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Top 10 Takeaways From ABA White Collar Crime Conference 2014 (Part 1 Of 2)

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Last week's annual American Bar Association White Collar Crime conference offered helpful glimpses into some emerging issues and recent trends in government enforcement both at home and abroad. Today and tomorrow, we feature the Top Ten takeaways from the conference for individuals, companies, and white collar practitioners as compiled by our partners in attendance.

1. The Department of Justice's FCPA Unit is alive and well and plans to aggressively enforce the FCPA in 2014.

Patrick Stokes, the new Chief of the DOJ's FCPA unit, stated that he expects a number of "significant corporate resolutions" in 2014 and that the FCPA unit expects an increased budget in 2014. He emphasized that the unit is working closely with foreign jurisdictions in order to coordinate prosecutions in multi-jurisdictional cases and – at least in theory – decrease the likelihood of multiple prosecutions for the same conduct. He also stated that the FCPA unit does not do industry sweeps, but that information from one case does often lead to another case in the same industry. He confirmed that companies should be focused on building better compliance programs and disclosing and cooperating where appropriate. Finally, Ex-Chief Chuck Duross remarked that the biggest FCPA problems from the DOJ's standpoint are a failure of pre-acquisition due diligence and post-acquisition follow-up. All of these comments make clear that companies should make anti-corruption compliance and due diligence a high-level priority in 2014.

2. Individual prosecutions are still a priority.

Not surprisingly, a common theme of the presentations of the DOJ and SEC representatives on the panels was that individual prosecutions are a priority and will continue. This is particularly true under the FCPA. Chief Stokes noted that he expects that in 2014 the unit will continue the trend of charging a number of high-level executives involved in bribery schemes" in part

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because the unit believes that individual prosecutions increase the deterrent effect of the FCPA.

3. Insider trading defenses require a plausible alternative explanation to be successful.

The participants in the insider trading panel all agreed that a critical component of a successful defense against insider trading charges is providing the jury with a plausible alternate explanation as to why the trading occurred. This has often been the fatal missing piece in many of the recent insider trading cases that the DOJ has won. Conversely, a good, plausible alternative explanation can often sink the government's case (*see* Mark Cuban). The SEC continues to be very aggressive in bringing cutting-edge cases under the insider trading laws and this may explain its recent track record.

4. Negotiating a proffer agreement in the Central/Midwest Region is becoming increasingly more difficult and complicated.

The attorneys at the Central/Midwest region presentation agreed that in some districts, there appears to be a trend away from allowing proffers – or at least, a trend towards making a traditional proffer agreement more difficult to obtain. Some attorneys also noted that AUSAs are beginning to insert confidentiality provisions into proffer agreements, with the result that any discussion of the proffer with any individual other than the client or his attorneys could void the agreement. Several practitioners discussed the issue of joint defense agreements and some recent experiences in which, often in the context of a proffer, AUSAs have specifically asked whether a defendant is a member of a joint defense agreement. There was a consensus that the appropriate response to such a question should be that the attorney simply never answers that question as a matter of practice and that the question may even be inappropriate from a privilege standpoint.

5. Courts in the Seventh Circuit are much more likely to grant a below-Guidelines sentence even without the support of the government.

Good news for Seventh Circuit defendants! A chart compiled by Sanford J. Boxerman addressing sentencing trends in the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits (comprising the Central/Midwest Region) reveals that courts in the Seventh Circuit are issuing below-Guidelines sentences without the sponsorship of the government in 33.3% of cases – significantly higher than the 18.6% average across those five Circuits. Only 44.4% of defendants in the Seventh Circuit are sentenced within the Guidelines compared to 51.2% across all five Circuits (with comparable above-Guidelines sentencing ranges). This indicates that defendants seeking downward departures in Seventh Circuit trial courts may have an easier time getting them, even without government sponsorship.

Thank you for reading Part 1 of our two-part blog post, "Top-10 Takeaways from ABA White Collar Crime Conference 2014." Part 2 can be accessed here.