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Foreign Corrupt Practices Act juggernaut picks up steam

By Sanford F. Remz

The global economy that we live in carries risks and rewards. U.S. and multi-national corporations must look to developing markets, including China and other Asian countries, to grow. The opportunities presented by these developing markets come with the risk of doing business in distant countries with different commercial and cultural norms. Increasingly important among those risks is that of running afoul of the Foreign Corrupt Practices Act.

The FCPA, 15 U.S.C. §78dd-1, et seq., was enacted in 1977. Its anti-bribery provisions generally make unlawful the payment or offer of anything of value to a "foreign official" for the purpose of influencing any act of that official in violation of his duty or to gain any improper advantage to obtain or retain business.

Its accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA but also have more general application, require covered corporations to make and keep books and records that accurately and fairly reflect the corporation's transactions and to devise and maintain an adequate system of internal accounting controls.

The Securities and Exchange Commission and the U.S. Department of Justice are concurrently charged with enforcing the FCPA. They are now enforcing it with renewed vigor and have made clear that it is an enforcement priority, notwithstanding the economic downturn.

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In 2010, the SEC created a specialized unit to spearhead its enforcement of the FCPA. The SEC's director of enforcement explained: "While we have been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations." http://www.sec.gov/news/speech/2009/spch080509rk.htm.

One might argue that, given the Great Recession and slow recovery, FCPA enforcement should not be a high priority. What the economy needs is a shot in the arm from free access to foreign markets, rather than a kick in the stomach that some assert comes from tough enforcement of a law that does not take into sufficient account the realities of doing business in certain parts of the world.

The government's response to that concern and to efforts by some to amend the FCPA to loosen some of its restrictions was articulated by Associate Attorney General Lanny Breuer, who declared in late 2011 at the 26th National Conference on the FCPA that, given the turning tide against corruption in many parts of the world, "this is precisely the wrong moment in history to weaken the FCPA."

Statistics reflect the government's enforcement priorities. In the period 2002 through 2006, the government brought an average of approximately three enforcement actions against corporations a year; in contrast, in the years 2007 through 2011, the government brought an average of 15 corporate cases.

The government has also placed an emphasis on investigating and prosecuting individuals. In the years 2002 through 2006, the SEC and DOJ brought an average of about six enforcement actions against individuals a year; in the years 2007 through 2011, they brought an average of approximately 18 cases against individuals.

Undoubtedly, the regulators have been busy investigating far more potential violations. The whistleblower provisions of the Dodd-Frank Act, Pub. L. No. 111-203, are expected to lead to an increase in the number of investigations and prosecutions.

However, the government does not suffer from a shortage of sources for learning of possible FCPA violations, as investigations are also triggered by corporate self-reporting, referrals from domestic and foreign government agencies, and stories in the media.

Only recently we have read in the media of FCPA investigations of Walmart's real estate

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acquisition practices in Mexico, payments of legal fees by Las Vegas Sands to a legislator in Macau, and the possible payment of bribes by Hollywood to officials in China.

To date, the biggest blockbuster case was Siemens' payment of $800 million in criminal fines and civil disgorgement in 2008, coupled with civil and criminal enforcement actions against 12 of its executives, related to a pervasive international bribery scheme.

Not far behind, in 2010, the SEC and DOJ entered into nine-figure settlements with major European corporations in four separate cases.

'Who is a foreign official'?

The FCPA has been interpreted broadly, starting with the question of who is a "foreign official." The FCPA defines the term to mean "any officer or employee of a foreign government or any department, agency, or instrumentality thereof ... ." 15 U.S.C. s. 78dd-1(f)(1)(A).

The SEC and DOJ have taken the position that a business in which a foreign government has an ownership interest qualifies as an "instrumentality" of a foreign government and that employees of such a business are "foreign officials" under the FCPA.

Given that in many countries state-owned enterprises dominate the economy, this interpretation covers a broad sweep of business relationships in foreign countries.

Similarly, the requirement that the payment to a foreign official be made for the purpose of "obtaining or retaining business" has been interpreted broadly. The current DOJ guidelines state that this provision encompasses "more than the mere award or renewal of a contract" and that the business does not need to be with the foreign government or instrumentality itself. http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

Thus, payments to foreign regulators, tax or customs officials, or other officials to allow or further the company's operations can meet the purpose test. See, e.g., United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

Successor liability is another area of major concern. It arises when one company acquires another company that may have committed undisclosed FCPA violations. Acquiring companies have had to pay at least disgorgement and civil penalties after it turned out the companies that they acquired had violated the FCPA.

The DOJ has published guidance that look to factors, such as due diligence conducted by the acquiring company, the prompt introduction of internal controls and policies and FCPA training and compliance programs post-acquisition, and prompt disclosures to the DOJ that will impact the DOJ's decision whether to prosecute the acquiring company. U.S. Department of Justice, FCPA Opinion Procedure Release No.08-02, June 13, 2008.

Increased government enforcement activity in recent years has generated a significant push by business organizations to narrow the scope of the FCPA, particularly to limit the definition of "foreign official" and to limit successor liability.

On the other side, legislation has been introduced to strengthen remedies, including creating a private FCPA right of action and the automatic debarment from federal government contracts of FCPA violators.

In the current political environment, none of this legislation is expected to be enacted soon, if ever. However, given the continual expansion of the global economy and the uncertainty inherent in doing business overseas, one would expect further persistent efforts to reduce the risk of American companies (and, by extension, foreign companies subject to the act) doing business abroad by narrowing the scope and/or remedies of the FCPA.

Compliance and cooperation

Given the inherent risks, it is essential that any company subject to the FCPA doing business abroad have a serious compliance program, starting at the top of the organization.

The company should have a code of conduct emphasizing FCPA compliance with specific do's and don'ts and should implement widespread, substantive FCPA training programs for its employees and representatives.

The company should ensure that the training program is followed and that its employees actually attend and take the program seriously.

Companies should also take reasonable measures to ensure FCPA compliance by their contractors and consultants. The FCPA, as interpreted by the regulators and courts, is very clear that a company will be responsible for the activities of third parties it retains and cannot turn a blind eye to such activities when it comes to payoffs of foreign officials. Therefore, companies would be well-advised to address FCPA compliance in contracts with consultants and to require that they receive adequate compliance training.

Given the risks of successor liability, substantial due diligence relating to FCPA is essential when acquiring another company with foreign operations. Likewise, post-acquisition it is important to bring that company up to standard quickly in FCPA compliance.

Adequate financial controls, while of course required in general, are particularly important when it comes to the FCPA. While it is clearly not easy to control every expenditure in a subsidiary's office half-way around the world, the company should have reasonable safeguards in place to protect against and identify irregularities.

These safeguards have two goals. First, while hardly an ironclad insurance policy, they should reduce the likelihood of a FCPA violation — or of an investigation that can cost in the neighborhood of $250 million, according to a July 30, Wall Street Journal article about Avon.

Second, if someone in the company has transgressed the FCPA, a company's good-faith and diligent efforts to comply with the FCPA could mitigate the consequences of a violation.

While the level of a company's compliance culture and cooperation with the government may or may not avoid prosecution completely or constitute a sufficient defense, it is at least likely to help limit any charges and the scope and amount of penalties and other remedies. NEIH

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