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DOJ Turns Up Heat on Foreign Corrupt Practices

2004 saw largest-ever number of FCPA enforcement actions.

By Homer Moyer

An unprecedented transition of Justice Department officials responsible for enforcing the Foreign Corrupt Practices Act (FCPA) presents an appropriate occasion for taking stock of how this 28-year-old statute is administered and enforced.

Although former Justice enforcement officials were expansive in interpreting its provisions, the FCPA produced few cases and sparse case law during its first two decades. By contrast, 2004 saw the largest number of FCPA enforcement actions ever, and escalating enforcement, harsher penalties, and new compliance and disclosure obligations have given the FCPA new prominence, both in the United States and abroad. More than ever before, the FCPA is attracting headlines and creating corporate anxiety.

The FCPA operates today in a dramatically different context than in years past. The transition at Justice affords new leadership an opportunity to consider initiatives that might improve compliance; increase confidence that enforcement is even-handed and predictable; and reduce unnecessary uncertainty, anxiety, and costs. Issues that are worthy candidates for a fresh look include the following.

SEPARATE MISSIONS

Inherent in the FCPA is enforcement by two different federal agencies—the DOJ and the Securities and Exchange Commission. Because the SEC focuses primarily on books, records, and internal controls, and Justice focuses primarily on anti-bribery provisions, a single off-books bribe can be prosecuted by Justice as an unlawful payment and by the SEC as an accounting violation. Likewise, jurisdictional differences can mean an improper payment by a foreign affiliate may be investigated by both agencies.

As a result of the administration's Corporate Fraud Task

Force, Justice and the SEC are cooperating more closely than ever before; however, improved interagency coordination has not eased the burdens on the companies involved. To the

contrary, a recent resurgence in SEC enforcement has increased the likelihood of two government agencies investigating the same company for essentially the same conduct. The pincer effect of dual investigations creates a triangular enforcement dynamic that typically requires companies to negotiate on two fronts.

An innovation worth considering in cases in which both agencies have jurisdiction is a single joint investigation rather than two parallel ones. Separate, substantially overlapping investigations do not necessarily serve the public interest: They can prolong the investigative process and unnecessarily increase costs. A joint investigation and single settlement negotiation could avoid duplicative investigative demands, reduce the risk of double-counting violations, produce more-consistent outcomes, and eliminate the shuttle diplomacy common in FCPA cases.

Two quite different perceptions are reflected in the government's constant message urging voluntary disclosure and private sector skepticism that credit for disclosing voluntarily will be either certain or predictable. While the greater transparency seen in some recent cases is to be applauded, the benefits of cooperation are not always apparent, as in a recent FCPA settlement that complimented the companies for their "extraordinary disclosure" and "full cooperation" but rewarded them with the second-highest penalty in FCPA history.

Clear public guidelines for voluntary disclosure under the FCPA would be good policy, particularly since this is a statute that is substantially self-enforced, that can impose liability for isolated acts of individuals who deliberately violate company policies, and that operates within rapidly shifting legal and cultural norms around the world. Effective policing, decisive corrective actions, and voluntary disclosure by corporations should be rewarded by consistent credit and protection against maximum sanctions, and that credit needs to be seen as reliable and predictable.

NO 'ROGUE EMPLOYEE'

Not all legal systems authorize criminal liability for corporations or allow acts of individual employees to be imputed to their employer. Under the FCPA, criminal liability may be imposed not because a company has a corporate pattern of unlawful conduct, but rather because of the unlawful conduct of one or more individuals acting contrary to company policies.

The contrast between the enforcement contention that there is "no such thing as a rogue employee" and the corporate view that one bad apple or deliberate wrongdoer does not damn an entire corporation feeds disagreement over how enforcement officials should treat companies that uncover wrongdoing themselves and take decisive corrective measures.

The Justice Department's "Thompson Memorandum," which identifies potential mitigating factors and sets forth 12 principles for determining whether to charge a corporation, nonetheless leaves prosecutors broad discretion. Although it acknowledges that "it may not be appropriate" to charge a company for the "single isolated act of a rogue employee" and that a company's detection of misconduct may reflect an effective corporate compliance program, the memo gives only grudging weight to effective compliance programs and is ambiguous about the benefits of voluntary disclosure and cooperation.

The Justice Department takes pride in its process for providing FCPA opinions "as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present enforcement policy regarding the [FCPA's] anti-bribery provisions." So long as the facts presented are accurate and complete, a favorable opinion creates a "rebuttable presumption" that the requestor's conduct is in compliance with the FCPA. The department is obliged to issue its opinion within 30 days of receiving a request.

Notwithstanding this potentially valuable protection, the opinion process has been used sparingly over the last 28 years—on average less than twice a year. Companies' reluctance to use this process is explained by several perceived disadvantages:

- The 30-day clock doesn't begin if the department demands additional facts, which can substantially extend the regulatory time frame.
- The risk of a negative or unduly conservative answer from Justice is often seen as outweighing the potential insulation of a favorable opinion.
- Although published DOJ opinions are widely looked to for guidance, they are typically bereft of helpful legal reasoning and apply only to the requesting company.

Justice could improve the process by including its reasoning in its opinions, withdrawing or modifying opinions it no longer views as sound, and providing binding guidance.

REASONABLE GUIDELINES

In enacting amendments to the FCPA in 1988, Congress invited the DOJ to issue "general guidelines describing examples of activities that would or would not conform with the Justice Department's enforcement policy regarding FCPA violations." A combination of private sector ambivalence and Justice's own lack of interest in assuming a regulatory responsibility caused the DOJ to decline Congress' invitation, and guidelines have never been issued.

As a result, many provisions of the FCPA remain undefined and ambiguous. Reasonable guidelines, published following a notice-and-comment process, could be useful. It would also be useful for the United States to acknowledge, for example, that a 10 percent government interest in a corporation does not automatically make the company a government "instrumentality," that an "effect" on U.S. commerce is insufficient to bring a matter within the territorial jurisdiction of the United States, and that certain customary promotional expenditures are not prohibited.

The number of internal investigations, compliance enhancements, disciplinary actions, and remedial steps voluntarily taken by the private sector dwarfs the number of FCPA enforcement actions. Because of that, certain administrative improvements could both meaningfully strengthen voluntary compliance with the FCPA and reduce unnecessary costs and inadvertent missteps by companies committed to full compliance.

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