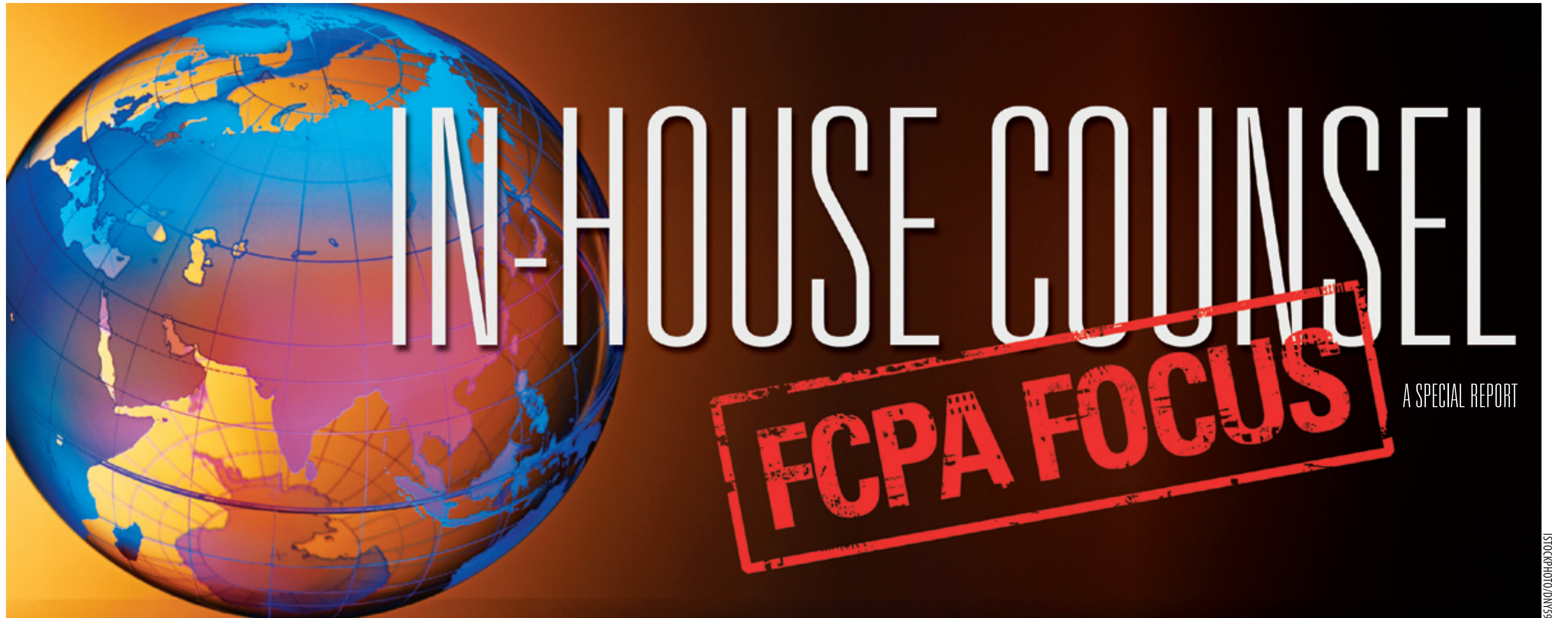
THE NATIONAL LAW JOURNAL

JUNE 6, 2011

Daily Updates at NLJ.COM

An ALM Publication



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Is there a trend away from FCPA compliance monitors?

Recent dispositions have signaled a possible move toward self-policing and direct reporting to agencies.

BY JOHN E. DAVIS AND JACQUELINE L. FERRAND

The current era of aggressive enforcement of the Foreign Corrupt Practices Act by the U.S. Department of Justice and Securities and Exchange Commission has produced corporate fines worth hundreds of millions of dollars, record numbers of investigations and an increased focus on the prosecution of individuals. The most intimidating prospect for companies facing FCPA investigations has been the requirement in some dispositions that companies appoint (and finance the activities of) an independent compliance monitor. However, recent FCPA dispositions have signaled a possible move away from the use of such monitors toward requirements that companies self-police and report directly to government agencies on FCPA-related issues. This trend has implications for all personnel overseeing their companies' FCPA compliance programs.

In most of the FCPA corporate dispositions in the past few years, a key element has been an undertaking by the company to upgrade its FCPA compliance programs and related internal controls. Many of the requirements build on elements of an "effective compliance and ethics program," as set out in the Federal Sentencing Guidelines Manual. See § 8B2.1. In a significant number of cases, the settlement has included an obligation that the company retain and pay for an independent monitor or consultant to ensure that those obligations are met (as examples, six of nine cases in 2006 and four of 10 cases in 2008 required a monitor).

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The roles, costs and qualifications of compliance monitors in FCPA and other corporate fraud resolutions have been the subject of much commentary and concern. See Prosecutors Adhered to Guidance but DOJ Could Better Communicate: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 11 (2009) (statement of Eileen R. Larence, director, Homeland Security and Justice, Government Accountability Office), http://judiciary.house.gov/hearings/pdf/Larence091119.pdf.

The agencies have taken steps to address some of these concerns. See, e.g., Memorandum by Deputy Attorney General Craig Morford, DOJ, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations" (March 7, 2008), www.justice.gov/dag/morford-useofmonitors-memo-03072008.pdf. Yet the use of monitors remains controversial, and the criteria by which the agencies have determined whether a monitor should be imposed remain unclear, apparently driven largely by case-specific factors.

In late 2010, however, signs appeared that the enforcement agencies might be shifting course on the use of monitors. On Nov. 4, 2010, Panalpina World Transport (Holding) Ltd., Panalpina Inc. and six of their oilfield customers settled FCPA-related charges with the Department of Justice (DOJ) and/or the Securities Exchange Commission (SEC) and were assessed a com-

bined total of approximately $236.5 million in fines and disgorgement. In resolving these investigations, DOJ did not impose compliance monitor obligations on any defendant (although Panalpina opted voluntarily to retain an outside compliance consultant to assist in complying with its deferred prosecution agreement). Instead, DOJ required all of the companies to provide it with annual reports regarding the implementation of the companies' anti-corruption compliance program—in effect, "self-monitoring."

In a November 2010 speech, Assistant Attorney General Lanny Breuer cited the lack of compliance monitors in these cases as evidence of the "range of options" available not only to DOJ, but "to corporations that are serious about cooperation and prevention." See DOJ press release, "Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act" (Nov. 16, 2010), at www.justice.gov/criminal/pr/speeches/ 2010/crm-speech-101116.html.

Of seven corporate resolutions announced between Jan. 1 and April 30 of this year, only one involved the appointment of an independent compliance "consultant." See Deferred Prosecution Agreement, *U.S. v. JGC Corp.*, Crim. No. 11 CR 260 (S.D. Texas April 6, 2011) (involving illicit payments of approximately $180 million, resulting in a $218.8 million criminal fine). Every other disposition noted voluntary disclosure, cooperation or other remedial steps as mitigating factors. Yet a comparison of these recent settlements to dispositions entered in the years prior to 2010 raises the possibility of a more general shift away from independent monitors and consultants.

For example, the Control Components Inc. case in 2009 involved illicit payments of $6.85 million and a resulting $18.2 million combined penalty. Even in light of a "voluntary disclosure of evidence…and its substantial cooperation in the [DOJ's] investigation and prosecution," plus various remedial efforts, a monitor was imposed. Plea Agreement, *U.S. v. Control Components Inc.*, Crim. No. 09-162 (S.D. Calif. July 31, 2009). Similarly, the Willbros Group Inc. settlement in 2008 involved illicit payments of $6.3 million, resulting in $32.2 million in combined penalties. Again, despite disclosure, an internal investigation and other extensive remedial conduct, a monitor was imposed. Deferred Prosecution Agreement, *U.S. v. Willbros Group Inc.*, Crim. No. 08-287 (S.D. Texas May 14, 2008).

By contrast, the recent action against Johnson & Johnson (and its affiliate Depuy Inc.) involved illicit payments of more than $18 million in four countries, resulting in a $21.4 million criminal penalty and $48.6 million in disgorgement and prejudgment interest. However, the settlement imposed no monitor. Instead, the three-year deferred-prosecution agreement required the company to report to DOJ every six months on remediation and implementation of a corporate compliance program with required elements, as well as additional "enhanced compliance obligations." Deferred Prosecution Agreement, *U.S. v. Depuy Inc.*, Crim. No. 11-00099 (D.D.C. April 8, 2011), ¶ 10 and attachments C and D.

In its press release announcing the disposition and in the deferred prosecution agreement itself, DOJ said Johnson & Johnson was not required to retain a corporate monitor because of the company's "pre-existing compliance and ethics programs, extensive remediation, and improvement of its compliance systems and internal controls, as well as the enhanced compliance undertakings included in the agreement." See Depuy Deferred Prosecution Agreement, ¶ 4.

As noted above, the DOJ settlement documents in several of the 2010 Panalpina-related actions also included specific language regarding detailed compliance-program requirements, including policies governing gifts, hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion. See, e.g., Deferred Prosecution Agreement, *U.S. v. Shell Nigeria Exploration and Production Company Ltd.*, Crim. No. 10-767 (S.D. Texas Nov. 4, 2010), Attachment C.

The results of these recent cases do not necessarily show a definitive shift away from the use of independent monitors. The JGC Corp. settlement noted above may suggest that independent monitors still will be employed for larger companies or in situations of serious or systemic violations. Whether such a trend exists, the Johnson & Johnson case provides some of the strongest evidence to date that the best way for a company to prevent the imposition of a monitor is to implement an anti-corruption compliance and ethics program reflecting all elements of current best practices.

The enhanced compliance obligations for Johnson & Johnson require the company to maintain a more robust compliance department, with both regional and business segment compliance personnel, that reports directly to the audit committee through a seasoned chief compliance officer. The obligations also call for the company to, among other things, maintain effective mechanisms for tracking compliance issues; institute well-tailored gifts, hospitality and travel policies and procedures; conduct periodic risk assessments and audits; complete thorough preacquisition due diligence on acquisition targets; vet all third-party sales intermediaries; and provide sufficient anti-corruption training. See Depuy Deferred Prosecution Agreement, Attachment D.

The question then becomes whether the compliance elements set out in the Johnson & Johnson case and in other recent dispositions constitute the enforcement agencies' views of current best practices regarding FCPA compliance programs. In many key respects, the compliance obligations described in these cases track the "Good Practice Guidance on Internal Controls, Ethics, and Compliance" issued in March 2010 by the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery. See Annex II to the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 26, 2009), www.oecd.-org/dataoecd/11/40/44176910.pdf.

This guidance has been endorsed by the U.S. government and, while not legally binding, is an attempt to standardize international anti-corruption compliance standards. Many of the concepts in the guidance build on the basic elements articulated in the U.S. Sentencing Guidelines and, in somewhat of a bootstrap fashion, reflect earlier DOJ and SEC requirements for compliance programs. The OECD guidance is therefore one of the primary sources of best practices in the FCPA compliance area.

The Johnson & Johnson case and other recent dispositions present a new opportunity for companies to benchmark their FCPA compliance programs. One path is to start with the OECD guidance as a baseline standard, checking that the company's program covers all the OECD's enumerated elements. A next step is to review the "enhanced compliance obligations" in the Depuy Deferred Prosecution Agreement, with the goal of adapting them, as appropriate, to the company's corporate structure and culture. The obligations addressing "risk assessments" and "acquisitions," for example, cover areas that all companies should deal with in their own programs. If the company's FCPA compliance program adopts and consistently applies these practices, the company is unlikely ever to see a monitor.

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