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Self-Reporting: A Wise Strategy Or Chasing Unicorns?

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As we noted in an earlier post, Department of Justice (DOJ) representatives have been emphasizing this spring the financial benefits of cooperation. They did so again last week at the Practicing Law Institute's Enforcement 2015: Perspectives from Government Agencies, during which enforcement officials from the DOJ, SEC, CFTC, FINRA and Consumer Financial Protection Bureau (CFPB) all pushed back last week against complaints that the benefits of self-reporting are illusory and the costs far too high. Director of the SEC's Division of Enforcement Andrew Ceresney claimed that significant benefits of self-reporting are evidenced by three FCPA settlements earlier this year: a disgorgement-only settlement with Goodyear, a deferred prosecution agreement with PBSJ Corporation and a settlement with FLIR Systems, Inc. which entailed only a "minimal penalty" of $1 million. William Stellmach, Principal Deputy Chief of the Fraud Section at the U.S. Department of Justice, noted that the Alstom S.A. settlement in which Alstom paid a $772,290,000 criminal penalty to settle an FCPA prosecution “gives you 772 million reasons to self-disclose.” Among the factors cited for such a high fine was the company’s failure to self-report. Stellmach claimed that - despite the perception of many practitioners that regulators almost always require some form of “public shaming” for even those companies that self-report - decisions not to prosecute are “not unicorns.” The difficulty, he explained, is that such decisions not to prosecute cannot be publicized without risking the adverse publicity companies want to avoid. As a result, he noted, there has been some discussion internally at DOJ about how it might anonymize such resolutions so that they could be publicized in order to provide the defense bar and their clients with evidence as to the benefits of self-reporting. The CFPB did exactly that, according to Deputy Enforcement Director Jeffrey Ehrlich, in a recent action filed against two financial institutions for alleged RESPA violations. A third institution (referred to in the complaint only as “Unnamed Financial Institution”) that engaged in the same conduct escaped being either named or fined by discovering the violation, reporting it and terminating the individual at issue. The calculus regarding whether to self-report is also changing, according to the SEC’s Ceresney, as a result of the increase in whistleblowers. If a company's management decides not to reach out to regulators, someone else may very well do it for them in today's environment of substantial whistleblower awards. For companies which have made the decision to self-report, the next decision is to which regulator should they report. The Director of the CFTC’s Division of Enforcement Aitan Goelman suggested that, if the company and/or the conduct is within the jurisdiction of multiple regulators, the company should advise all the relevant regulators, as opposed to relying on one regulator to pass the information along to the others. The regulators also made clear that self-reporting is not, by itself, enough to get significant credit; sincere efforts and cooperation in

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uncovering the full scope of the problem is required. Ceresney and Stellmach, however, rejected criticism that regulator demands as to the scope of such investigations result in undue costs, sometimes in the hundreds of millions of dollars. Rather than micromanaging the companies' investigation, the SEC and DOJ only expect a risk based investigation. For example, if an employee was paying bribes in one country, the investigation might cover only the countries in which the employee worked. Absent evidence of a more widespread problem, there would be no need to "boil the ocean" with an investigation that covered all operations around the globe. Stellmach and others cautioned, however, that in order to receive the most significant credit for cooperation, a company must be willing to identify culpable employees and assist in the gathering of evidence in order to prosecute those individuals. As FINRA's Executive Vice President of Enforcement J. Bradley Bennett noted, this is the area in which it is most difficult for FINRA to get cooperation. Too often, he indicated, the individuals identified by the company are dead, retired, now employed by a competitor or outside FINRA's jurisdiction.