THE NATIONAL
LAW JOURNAL
ALM PROPERTIES, INC. WWW.NLJ.COM MONDAY, MAY 23, 2005 ALM

OPINION

■ FOREIGN CORRUPT PRACTICES ACT ■

Provide clearer guidance

By Homer E. Moyer Jr. SPECIAL TO THE NATIONAL LAW JOURNAL

A CRESCENDO of enforcement actions under the Foreign Corrupt Practices Act (FCPA) over the last two years has produced more headlines and more corporate anxiety than ever before. Not only have there been more cases and larger penalties, but recent cases have also reflected renewed Securities and Exchange Commission (SEC) enforcement, massive mergers-and-acquisitions settlements, an insistence on immediate voluntary disclosures, new sanctions and ever-escalating "best practices."

With this unprecedented activity, addressing a number of old and new issues relating to how this law is administered and enforced could advance the public policy objective of preventing bribery of foreign government officials that underlies this 28-year-old statute. Changes in FCPA enforcement leadership—just completed at the Department of Justice (DOJ) and upcoming at the SEC—are appropriate occasions for such a review. Among the issues deserving consideration are the following:

■ *Administrative guidance*. Although DOJ officials maintain that they are prosecutors, not regulatory officials, the FCPA is in many respects a regulatory statute, prohibiting not just a single criminal act, but also activities that range from hosting government customers to making per diem payments. Reasonable administrative guidelines—which Congress requested in 1988 but DOJ has declined to provide—could enhance FCPA compliance by clarifying statutory language that continues to generate uncertainty and disagreement.

■ *Improved DOJ opinions*. In response to a submission describing a pending transaction, DOJ may issue an opinion that will protect the requesting company from prosecution. Although opinions are requested sparingly (about twice a year), they are nonetheless looked to, in lieu of regulations or meaningful jurisprudence, for guidance. However, the opinions articulate no rationale for the conclusions they announce. Opinions would become far more valuable if DOJ would set forth its reasoning, withdraw any old opinions it deems no longer valid, acknowledge certain conduct that does not violate the prohibitions or come within the jurisdictional reach of the FCPA and provide binding public guidance of the sort offered by Internal Revenue Service revenue rulings.

■ *Third-party lawsuits*. Under the FCPA, companies may be held vicariously liable for improper payments made by agents, sales reps, consultants or other third parties. A company need not have directed or even known about the third party's improper conduct to meet the FCPA standard of knowing that there existed a "high probability" of improper conduct by the third party. This risk of vicarious liability has caused companies not only to analyze "red flags" and undertake extensive due diligence, but also, in the face of facts suggesting a "high probability" of misconduct, to terminate the third party. It is increasingly common for terminated third parties then to sue the company for breach of contract, often seeking lost profits, consequential damages and a jury trial in state court.

Avoiding Catch-22 situations

When companies do what enforcement officials would have them do—terminate a third party in accordance with the FCPA's "high-probability" standard—they risk commercial liability. Sound public policy suggests that enforcement officials must either join the company in interposing a "public policy" defense, expressing to the court the government's support for the company's action, or investigate the third party on the basis of the circumstances that prompted his or her termination. A failure by the government to respond to the Catch-22 situations that terminating an irresponsible third party can create could undermine the policies the FCPA embodies.

■ *Clear credit for voluntary disclosure*. The most urgent call from enforcement officials today is for immediate voluntary disclosure and cooperation. And the clear message is that otherwise, a company can expect harsher treatment. However, the private sector perception that voluntary disclosure will be predictably rewarded with more lenient treatment remains well short of universal, particularly since one recent case produced both explicit appreciation by the government for a company's exemplary cooperation and the second-largest penalty in the history of the FCPA.

Although both the DOJ's "Thompson Memorandum" and the SEC's recent 21(a) report articulate helpful general principles, it remains virtually impossible for a company to anticipate the extent to which it will receive credit for disclosure and cooperation. Cooperation would be facilitated if, in lieu of protestations that every case is different, enforcement officials were to announce clear policies—for example, a policy that no company making a voluntary disclosure will be subject to criminal sanctions if enforcement officials determine that the company had a strong compliance program in place, that the misconduct did not involve senior management and that the company responded immediately with decisive remedial actions.

To the foregoing list, one might add issues relating to overlapping and parallel government investigations, the extent of successor liability following an asset acquisition, corporate responsibility for disobedient employees and a host of questions about the best use of compliance monitors, which have been required in five of the last major FCPA settlements. All are strong and timely candidates for thoughtful policy review. NLJ

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