

The Westlaw Column

Craig's Corner For Counsel: Foreign Corrupt Practices Act (FCPA)

As corporate counsel know, the purpose of the Foreign Corrupt Practices Act (FCPA) is to enhance public confidence in the integrity of the American business system. In recent years, the number of FCPA cases has increased.

I recently interviewed Homer E. Moyer, Jr., former General Counsel of the U.S. Department of Commerce, an FCPA expert and a contributor to West publications. He told me that while corruption remains a part of modern international business, there has been progress in the efforts to curtail it.

"Bribery continues to be a widespread problem and has increased as additional markets have opened and expanded," states Moyer. "At the same time, laws and initiatives have drawn increased attention to bribery, and we're starting to see the beginnings of fundamental changes in how international business is done." Moyer, now a partner at Miller & Chevalier in Washington, D.C., says the FCPA has led to increased scrutiny of business practices for U.S. corporations and the business and government officials with whom they interact.

"The FCPA has simply become one of the most important laws for companies doing business internationally," said Moyer.

The FCPA was enacted in 1977 to stop the payment of bribes by American firms to foreign officials to obtain or keep business. According to the Department of Justice (DOJ), the FCPA was a result of SEC investigations in which more than 400 companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. More than 20 years later, the amount of money changing hands in bribery has shot up to staggering amounts, and enforcement is as aggressive as ever.

"We're expecting the busiest FCPA enforcement season ever in 2008," says Richard Cassin, founder of Cassin Law LLC and editor of The FCPA Blog (www.fcpablog.blogspot.com). "DOJ and SEC Investigations of more than 50 U.S. and foreign companies are pending and headed for resolution."

Cassin believes part of the reason for the recent rise in investigations is the whistleblower hotlines required by the Sarbanes-Oxley Act. Also, companies and their corporate counsel are self-reporting potential FCPA violations. This kind of early voluntary disclosure helps companies resolve the cases faster and usually with reduced penalties, he says.

Cassin believes the biggest development in the FCPA landscape is that U.S. enforcement authorities are starting to focus on the questionable overseas practices of entire industries. "The DOJ's examination of the overseas customs clearance and permitting practices of a dozen or so oil and gas services firms, and certain marketing practices by the leading orthopedic device makers, signals that companies won't be protected from the FCPA because everyone in their industry is doing the same thing. There's no safety in numbers if the behavior might violate the FCPA."

As a result of the increased enforcement, Moyer states that corporate counsel have shown more interest in FCPA matters than before.

"I remember an FCPA conference I chaired in the mid-nineties that had 40 or 50 people in attendance," Moyer said. "Last fall, I was at a conference in Washington, D.C., with more than 500 participants."

Cassin notes that the pressures business executives feel to top their profits from prior year can lead to increased temptation "to take shortcuts by paying bribes and that puts extra pressure on corporate counsel to make sure compliance programs reach everyone, from top to bottom. It's easier said than done."

Here's where Westlaw can help. Westlaw offers corporate counsel an extensive collection of material, including insight and discussion of FCPA as well as international law materials like treaties, documents from intergovernmental organizations and journals.

A good place to start is PLI's *Doing Business Under the Foreign Corrupt Practices Act* by Don Zarin (PLIREF-FCPA). This Westlaw database contains a practical guide for doing business in a competitive international market under the FCPA, including how to satisfy the FCPA's accounting provisions, circumstances that trigger FCPA violations, the limits and reach of the FCPA, and how to structure third-party and joint venture relationships under the FCPA. The easy-to-use Table of Contents provides a complete view of each chapter and delivers ready access to guidance and analyses.

The *Foreign Corrupt Practices Act Reporter* (FCPAREP) provides text, commentary, and other relevant materials relating to the Foreign Corrupt Practices Act, including the legislative history, the statute, and a comprehensive bibliography of useful resources. It includes information on the most recent amendments, the OECD Anti-bribery Convention, as well as coverage of issues relating to other transnational bribery laws. In addition, the *Reporter* includes:

- The full text of all Department of Justice FCPA Review/Opinion Procedure Releases
 - Useful SEC documents on the accounting aspects of the FCPA
 - Suggestions for drafting foreign agency contracts
 - Suggestions for specific compliance programs, including sample language
- For complete analysis, the *Bribery in International Commerce* (BRIBERY) database covers all aspects of bribery in an international context, including:
- Full coverage of the background and provisions of the Foreign Corrupt Practices Act
 - Coverage of other U.S. statutes which may be implicated
 - Coverage of international agreements, conventions and standards concerning the area, including detailed coverage of the United Nations Convention Against Corruption
 - Corporate governance considerations
 - Prevention and detection in corporate settings

When it comes to the FCPA, Cassin says it's simply about knowing when your company is in compliance and when it is not. "Bribery offenses don't happen by accident; they're intentional," he adds. "These are reasons why the FCPA is respected and feared. It's not a law to be 'lawyered around' or ignored."

For additional insight on the FCPA and international law, a list of additional Westlaw databases can be found on The Metropolitan Corporate Counsel website at www.metrocorp-counsel.com.



Craig Miller

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