said that cash payments were acceptable.[14]

According to Control Risks, the majority of respondents believe that operational bribes and facilitation payments represent the greatest opportunity for bribery and corruption. Fifty-eight percent felt that their companies were most vulnerable to the risks associated with ensuring that their business runs smoothly, such as bribe demands from customs officers, police officers, or tax inspectors.[15] In addition, 35% of respondents felt that it was a "routine" risk in their industry that companies make facilitation payments to avoid unacceptable delays in processing goods through customs.[16]

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Risks in Emerging Markets

Respondents to the E&Y and Kroll surveys continue to perceive high bribery and corruption risks in emerging markets such as Russia, India, and Mexico. The E&Y EMEIA survey found that 67% of respondents think that bribery and corrupt practices are common in rapid-growth countries.[17] Furthermore, 82% of respondents in Russia and 69% of respondents in India believed that corruption and bribery were widespread.[18] The Kroll survey illustrates that respondents believe that these risks in emerging markets are higher than they were last year. Thirty-two percent of respondents from Russian firms reported losses due to corruption and bribery, which is double the percentage from last year and the single highest in any country.[19] India saw a similar increase, with 24% of surveyed respondents reporting actual loss due to corruption and bribery this year (as opposed to 20% last year).[20] Kroll also reported that 37% of survey respondents acknowledged that their firms were highly vulnerable to corruption in India, up from 32%.[21] The percentage of surveyed respondents identifying losses due to corruption and bribery in Mexico also increased from 15% last year to 25% this year.[22]

Corruption in emerging markets likely disadvantages companies that abide by anti-corruption laws, and may result in the loss of certain business opportunities. In the E&Y EMEIA survey, 21% of respondents conducting business in rapid-growth

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10. Kroll Survey at 25.
11. *Id.* at 27.
12. *Id.* at 39.
13. E&Y EMEIA Survey at 12.
14. E&Y AP Survey at 8.
15. Control Risks Survey at 4.
16. *Id.* at 7.
17. E&Y EMEIA Survey at 12.
18. *Id.* at 23.
19. Kroll Survey at 45.
20. *Id.* at 31.
21. *Id.*
22. *Id.* at 22.

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markets stated that it would harm their competitiveness if they chose to follow their Anti-Bribery and Corruption ("ABAC") policies.[23] In contrast, this number was only 11% in developed markets.[24] Similarly, 22% of respondents in rapid-growth markets stated that foreign companies in those markets were disadvantaged because they were more heavily regulated.[25] Only 11% of respondents in developed markets reported that belief.[26]

The Kroll survey reported that Sub-Saharan Africa was again the region with the highest overall incidence of fraud. Thirty percent of respondents reported fraud due to corruption and bribery in Africa, and 48% said that their firms are highly vulnerable to corruption risks.[27] In cases in which a fraud has occurred and the perpetrator is known, 33% of respondents said that a government official played a leading role in the crime.[28]

Risks Associated With the Use of Third Parties

Respondents in several surveys cited the use of third parties as a major weakness in their efforts to counteract bribery and corruption. Control Risks reported that 52% of those surveyed felt that they were the most vulnerable with respect to the risks associated with their company's relationship to third parties.[29] In addition, 40% believed that the risks associated with using commercial agents who receive 10% of the contract value as commission were "routine."[30] No one in the United States took the view that the risk was "insignificant," which is expected, considering the number of enforcement cases in the United States involving intermediaries.[31]

Despite an awareness of these risks associated with third parties, it does not appear that many companies have robust policies in place to ensure that third parties are complying with their ABAC policies. Only 64% of respondents to the Control Risks survey reported that their companies have a standard clause in agreements with sub-contractors and consultants stating that the sub-contractors and agents will not pay bribes on the company's behalf.[32] Similarly, 47% of respondents in the Kroll survey said that their firms do not conduct anti-corruption training of their third parties.[33] For those that do train their third parties, only 30% believe that these trainings are effective.[34]

Corporate Efforts to Reduce Bribery and Corruption

The surveys again demonstrated a general increase in corporate compliance efforts to reduce these risks. Compliance budgets are steadily rising, with 36% of those surveyed by PWC reporting an increase in their company's budget over the last 12 months.[35] PWC also found that larger companies are more likely to have Chief Compliance Officers (CCOs). Eighty-eight percent of companies with more than $25 billion in annual revenue have a CCO, while 73% of companies with revenues in the $1-$5 billion range have CCOs.[36] Similarly, about half of those surveyed by Control Risks said that their company has board directors with specific anti-corruption responsibilities.[37] Sixty-five percent of respondents said that their companies have policies that explicitly forbid bribes to secure business contracts, and 53% have policies that explicitly forbid facilitation payments.[38] Fifty-seven percent of executives in the E&Y EMEIA survey stated that their company

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23. E&Y EMEIA Survey at 15.
24. *Id.*
25. *Id.*
26. *Id.*
27. Kroll Survey at 42.
28. *Id.*
29. Control Risks Survey at 4.
30. *Id.* at 8.
31. *Id.*
32. *Id.* at 14.
33. Kroll Survey at 17.
34. *Id.*
35. PWC Survey at 28.
36. *Id.* at 5.
37. Control Risks Survey at 12 (noting that this figure is 54%).
38. *Id.*

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has an anti-corruption policy and code of conduct, and 49% agreed that there were clear penalties for breaking these policies.[39]

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These policies' overall success is questionable, however. Only 38% of those responding to the E&Y survey believe that these policies are effective in their market and only 38% stated that their company has actually undertaken action against employees who have violated these policies.[40] According to a separate Kroll survey, 18% of respondents stated that their company either does not have an anti-corruption policy or has an anti-corruption policy but does not require its employees to read it.[41]

Due diligence on new business partners, employee training, and internal investigations are several ways survey respondents seek to ensure compliance with anti-corruption laws. Thirty-six percent of firms in the Control Risks survey said that their company has a procedure in place for anti-corruption risk assessments when undertaking business in a new country, and about half have a procedure for integrity due diligence on new business partners.[42] In addition, 27% have an anti-corruption training program for all employees, and 40% have a confidential whistle-blowing line through which employees can raise concerns about suspected bribery and corruption.[43] Thirty-three percent of respondents to the E&Y EMEIA survey stated that their company has anti-corruption training.[44] If an employee reports suspected corruption and an internal investigation is required, 78% of respondents to the Control Risks survey reported that they were "very" or "somewhat" confident in their own ability to manage the requirements of the investigation.[45] Furthermore, 68% stated that their company had an investigation response plan already in place that covered data identification and retrieval.[46]

The Control Risks survey also highlights shifting sentiments among executives towards self-reporting. Sixty-eight percent of those surveyed said that, compared to three years ago, they were more likely to self-report to regulators if they identified a suspected bribery case involving an employee.[47] If the suspected violation appears to be serious, 53% said they would self-report first and then investigate. Thirty-one percent said they would investigate first and then self-report only if the violation is confirmed.[48]

These findings by Kroll, PWC, E&Y, and Control Risks illustrate that incidences of bribery and corruption are still present worldwide, and these risks may be increasing in certain areas. Although companies are escalating their anti-corruption efforts, emerging markets and relationships with third parties still appear to be areas where they remain vulnerable.

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39. E&Y EMEIA Survey at 17.
40. *Id.*
41. Kroll Survey at 17.
42. Control Risks Survey at 14.
43. *Id.* at 15.
44. E&Y EMEIA Survey at 13.
45. Control Risks Survey at 18.
46. *Id.* at 19.
47. *Id.* at 17.
48. *Id.* at 18.