

Recent Guidance from the DOJ on Enforcement of the Foreign Corrupt Practices Act

November 2009

In the last couple of weeks, the Department of Justice has put the business and legal community on notice that the trend seen over the past years of vigorous enforcement of the Foreign Corrupt Practices Act (“FCPA”) will be continuing for some time to come. The FCPA prohibits individuals and entities subject to its expansive jurisdictional reach from making payments to foreign officials that are intended to influence corruptly the award of business. Over the past several years, the statute has served as a powerful tool for the DOJ, which holds principal statutory enforcement authority. (The SEC, too, has, and actively, enforces the statute.) Recent remarks by senior Justice Department officials leave no doubt that the FCPA remains high on the Department’s agenda. Indeed, the DOJ intends to increase its enforcement efforts in certain areas and add new tools to its FCPA enforcement arsenal.

Speaking at the Sixth Global Forum on combating Corruption and Safeguarding Integrity, Attorney General Holder Eric Holder renounced corruption as “a scourge on civil society” and quoted President Obama as stating that “the struggle against corruption is one of the great struggles of our time.” Citing recent statistics that found a perception of increased corruption in the private sector and ineffective government efforts to combat corruption, the Attorney General sounded “a clarion call” to other nations to increase further their efforts to fight corruption.

Lanny A. Breuer, Assistant Attorney General, Criminal Division, reinforced the Attorney General’s strong anti-corruption message in speeches that he gave at two recent legal and compliance conferences in the U.S.—the American Conference Institute’s 22nd National Forum on the Foreign Corrupt Practices Act and the Tenth Annual Pharmaceutical and Regulatory Congress and Best Practices Forum. In these speeches, Mr. Breuer offered an advance preview of the Department’s planned FCPA agenda.

First, recounting the developments in the past year, which Mr. Breuer described as “the most dynamic single year in the more than 30 years since the FCPA was enacted,” the Assistant Attorney General advised that the Department intends to continue many of the same strategies and practices, including:

- concentrating on prosecuting individuals, which he dubbed the “cornerstone” of the Department’s enforcement strategy. Mr. Breuer expressly noted that it is the DOJ’s

objective to hold “every corporate executive, every board member, and every sales agent . . . personally accountable for FCPA violations.”

- pursuing corporate violators, in particular, bringing criminal charges where the conduct is “egregious, pervasive and systemic” and also where a corporation “fails to implement compliance reforms, changes to its corporate culture, and undertake other measures designed to prevent a recurrence of the criminal conduct.”
- providing meaningful benefits to those who make voluntary disclosures, and provide meaningful cooperation, to the Department. Here, Mr. Breuer expressly noted that such benefits will not be conditioned on disclosure of privileged material.

Assistant Attorney General Breuer also revealed new points of focus by the DOJ. One such focal point will be on the pharmaceutical industry, where the Department will be increasing its enforcement efforts by joining the forces of its FCPA and Health Care fraud units. The pharmaceutical industry has been targeted because “the depth of government involvement in foreign health systems, combined with fierce industry competition and the closed nature of many public formularies, create a significant risk that corrupt payment will infect the process.” Mr. Breuer also warned that in those parts of the world where the health care industry is largely state-owned or controlled, “nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in [that] foreign country will involve a ‘foreign official’ within the meaning of the FCPA.”

Another new area of concentration will be on asset forfeiture and recovery. The DOJ is examining all cases to determine whether forfeiture of the allegedly illicit proceeds of corruption is appropriate and is working with the Department’s counterparts outside of the U.S. to repatriate ill-gotten gains to those countries.

To assist the DOJ in achieving its enforcement objectives in this area, it is increasing its resources by working with other arms of government. Partnering with the Internal Revenue Service, Criminal Investigation Division on FCPA enforcement is in the works and the DOJ has established partnerships with certain U.S. Attorney’s Offices where FCPA investigations are concentrated. The DOJ will also continue to work with the Departments of State and Commerce and the SEC.

The DOJ’s remarks come on the heels of three FCPA trials, all of which resulted in convictions of individuals who face jail time; in the face of reports of approximately 120 open FCPA investigations; and record numbers of prosecutions and corporate fines. The message from the DOJ is clear. FCPA compliance is critical for any company with global operations that involve transactions with a non-U.S. government, including government owned or controlled entities. Although the DOJ recognized that it is costly for companies “to implement robust compliance programs, to hire outside counsel to conduct in-depth internal investigations, and to forego certain business opportunities that are tainted with corruption,” in the DOJ’s words, the “cost of not being FCPA compliant . . . can be far higher.”