Legal Opinion Letter

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FOREIGN CORRUPT PRACTICES ACT: KEEPING ENFORCEMENT AND POLICY OBJECTIVES ALIGNED

by
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The crescendo of enforcement actions that has occurred 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 objectives that underlie this 28-year old statute. Changes in FCPA enforcement leadership – just completed at the Justice Department and upcoming at the SEC – are appropriate occasions for such a review. Among the issues deserving consideration are the following:

Administrative Guidance. Although Justice officials maintain that they are prosecutors, not regulatory officials, the FCPA is, in many respects, a regulatory statute. It not only prohibits cash bribes to government officials, but also regulates such activities as hosting government customers, making per diem payments, and managing third party consultants. Reasonable administrative guidelines – which Congress requested in 1988 but Justice has declined to provide – could enhance FCPA compliance by giving greater certainty and clarity to general statutory language that continues to generate uncertainty and disagreement.

Improved Justice Department Opinions. In response to a submission describing a pending transaction, Justice may issue an opinion that will protect the requesting company from prosecution. Although opinions are requested sparingly (about twice a year), these releases are nonetheless looked to, in lieu of regulations or meaningful jurisprudence, for guidance on compliance with the Act.

However, the opinions articulate no rationale for the conclusions they announce and leave readers to infer the determinative factors or legal points. Opinions would be far more valuable if Justice would set forth its reasoning, withdraw any old opinions it believes are no longer valid, acknowledge that certain conduct does *not* violate the prohibitions or come within the jurisdictional

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reach of the FCPA, and provide binding public guidance of the sort offered by IRS 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.

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 address this increasingly common pattern, by either joining the company in interposing a "public policy" defense, expressing to the court the government's support for the company's action (as the State Department did in Alien Tort Claims Act litigation), or investigating 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 sometimes create could undermine the policies the FCPA embodies.

Clear Credit for Voluntary Disclosure and Cooperation. 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 by the government. 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 Justice Department's "Thompson Memorandum" and the SEC's *Seaboard* 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 disciplinary and 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, rogue employees, and a host of questions about the appropriate and 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.

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