

Exploring Pharmaceutical FCPA Issues with Miller & Chevalier

By Susan Beck

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Yesterday we posted an item about assistant attorney general Lanny Breuer's warning to a pharmaceutical group that the government will be "intensely focused" on violations of the Foreign Corrupt Practices Act by members of their industry. In brief, the FCPA makes it illegal to offer bribes to any foreign government official in an attempt to get business.

To better understand the implications of these comments, we talked to James Tillen, the FCPA Practice group coordinator at Miller & Chevalier, and his partner Matthew Reinhard. (The lawyers helpfully gave us a transcript of Breuer's speech, which was posted on the website Main Justice.)

"One thing I thought was very interesting in Lanny's speech is that he said they would be working with the [Justice Department's] health care fraud group," said Tillen. "The subtext was, we already have ramped up. There won't be a learning curve here." Both lawyers note that the government has already been actively investigating FCPA violations by pharmaceutical companies, and has brought charges, although this industry in the past hasn't gotten as much attention as the oil and gas business.

The two lawyers noted that it's not always clear what constitutes a FCPA violation, especially in the health care realm. Reinhard pointed out that Breuer emphasized that the government will be looking closely at gifts, entertainment, and conference travel and lodging provided to medical officials. "The problem is, there is no bright-line rule," he said. "It's not like on Capitol Hill, where they can't accept anything worth more than \$25." He added, "This is an area where the industry association could really get involved and try to develop some guidelines and best practices."

Tillen adds that the FCPA only applies to bribes paid to government officials, but sometimes it can be hard to tell who is a government official in the health care world overseas. "In much of the world where you have some form of socialized medicine, the question of who is a government official can be complicated," he says. "In China, for example, nearly everyone [in the health care realm] is a government official. In the European Union you have to look closer at what the doctor does. Are they part of the government?"

Tillen continued: "Companies will face challenges navigating a safe course. ... Some things are obviously wrong, like offering stacks of money to get a contract to supply Beijing Hospital with drugs. But what about a round of golf that cost \$1,000?"