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NFTC CRITICIZES BROADENING FCPA ENFORCEMENT, LAWYERS DISAGREE

The National Foreign Trade Council (NFTC) is poised to launch a new project to monitor the U.S. government's enforcement of the Foreign Corrupt Practices Act (FCPA) in response to what its members and some outside lawyers see as overly broad and aggressive enforcement that has moved away from the original focus of the law on procurement-related incidents of bribery.

NFTC and some lawyers representing companies not affiliated with NFTC in FCPA matters argue that the Justice Department and the Securities and Exchange Commission (SEC) over the past five years have increasingly focused on companies' charitable contributions and smaller payments to customs officials. In addition, they complain that Justice and the SEC have expanded their FCPA investigations into foreign companies that have no business dealings in the United States.

The NFTC monitoring is meant to lead to best practices guidelines for companies in terms of gifts and entertainment to ensure they are adhering to the FCPA, as well as defining who is considered a government official for purposes of the FCPA and whose treatment deserves extra diligence, according to an NFTC source.

NFTC members think this is necessary because of what they consider the expanded scope of FCPA enforcement that has not been vetted with U.S. companies. The guidelines would help companies in their charitable giving, for example, by ensuring that they are not running afoul of the FCPA, according to NFTC staff.

Because of the overly broad FCPA enforcement, some companies are spending more money on vetting a business deal to ensure it complies with the FCPA than the deal will actually make them in profit, according to a source with TRACE, an international non-profit membership association working with companies to raise their anti-bribery standards.

However, other lawyers this week insisted they did not see a fundamental shift in FCPA enforcement that in any way breached the limits established in the FCPA, while acknowledging that the overall number of enforcement actions by the Justice Department and the SEC has increased.

Former Justice Department official Billy Jacobson, now a partner at the law firm Fulbright & Jaworski, said enforcement cases in 2007 were roughly double the number in 2006. He said that all of the enforcement activities, such as investigations of smaller payments to customs officials, are allowed under the wording of the FCPA.

Under the terms of the FCPA, the U.S. government can take action against U.S. and foreign companies that engage in corrupt activities for the purpose of assisting someone in "obtaining or retaining business." The Justice Department interprets that phrase to cover more than the "mere award or renewal of a contract," according to a Justice Department fact sheet. The FCPA also prohibits payments to secure any improper advantage in business dealings.

The FCPA also explicitly allows the U.S. government to take action against foreign companies, even if they do not do business in the United States. The FCPA establishes jurisdiction over these companies by virtue of the fact that they issue stock that is traded on U.S. stock exchanges, sources said.

Enforcement actions can also be brought against those foreign companies issuing stock traded on U.S. exchanges if they take action in furtherance of a bribe scheme by using the U.S. mail, or making a wire transfer of a bribe to be paid in a third country through a U.S. bank, sources said.

Foreign companies that do not do business in the United States and do not issue stocks traded here can still be subject to the FCPA if they take action in furtherance of a bribe while in the territory of the United States.

But critics charge that Justice sometimes proceeds to a case even though the link between the action and the territory of the U.S. is a weak one. A weak link would be the wiring of money through a New York bank to another country, one lawyer said.

Overall, enforcement actions have increased in part because of an increased number of voluntary disclosures of FCPA violations over the past five years. These stem from a new "corporate culture" that arose out of passage of the so-called Sarbanes-Oxley law in 2002, Jacobson said. The law strengthened corporate accounting controls in response to major corporate and accounting scandals, such as the collapse of Enron.

Companies may opt for voluntary disclose of corrupt practices because they can be handled in settlements that avoid the publicity of a court case, sources said.

These voluntary disclosures then led to more cases not based on information provided by the companies in their self-disclosures, according to Jacobson. For example, if a company in a given field reported a violation of the FCPA in a given country, Justice may then begin looking at the conduct of other firms in that country.

As a result of the increased case load, the Justice Department now allocates more attorneys to FCPA enforcement and has a dedicated FBI squad working on these issues, Jacobson said.

Allen Green, a partner at the law firm McKenna Long & Aldridge, said it is "unquestionable" that there has been a broader and more aggressive approach to the enforcement of the FCPA, particularly with respect to foreign companies.

Green said this aggressive enforcement against companies, even those not doing business in the U.S., could pose a problem for U.S. multinational companies in foreign countries where they or their subsidiaries could become subject to similar investigations from foreign country governments.

An NFTC source said that Justice should leave the prosecution of bribery cases of foreign companies to their national governments. But private-sector lawyers said action against foreign companies that do not do business in the U.S. is a way for the Justice Department to pressure other countries' governments to pursue such cases. The message from the Justice Department to these governments is that it will pursue these cases if they do not, according to this lawyer.

Foreign countries are obligated to fight bribery if they have signed the Convention on Combating Bribery negotiated in the Organization for Economic Cooperation and Development at the impetus of the U.S. after it had passed the FCPA in 1977.

Regarding charitable contributions, critics of the current enforcement policy cite the 2004 case of the pharmaceutical company Schering Plough, which gave a donation to a Polish charity helping to preserve a historic castle. That charity group was headed by a person with whom the company did business in his job as a civil servant in the Polish government, according to the NFTC.

This prosecution of a bona fide charitable contribution that had no apparent element of personal gain for the foreign official has had a chilling effect on other corporate donations, according to NFTC.

Homer Moyer, a partner at Miller & Chevalier, said the U.S. government may have overreached in that case because there was no direct payment to the official in question. However, Moyer said that the Schering Plough case is not a harbinger of "super aggressive cases" to come on charitable contributions.

The government concluded that the company's contribution to the charity bestowed a benefit to the official because it enhanced his reputation, according to a private-sector lawyer. This lawyer said that the key in such charitable contribution cases is whether the intent of the company making the donation was to have it serve a "corrupt purpose."

This lawyer pointed out that the Justice Department did not prosecute the case, and that the SEC brought a civil action focused on the company's failure to adhere to its internal controls to guard against FCPA violations and properly account for the contribution.

Regarding increased enforcement activity on smaller payments to customs officials, companies critical of what they see as a new focus charge that the Justice Department is putting the burden of cleaning up civil services around the world on their shoulders. This forces them to suffer commercial disadvantages in countries where a small payment would ensure movement of goods into a market instead of sitting idle on the dock, one lawyer said.

But Moyer and other lawyers pointed out that there is an exception in the FCPA for facilitating payments that are aimed at getting officials to perform their duties. He said the cases the government has prosecuted thus far have all involved payments aimed at getting customs officials to do things that are not permitted, which by definition is prohibited under the FCPA.

These cases allegedly involved "substantial, systematic and recurring payments to customs officials," not the kind of facilitating payments that are meant to get customs officials to do their jobs, according to Moyer.

As an example, he pointed to the case of U.S. vs. Kay and Murphy, in which two former executives of American Rice, David Kay and Douglas Murphy, were found guilty of having bribed customs officials in Haiti to falsify the amount of rice they were exporting in order to save customs duties in that country.

Moyer said he suspects that many of the complaints about overly aggressive FCPA enforcement may have been generated in an effort to develop support for the petition to the Supreme Court to review the case. That request for review was denied on Oct. 6, letting stand the Fifth Circuit court decision sentencing the Kay and Murphy to jail time.

The court found the bribes to the Haitian officials were covered by the FCPA because the payments assisted American Rice in obtaining and retaining business in that it bestowed a competitive advantage by eliminating the cost of customs duties, according to Jacobson.

This case illustrates a broad interpretation of the FCPA, but one that is still acceptable under the limits of the law, according to Jacobson and Moyer.

NFTC is also complaining about what it considers the unchecked powers of monitors that the Justice Department appoints to oversee a company's compliance in many cases where a company has settled a corruption case. NFTC had initially considered developing best practices guiding the activity of monitors but has since backed away from that idea, an NFTC source said.

NFTC and other critics charge that these monitors have unchecked powers in how they go about ensuring a company improves its compliance program, and that companies have no recourse against their decisions, which can have adverse impacts on their businesses, given their appointment by the Justice Department.

According to NFTC, monitors are picked from a small group of FCPA practitioners who at the same time they are working for government prosecutors are also defending other clients before the same prosecutors. This "revolving door" clearly has the "potential for abuse and cronyism," NFTC president Bill Reinsch charged in a Sept. 17 speech to an FCPA conference.

While the Justice Department has already issued guidelines for the selection of monitors in March 2008, they leave open a number of questions. For example, they do not provide a clear indication of when a monitor's work on improving compliance with the FCPA goes too far in telling the company how to run its business, one lawyer said.

Another lawyer not affiliated with the NFTC project said that it would be useful to have a mechanism to check the cost of the monitors' actions, which he said does not now exist.

The Justice Dept. is the chief enforcement agency for the FCPA with a "coordinate role" being played by the Securities and Exchange Commission (SEC), according to a Justice Department fact sheet.

Justice is responsible for the criminal enforcement and for civil enforcement with respect to U.S. companies as well as foreign companies and nationals. The SEC is responsible for the civil enforcement of the anti-bribery provisions with respect to companies that issue stocks traded on U.S. stock exchanges, according to the fact sheet.

Criminal enforcement actions can result in large fines up to $2 million for corporations and up to $100,000 for individuals and up to five years in jail. Other penalties include ineligibility for bidding on federal U.S. contracts, as well as jail sentences, according to the fact sheet.

Civil fines can rise up to $10,000 against any firm as well as any of its officers but the SEC can impose additional fines, according to the fact sheet.