Homer Moyer: declinations, disclosure & double-dipping

Homer Moyer, a member at Miller & Chevalier in Washington, DC, is one of the world's leading FCPA experts. **David Vascott** spoke to him at the ABA White-Collar Crime conference in Miami.

You're frequently referred to as the dean of the FCPA bar. How did you become involved in this area of the law?

I was in the government, at the Commerce Department, when the law was enacted. When I left government four years later to start an international practice, one of the potential areas was the FCPA. But at that time, export controls, economic sanctions, anti-boycott law, trade disputes, were all much more prominent. It was not until the mid-1990s that FCPA began to expand. It has now exploded into a very large area.

What's the highlight of your career so far?

When I was at Covington & Burling, the firm had a very formal black-tie dinner for all the lawyers. Clark Clifford was the speaker – it was quite a serious affair. To the surprise of the firm, a colleague and I sang two songs, which brought the house down. That's probably not substantively the highlight of my career, but it's one of the most memorable moments and was by far the most enthusiastic response I ever got from the firm.

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Arguing at the Supreme Court was also a highlight, as was my time as general counsel of the commerce department – I would not trade that for any experience. And of course my current practice with its emphasis on FCPA is absolutely fascinating.

At the ABA White-Collar Crime conference, you asked Patrick Stokes of the DoJ's FCPA Unit about how the agency views the responsibility of parent companies for their foreign subsidiaries.

The point of my comment was that the government should be more explicit about its jurisdictional basis when a foreign subsidiary of a US company enters into a settlement. Foreign subsidiaries are not directly subject to the anti-bribery provisions. They're indirectly subject to the accounting provisions. But they may become subject to the anti-bribery provisions if they take action in the United States, if they act as an intermediary for their US parent, if they act as an agent.

So it's a complicated jurisdictional issue and a number of the cases have been sufficiently opaque in the settlement papers that they invite the question, is there jurisdictional basis that's not clear from the papers, and is the government overreaching, has a foreign company voluntarily submitted to US jurisdiction? Because these cases are rarely litigated, we are dependent on the agencies for that information.

At the conference, Patrick Stokes ruled out the possibility of the FCPA Unit introducing an antitrust-style leniency programme. Is the DoJ missing an opportunity?

In an informal sense they have a leniency programme – perhaps not by that name – but the agencies have systematically and aggressively encouraged voluntary disclosure. They have promised real benefits in return to companies that disclose voluntarily and cooperate. That's a real commitment on their part.

They have also made a point of recently featuring, without naming names, declinations – situations in which they have decided not to prosecute. Happily we've had a number of situations in which the government decided not to proceed against our clients.

There is not the same type of amnesty that antitrust enforcers offer. But there are incentives.

Should the DoJ better publicise its declinations?

It has included in its FCPA guide examples that have been anonymised, and that's helpful. Often, the companies publicise the declination. If they have had to report in their securities reports that there was an investigation, they are often eager to say that that investigation has ended. Neither that, nor what the Justice Department or the SEC says, gives a great deal of insight into exactly what tipped the balance. But it's pretty easy to figure out what those factors are.

Do you foresee, in the world of anti-corruption enforcement, the same kind of multilateral cooperation between agencies that we see in antitrust?

An unrealised phenomenon can be found in the UN convention against bribery. It's a very ambitious convention and it has been accepted by more than 150 different countries, which obviously provides the framework for quite a lot of international enforcement and cooperation. We're a long way from that being a reality, as enforcement is just picking up in some other countries. But it's clear we are on a path to greater and greater international enforcement and cooperation – information-sharing, coordinating investigations and, as private parties hope, better coordination in terms of allocating penalties to avoid double jeopardy and double-dipping.

Is the revolving door a good thing?

Absolutely. One of the things I remember vividly from law school was a passing comment that a professor made to someone who could only see one side of an issue. He said, you'll never be a good defence lawyer unless you can think like a prosecutor.

It's valuable both ways. There has to be a cooling-off period, there have to be ethical constraints about what you can and can't do after you leave.

But having experienced from both perspectives is very valuable. It makes for better lawyering. It makes for more thoughtful judgments on both sides. It is an adversary system and so there will be contrary, conflicting views. But as a matter of public policy we benefit.

Is there a risk that that with so many former government officials joining private practice, the defence bar becomes less adversarial than it could or should be?

We occasionally chuckle if we see someone who was a prosecutor who has a longer-than-might-be-assumed transitional period from the other side of the bar. That happens, and it happens both ways.

There is certainly room for assertive and constructive disagreement and refinement of how the law is interpreted and applied. There's little opportunity to test that or adjudicate it because corporations almost never take the case to court. And only recently have individuals taken cases to court. They have tested a few issues, but only a few.

The incentive to settle a case from a company's point of view, and the convenience of settling a case from the government's point of view, really create forces that push in the direction that this law has gone.

What are the most pressing issues facing FCPA lawyers today?

One of the most interesting issues, and one that has to change significantly, relates to voluntary disclosure. The government

has had almost a campaign to encourage and reward voluntary disclosure. It is now a much more nuanced question than it was a decade ago. There are incentives for disclosing and risks for not disclosing.

At the same time there are risks for disclosing voluntarily. And so there's not a single right answer, it heavily depends on the circumstances. It depends on which type of risks a company prefers to run. There are many more collateral consequences to either decision now than there were a decade ago.

It's not a binary decision. The pressures and the trends are moving in the direction of more disclosure, but there's still quite a lot of disagreement.

There are a number of factors that thoughtful corporations need to take into account when making that decision. By disclosing, you get to take the government up on its claim of more favourable treatment. Recently, the government has strongly implied that there will not be declinations in situations where there has not been a voluntary disclosure. They've not said that explicitly, but that's the strong implication.

An advantage of disclosing is that it allows you to evaluate the case, start taking remedial action and present the case to the government in the most favourable light – in terms of the facts and in terms of how the company has dealt with them.

There's greater risk now than there was 10 years ago that the government will independently find out about the matter. Why is that? Sarbanes–Oxley, and greater reporting under the securities laws. If the securities council says you have to disclose something, then that matter's going to be public. Many cases come out in the press these days. So there's a risk of involuntary disclosure.

On the other hand, if you disclose voluntarily, you are assuring yourself of an investigation of some sort and quite possibly some penalty or sanctions and – in some ways more importantly – you are buying into what may be a protracted process. You could be in an uncertain position for two or three years as the investigation goes on. The investigation might expand at the government's request. It puts pressure on attorney–client privilege if you disclose voluntarily and attempt to cooperate. And disclosure invites shareholder lawsuits. Whereas declinations result in some enforcement actions, shareholder suits are often settled with an amount of real money. So it's a complicated calculus, I think, even without taking into account the traditional concerns of debarment, the World Bank picking up on the issue and loss of export privilege or the like.

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What else is on your mind?

As this area of law has evolved, the challenges for all concerned have changed. Agencies plainly hold most of the cards here. They have great leverage in these cases. And as we discussed, they are rarely subject to judicial review. That creates a special responsibility for enforcement agencies.

As a practical matter, they are creating the operative jurisprudence. Companies and practitioners read those settlements and try to tease out of them the principles that have been at play. So it's important that the government articulates its legal rationales, and frankly it's important the government self-polices. It may invest in a lengthy investigation at the end of which it should take no action. And that's sometimes hard for an agency to do.

The agencies have, over the last 25 years, expanded their jurisdictional reach; they've expanded their theories of liability,;they have expanded the penalties imposed with new kinds of penalties and new kinds of settlements. So I think there's a burden on the agencies, given that much sway, to act especially responsibly.

For corporations, the changes have produced a number of issues. Obviously expectations for compliance programmes have risen and good compliance programmes are much more innovative now than they were a generation ago, especially with Dodd–Frank whistle-blower provisions – another possible avenue of public disclosure. There are time pressures on companies that have potential issues, and that puts a premium on speed. Companies that are effective in dealing with these issues are good staying ahead of the curve.

Things have obviously changed for practitioners as well. Not only has competition in the legal community increased a hundredfold, but the issues are more uncertain and nuanced than they were in the past. The range of possible outcomes is much greater in almost any case, and a company and its outside counsel can do quite a lot to determine what the outcome might be.

Finally, the great interest in this area has been prompted in part by reports of enormous costs to corporations of investigations. I think law firms have to address that. Many of the reported costs are stupefying and, in my opinion, can be avoided. But that takes a little clear-eyed thinking on the part of both outside law firms and corporations.

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